#### CT

# THE LEGAL PROFESSION IN GRATEFUL RECOGNITION OF THEIR WARM APPRECIATION AND SUPPORT

## THE

## CODE OF CIVIL PROCEDURE

(ACT V OF 1908)

WITH

EXHAUSTIVE, ANALYTICAL AND CRITICAL COMMENTARIES

BY

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Second Edition

## VOLUME III

THE FIRST SCHEDULE ORDERS XXXI TO LI
FORMS, THE SECOND AND THIRD SCHEDULES
GOVERNMENT OF INDIA ACT, LETTERS PATENTS
AND OTHER APPENDICES

AND

GENERAL INDEX

THE ALL INDIA REPORTER, LTD.

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## THE CODE OF CIVIL PROCEDURE, 1908 (ACT V of 1908)

## VOLUME III

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#### GOVERNMENT OF INDIA ACT, 1935.

[25 & 26 GEO V, CH 42]

An Act to make further provision for the government of India. [2nd August 1935]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows -

PART VII

FINANCE, PROPERTY, CONTRACTS AND SUITS

CHAPTER III

PROPERTY, CONTRACTS, LIABILITIES AND SUITS

176,-(1) The Federation may sue or be sued by the name of the Federation of India and a Provincial Government may sue or be sued by the Suits and pro name of the Province, and, without prejudice to the subsequent provisions of ceedings this chapter, may, subject to any provisions which may be made by Act of the Federal or a Provincial Legislature enacted by virtue of powers conferred on that Legislature by this Act, sue or be sued in relation to their respective affairs in the like cases as the Secretary of State in Council might have sued or been sued if this Act had not been passed

Section 176

(2) Rules of Court may provide that, where the Federation, the Federal Railway Authority, or a Province sue or are sued in the United Kingdom, scryice of all proceedings may be effected upon the High Commissioner for India or such other representative in the United Kingdom of the Federation, Authority or Province as may be specified in the rules

179.-(1) Any proceedings which, if this Act had not been passed. might have been brought against the Secretary of State in Council may, in the case of any liability arising before the commencement of Part III of this Act or arising under any contract or statute made or passed matters before that date be brought against the Federation or a Province, according to the subject-matter of the proceedings, or, at the option of the person by whom the proceedings are brought, against the Secretary of State, and any sum ordered to be paid by way of debt, damages or costs in any such proceed-

Legal proceedings as to certain ings, and any costs or expenses incurred in or in connection with the defence thereof, shall be paid out of the revenues of the Federation or the Province, as the case may be, or, if the proceedings are brought against the Secretary of State, out of such revenues as the Secretary of State may direct

The provisions of this sub-section shall apply with respect to proceedings arising under any contract declared by the terms thereof to be supplemental to any such contract as is mentioned in those provisions as they apply in relation to the contracts so mentioned

(2) If at the commencement of Part III of this Act any legal proceedings are pending in the United Kingdom or in India to which the Secretary of State in Council is a party, the Secretary of State shall be deemed to be substituted in those proceedings for the Secretary of State in Council, and the provisions of sub-section (1) of this section shall apply in relation to sums ordered to be paid, and costs or expenses incurred, by the Secretary of State or the Secretary of State in Council in or in connection with any such proceedings as they apply in relation to sums ordered to be paid in, and costs or expenses incurred in or in connection with the defence of, proceedings brought against the Secretary of State under the said sub-section (1)

(3) Any contract made in respect of the affairs of the Federation or a Province by or on behalf of the Secretary of State after the commencement of Part III of this Act may provide that any proceedings under that contract shall be brought in the United Kingdom by or against the Secretary of State and any such proceedings may be brought accordingly, and any sum ordered to be paid by the Secretary of State by way of debt, damages or costs in any such proceedings, and any costs or expenses incurred by the Secretary of State in or in connection therewith, shall be paid out of the revenues of the Federation or the Province, as the case may be

(4) Nothing in this section shall be construed as imposing any liability upon the Exchequer of the United Kingdom in respect of any debt, damages costs or expenses in or in connection with any proceedings brought or continued by or against the Secretary of State by virtue of this section, or as derogating from the provisions of sub-section (1) of the last preceding section

(5) This section does not apply in relation to contracts or habilities solely in connection with the affairs of Burma or Aden, other than habilities which are by this Act made habilities of the Federation, or to contracts or liabilities for purposes which will, after the commencement of Part III of this Act, be purposes of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States

#### 'PART IX

#### THE IUDICATURE

#### CHAPTER I.

#### THE FEDERAL COURT.

200.—(1) There shall be a Federal Court consisting of a Chief Justice of India and such number of other judges as His Majesty may deem necessary,

Section 2no

but unless and until an address has been presented by the Federal Legislature to the Governor-General for submission to His Majesty praying for an increase in the number of judges, the number of pulses shall not exceed Six.

(2) Every judge of the Federal Court shall be appointed by His Majesty by warrant under the Royal Sign Manual and shall hold office until he attains the age of sixty five years.

#### Provided that-

- (a) A judge may by resignation under his hand addressed to the Governor-General resign his office
- (b) A judge may be removed from his office by His Majesty by warrant under the Royal Sign Manual on the ground of misbehaviour or of infirmity of mind or body, if the Judicial Committee of the Pravy Council, on reference being made to them by His Majesty report that the judge ought on any such ground to be removed.
- (3) A person shall not be qualified for appointment as a judge of the Federal Court unless he—
  - (a) has been for at least five years a judge of a High Court in British India or in a Federated State or
  - (b) is a barrister of England or Northern Ireland of at least ten years standing or a member of the Faculty of Advocates in Scotland of at least ten years standing or
  - (c) has been for at least ten years a pleader of a High Court in British India or in a Federated State or of two or more such Courts in succession

#### Provided that-

- (i) a person shall not be qualified for appointment as Chief Justice of India unless he is or when first appointed to judicial office was a barrister, a member of the Faculty of Advocates or a pleader and
- (11) in relation to the Chief Justice of India for the references in paragraphs (6) and (c) of this sub section to ten years, there shall be substituted references to fifteen years

In computing for the purposes of this sub-section the standing of a barrister or a member of the Faculty of Advocates, or the period during which a person has been a pleader any period during which a person has held judicial office after he became a barrister a member of the Faculty of Advocates or a pleader as the case may be, shall be included

(4) Every person appointed to be a judge of the Federal Court shall, before he enters upon his office make and subscribe before the Governor-General or some person uppointed by him an oath according to the form set out in that behalf in the Fourth Schedule to this Act

201. The judges of the Federal Court shall be entitled to such salaries and allowances, including allowances for expenses in respect of equipment and travelling upon appointment and to such rights in respect of leave and pensions, as may from time to time be fixed by His Majesty in Council

Section 201. Salaries, &c, of judges Section 201.

Provided that neither the salary of a judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment

Section 202 Temporary ap pointment of act ing Chief Justice

202. If the office of Chief Justice of India becomes vacant, or if the Chief Justice is, by reason of absence or for any other reason, unable to perform the duties of his office, those duties shall, until some person appointed by His Majesty to the vacant office has entered on the duties thereof or until the Chief Justice has resumed his duties, as the case may be, be performed by such one of the other judges of the court as the Governor General may in his discretion appoint for the purpose

Section 203

203. The Federal Court shall be a court of record and shall sty up Seat of Federal Delhi and at such other place or places if any, as the Chief Justice of India may, with the approval of the Governor-General, from time to time appoint

Section 204 Original jurisdic tion of Federal Court

204,-(1) Subject to the provisions of this Act, the Federal Court shall. to the exclusion of any other Court, have an original jurisdiction in any dispute between any two or more of the following parties that is to say, the Federation, any of the Provinces or any of the Federated States, if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends

Provided that the said jurisdiction shall not extend to-(a) a dispute to which a State is a party, unless the dispute-

- (1) concerns the interpretation of this Act or of an Order in Council made thereunder, or the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument
- of Accession of that State, or (11) arises under an agreement made under Part VI of this Act in relation to the administration in that State of a law of the Federal Legislature, or otherwise concerns some matter with respect to which the Federal Legislature has power to make laws for that State, or
- (iii) arises under an agreement made after the establishment of the Federation, with the approval of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States, between that State and the Federation or a Province, being an agreement which expressly provides that the said jurisdiction shall extend to such a dispute,
- (b) a dispute arising under any agreement which expressly provides that the said jurisdiction shall not extend to such a dispute
- (2) The Federal Court in the exercise of its original jurisdiction shall not pronounce any judgment other than a declarator, judgment

Section 205 Appollate juris diction of Federal Court in appeals from High Courts in lititish India

205,-(1) An appeal shall be to the Federal Court from any judgment, decree or final order of a High Court in British India if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly.

(2) Where such a certificate is given any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided and on any ground on which that party could have appealed without special leave to His Majesty in Council if no such certificate had been given, and, with the Icave of the Federal Court, on any other ground. and no direct appeal shall lie to His Majesty in Council either with or without special leave

Section 2(

206.-(1) The Federal Legislature may by Act provide that in such civil cases as may be specified in the Act an appeal shall lie to the l'ederal Court from a judgment, decree or final order of a High Court in British large appe India without any such certificate as aforesaid, but no appeal shall he under any such Act unless-

Section 20 Power of Fee Legislature t jurisdiction

- (a) the amount or value of the subject matter of the dispute in the court of first instance and still in dispute on appeal was and is not less than fifty thousand rupees or such other sum not less than fifteen thousand rupees as may be specified by the Act. or the judgment decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value, or
- (b) the Federal Court gives special leave to appeal
- (2) If the Federal Legislature makes such provision as is mentioned in the last preceding sub section, consequential provision may also be made by Act of the Federal Legislature for the abolition in whole or in part of direct appeals in civil cases from High Courts in British India to His Maiesty in Council either with or without special leave
- (3) A Bill or amendment for any of the purposes specified in this section shall not be introduced into, or moved in, either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion

207,-(1) An appeal shall he to the Federal Court from a High Court in a Federated State on the ground that a question of law has been wrongly decided, being a question which concerns the interpretation of this Act or of an Order un Council made thereunder or the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of that State, or arises under an agreement made under Part VI of this Act in relation to the administration in that State of a law of the Federal Legislature

Section 20 Appellate ju z diction of Fed Court in app from High Cot in Federat States

(2) An appeal under this section shall be by way of special case to be stated for the opinion of the Federal Court by the High Court, and the Federal Court may require a case to be so stated, and may return any case so stated in order that further facts may be stated therein

208 An appeal may be brought to His Majesty in Council from a decision of the Federal Court-

Section 208 Appeals to 1 Majesty in Con

(a) from any judgment of the Federal Court given in the exercise of cil its original jurisdiction in any dispute which concerns the interpretation of this Act or of an Order in Council made thereunder, or the extent of the legislative or executive authority

vested in the Federation by virtue of the Instrument of Accession of any State or arises under an agreement made under Part VI of this Act in relation to the administration in any State of a law of the Federal Legislature without leave and

(b) in any other case by leave of the Federal Court or of His Maiests in Council

Section 209 on appeal

- 209-(1) The Federal Court shall where it allows an appeal remit Form of judgment the case to the court from which the appeal was brought with a declaration as to the judgment decree or order which is to be substituted for the judgment decree or order appealed against and the court from which the appeal was brought shall give effect to the decision of the Federal Court
  - (2) Where the Federal Court upon any appeal makes any order as to the costs of the proceedings in the Federal Court it shall as soon as the amount of the costs to be paid as ascertained transmit its order for the payment of that sum to the court from which the appeal was brought and that court shall give effect to the order
  - (3) The Federal Court may subject to such terms or conditions as it may think fit to impose order a stay of execution in any case under appeal to the Court pending the hearing of the appeal and execution shall be stayed accordingly

Section 210 Enforcement of decrees and orders of Federal Court and orders as to discovery &c

210 -(1) All authorities civil and judicial throughout the Federation shall act in aid of the Federal Court

(2) The Federal Court shall as respects British India and the Federated States have power to make any order for the purpose of securing the atten dance of any person the discovery or production of any documents or the in vestigation or punishment of any contempt of Court which any High Court in British India has power to make as respects the territory within its jurisdic tion and any such orders and any orders of the Federal Court as to the costs of and incidental to any proceedings therein shall be enforceable by all courts and authorities in every part of British India or of any Federated State as if they were orders duly made by the highest court exercising civil or criminal jurisdiction as the case may be in that part

- (3) Nothing in this section-
  - (a) shall apply to any such order with respect to costs as is men tioned in sub section (2) of the last preceding section or
  - (b) shall as regards a Federated State apply in relation to any jurisdiction exercisable by the Federal Court by reason only of the making by the Federal Legislature of such provision as is mentioned in this chapter for enlarging the appellate jurisdic tion of the Federal Court

Sect on 211 211 Where in any case the Federal Court require a special case to be Letters of request to Federated States

stated or re stated by or remit a case to or order a stay of execution in a case from a High Court in a Federated State or require the aid of the civil or judicial authorities in a Federated State the Federal Court shall cause letters of request in that behalf to be sent to the Ruler of the State and the Ruler shall cause such communication to be made to the High Court or to any judicial or civil authority as the circumstances may require.

212 The law declared by the Federal Court and by any judgment of the Privy Council shall so far as applicable be recognised as binding on and shall be followed by all courts in British India and so far as respects the application and interpretation of this Act or any Order in Council thereunder or any matter with respect to which the Federal Legislature has power to make laws in relation to the State in any Federated State

Section 212 Law declared by Federal Court and Privy Conneil to be binding on all Courts

213-(1) If at any time it appears to the Governor General that a question of law has arisen or is likely to arise which is of such a nature and of such public importance that it is expedient to obtain the opinion of the consult Federal Federal Court upon it he may in his discretion refer the question to that court Court for consideration and the court may after such hearing as they think fit repor to the Governor General thereon

Section 213 Power of Gover nor General to

(2) No report shall be made under this section save in accordance with an opinion delivered in open court with the concurrence of a majority of the judges present at the hearing of the case but nothing in this sub-section shall be deemed to prevent a judge who does not concur from delivering a dissenting opinion

> Section 214 Rules of Court

- 214 -(1) The Federal Court may from time to time with the approval of the Governor General in his discretion, make rules of court for regulating generally the practice and procedure of the court including rules as to the persons practising before the court as to the time within which appeals to the court are to be entered as to the costs of and incidental to any proceedings in the court and as to the fees to be charged in respect of proceedings therein and in particular may make rules providing for the summary determination of any appeal which appears to the court to be frivolous or vexatious or brought for the purpose of delay
- (2) Rules made under this section may fx the minimum number of judges who are to sit for any purpose so however that no case shall be decided by less than three judges

Provided that if the Federal Legislature makes such provision as is mentioned in this chapter for enlarging the appellate purisdiction of the court, the rules shall provide for the constitution of a special division of the court for the purpose of deciding all cases which would have been within the jurisdiction of the court even if its jurisdiction had not been so enlarged

- (3) Subject to the provisions of any rules of court the Chief Justice of India shall determine what judges are to constitute any division of the court and what judges are to sit for any purpose
- (4) No judgment shall be dehiered by the Federal Court save in open court and with the concurrence of a majority of the judges present at the hearing of the case but nothing in this sub-section shall be deemed to prevent 1 judge who does not concur from delivering a dissenting judgment
- (5) All proceedings in the Federal Court shall be in the English language

215 The Federal Legislature may make provision by Act for conferring upon the Federal Court such supplemental powers not inconsistent with any of the provisions of this Act as may appear to be necessary or desirable for the purpose of enabling the court more effectively to exercise the jurisdiction conferred upon it by or under this act

Section 215 Ancillary powers of Federal Court

Section 216 Expenses of Fe deral Court

216,-(1) The administrative expenses of the Federal Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the court, shall be charged upon the revenues of the Federation. and any fees or other moneys taken by the court shall form part of those nevenues

(2) The Governor-General shall exercise his individual judgment as to the amount to be included in respect of the administrative expenses of the Federal Court in any estimates of expenditure laid by him before the Chambers of the Federal Legislature

Section 217 Construction of references to High Courts in States

217. References in any provision of this Part of this Act to a High Court in a Federated State shall be construed as references to any court which His Majesty may, after communication with the Ruler of the State declare to be a High Court for the purposes of that provision

Section 218 Bayings

218. Nothing in this chapter shall be construed as conferring or empowering the Federal Legislature to confer any right of appeal to the Federal Court in any case in which a High Court in British India is evercising jurisdiction on appeal from a court outside British India, or as affecting any right of appeal in any such case to His Majesty in Council with or without leave

#### CHAPTER II

#### THE HIGH COURTS IN BRITISH INDIA

Section 219 Court

219,-(1) The following courts shall in relation to British India he Meaning of High deemed to be High Courts for the purposes of this Act, that is to say, the High Courts in Calcutta, Madras, Bombay, Allahabad Lahore and Patna, the Chief Court in Oudh, the Judicial Commissioner's Courts in the Central Provinces and Berar, in the North West Frontier Province and in Sind, any other court in British India constituted or reconstituted under this chapter as a High Court, and any other comparable court in British India which His Majesty in Council may declare to be a High Court for the purposes of this Act

Provided that, if provision has been made before the commencement of Part III of this Act for the establishment of a High Court to replace any court or courts mentioned in this sub-section then as from the establishment of the new court this section shall have effect as if the new court were mentioned therein in heu of the court or courts so replaced

(2) The provisions of this chapter shall apply to every High Court in British India

Section 220 Constitution High Courts

220 .- (1) Every High Court shall be a court of record and shall consist of a chief justice and such other judges as His Majesty may from time to time deem it necessary to appoint

Provided that the judges so appointed, together with any additional judges appointed by the Governor-General in accordance with the following provisions of this chapter, shall at no time exceed in number such maximum number as His Majesty in Council may fix in relation to that court

(2) Every judge of a High Court shall be appointed by His Majesty by warrant under the Royal Sign Manual and shall hold office until he attains the age of sixty years

Section 220

Provided that-

- (a) a judge may by resignation under his hand addressed to the Governor resign his office
- (b) a judge may be removed from his office by His Majesty by warrant under the Royal Sign Manual on the ground of mis behaviour or of infirmity of mind or body if the Judicial Com mittee of the Privy Council on reference being made to them by His Majesty report that the judge ought on any such ground to be removed
- (3) A person shall not be qualified for appointment as a judge of a High Court unless he-
  - (a) is a barrister of England or Northern Ireland of at least ten years standing or a member of the Faculty of Advocates in Scotland of at least ten years standing or
  - (b) is a member of the Indian Civil Service of at least ten years standing who has for at least three years served as or exercised the powers of a district judge or
  - (c) has for at least five years held a judicial office in British India not inferior to that of a subordinate judge or judge of a small cause court or
  - (d) has for at least ten years been a pleader of any High Court or of two or more such Courts in succession.

Provided that a person shall not unless he is or when first appointed to judicial office was a barrister a member of the Faculty of Advocates or a pleader be qualified for appointment as Chief Justice of any High Court constituted by letters patent until he has served for not less than three years as a judge of a High Court

In computing for the purposes of this sub-section the standing of a barrister or a member of the Faculty of Advocates or the period during which a person has been a pleader any period during which the person has held judicial office after he became a barrister a member of the Faculty of Advocates or a pleader as the case may be shall be included

- (4) Every person appointed to be a judge of a High Court shall be fore he enters upon his office make and subscribe before the Governor or some person appointed by him an oath according to the form set out in that behalf in the Fourth Schedule to this Act
- 221 The judges of the several High Courts shall be entitled to such salaries and allo vances including allo vances for expenses in respect of equip- Salaries &c of ment and travelling upon appointment and to such rights in respect of leave and pensions as may from time to time be fixed by His Maiesty in Council

Section 221

Provided that neither the salary of a judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment

Section 222 Temporary and additional judges

- 222.-(1) If the office of chief justice of a High Court becomes vacant. or if any such chief justice is by reason of absence or for any other reason, unable to perform the duties of his office those duties shall, until some person appointed by His Majesty to the vacant office has entered on the duties thereof, or until the chief justice has resumed his duties, as the case may be, be performed by such one of the other judges of the court as the Governor-General may in his discretion think fit to appoint for the purpose
- (2) If the office of any other judge of a High Court becomes vacant or if any such judge is appointed to act temporarily as a chief justice or is by reason of absence, or for any other reason unable to perform the duties of his office the Governor-General may in his discretion appoint a person duly qualified for appointment as a judge to act as a judge of that court, and the person so appointed shall, unless the Governor General in his discretion thinks fit to revoke his appointment, be deemed to be a judge of that court until some person appointed by His Majesty to the vacant office has entered on the duties thereof, or until the permanent judge has resumed his duties
- (3) If by reason of any temporary increase in the business of any High Court or by reason of arrears of work in any such court it appears to the Governor-General that the number of the judges of the court should be for the time being increased, the Governor General in his discretion may, subject to the foregoing provisions of this chapter with respect to the maximum number of judges appoint persons duly qualified for appointment as judges to be additional judges of the court for such period not exceeding two years as he may specify

Section 223 Jurisdiction existing H 1 g h Courts

223 Subject to the provisions of this Part of this Act to the provisions of any Order in Council made under this or any other Act and to the provisions of any Act of the appropriate Legislature enacted by virtue of powers conferred on that Legislature by this Act, the jurisdiction of, and the law administered in, any existing High Court and the respective powers of the sudges thereof in relation to the administration of sustice in the court including any power to make rules of court and to regulate the sittings of the court and of members thereof sitting alone or in division courts shall be the same as immediately before the commencement of Part III of this Act

Courts

224 -(1) Every High Court shall have superintendence over all courts Administrative in India for the time being subject to its appellate jurisdiction and may do functions of High any of the following things that is to say-

(a) call for returns

- (b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts,
- (c) prescribe forms in which books entries and accounts shall be kept by the officers of any such courts, and
- (d) settle tables of fees to be allowed to the sheriff attorneys, and all clerks and officers of courts

Provided that such rules forms and tables shall not be inconsistent with the provision of any law for the time being in force and shall require the previous approvat of the Governor

(2) Nothing in this section shall be construed as giving to a High Court any jurisdiction to question any judgment of any inferior court which is not otherwise subject to appeal or revision

Section 224.

225 -(1) If on an application made in accordance with the provisions of this section a High Court is satisfied that a case pending in an inferior court being a case which the High Court has power to transfer to itself for trial involves or is likely to involve the question of the validity of any Federal or Provincial Act it shall exercise that power

Section 225 Transfer of cer tain cases to High Court for trial

- (2) An application for the purposes of this section shall not be made except in relation to a Tederal Act by the Advocate General for the Federation and in relation to a Provincial Act by the Advocate-General for the Federation or the Advocate General for the Province
- 226 1) Until otherwise provided by Act of the appropriate Legislature no High Court shall have any original surrediction in any matter concerning the Jurisdiction in revenue or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force

Section 226 revenue matters

- (2) A Bill or amendment for making such provision as aforesaid shall not be introduced into or moved in a Chamber of the Federal or a Provincial Legislature without the previous sanction of the Governor General in his discretion or as the case may be of the Governor in his discretion
- 227 All proceedings in every High Court shall be in the English language

Section 227 Proceedings High Courts to be in English

228 - 1) The administrative expenses of a High Court including all salaries allowances and pensions payable to or in respect of the officers and servants of the court and the salaries and allowances of the judges of the Court shall be charged upon the revenues of the Province and any fces or other moneys taken by the court shall form part of those revenues

Section 228 Expenses of High Courts

(2) The Governor shall exercise his individual judgment as to the amount to be included in respect of such expenses as aforesaid in any esti mates of expenditure laid by him before the Legislature

> Section 229 Power of His Majesty to consti tute or reconstitute High Court by letters patent

- 229-(1) His Majesty if the Chamber or Chambers of the Legislature of any Province present an address in that behalf to the Governor of the Province for submission to His Majesty may by letters patent constitute a High Court for that Province or any part thereof or reconstitute in like manner any existing High Court for that Province or for any part thereof or where there are two High Courts in that Province amalgamate those courts
- (2) Where any Court is reconstituted or two Courts are amalgamated. as aforesaid the letters patent shall provide for the continuance in their respective offices of the existing judges officers and servants of the Court or Courts and for the carrying on before the reconstituted Court or the new Court of all pending matters and may contain such other provisions as may appear to His Majesty to be necessary by reason of the reconstitution or amalgamation

230 -(1) His Majesty in Council may if satisfied that an agreement in that behalf has been made between the Governments concerned, extend High Courts

Section 230 Extra provincial jurisdiction

the jurisdiction of a High Court in any Province to any area in British India not forming part of that Province and the High Court shall thereupon have the same jurisdiction in relation to that area as it has in relation to any other area in relation to which it exercises jurisdiction

- (2) Nothing in this section affects the provisions of any law or letters patent in force immediately before the commencement of Part III of this Act empowering any High Court to exercise jurisdiction in relation to more than one Province or in relation to a Province and an area not forming part of any Province.
- (3) Where a High Court exercises jurisdiction in relation to any area or areas outside the Province in which it has its principal seat nothing in this Act shall be construed—
  - (a) as empowering the Legislature of the Province in which the Court has its principal seat to increase restrict or abolish that jurisdiction or
  - (b) as preventing the Legislature having power to make laws in that behalf for any such area from passing such laws with respect to the jurisdiction of the court in relation to that area as it would be competent to pass if the principal seat of the court were in that area

Section 231 Baying and defini tions

231.—(1) Any judge appointed before the commencement of Part III of this Act to any High Court shall continue in office and shall be deemed to have been appointed under this Part of this Act but shall not by virtue of this Act be required to relinquish his office at any earlier age than he would have been required so to do if this Act had not been passed

(2) Where a High Court exercises jurisdiction in relation to more than one Province or in relation to a Province and an area not forming part of a Province references in this chapter to the Governor in relation to the judges and expenses of a High Court and references to the revenues of the Province shall be construed as references to the Governor and the revenues of the Province in which the Court has its principal seat and the reference to the approval by the Governor of rules forms and tables for subordinate courts shall be construed as a reference to the approval thereof by the Governor of the Province in which the subordinate court is situate or if it is situate in an area not forming part of a Province by the Governor General

PART XIV
BURMA

CHAPTER VIII

#### THE HIGH COURT

| Solution and control of the High Court at Rangoon (in this Part of this Act called the High Court) shall continue and shall be a Court of record and shall continue and such number of other Judges as His Majest, may deem it necessity to atmosph

Provided that the judges so appointed together with any additional judges appointed by the Governor in accordance with the following provisions of this chapter shall at no time exceed in number such maximum number as His Maiesty in Council may fix

(2) Every judge of the High Court shall be appointed by His Majesty by warrant under the Royal Sign Manual and shall hold office until he attains the age of sixty years.

Provided that-

- (a) a judge may by resignation under his hand addressed to the Governor resign his office
- (b) a judge may be removed from his office by His Majesty by warrant under the Royal Sign Manual on the ground of mis behaviour or of infirmity of mind or body if the Judicial Committee of the Privy Council on reference being made to them by His Vajesty report that the judge ought on any such ground to be removed
- (3) A person shall not be qualified for appointment as a judge of the High Court unless he—
  - (a) is a barrister of England or Northern Ireland of at least ten years standing or a member of the Faculty of Advocates in Scotland of at least ten years standing or
  - (b) is a member of the Indian Civil Service or the Burma Civil Service (Class I) of at least ten years standing who has for at least three years served as or exercised the powers of a district judge or
  - (c) has for at least five years held judicial office in Burma not in ferior to that of a district judge or judge of the small cause court of Rangoon or
- (d) has for at least ten years been an advocate of the High Court Provided that a person shall not unless he is or when first appointed to judicial office was a barrister a member of the Faculty of Advocates or an advocate of the High Court be qualified for appointment as chief justice

of the High Court until he has served for not less than three years as a judge of the High Court

In computing for the purpose of this sub-section the standing of a barns'er or a member of the Faculty of Advocates or the period during which a person has been an advocate any period during which he has held judicial office after he became a barnster a member of the Fa ulty of Advocates or

- an advocate as the case may be shall be included

  (4) Every person appointed to be a judge of the High Court shall before he enters upon his office make and subscribe before the Governor or some person appointed by him an oath according to the form set out in that behalf in the Fourteenth Schedule to this Act.
- 400 The judges of the High Court shall be entitled to such salaries and allowances including allowances for expenses in respect of equipment and travelling upon appointment and to such rights in respect of leave of absence and pensions as may from time to time be fixed by His Majesty in Council

Section 400 Salaries &c of judges

Provided that neither the salary of a judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment

Section 401 additional judges

- 401-(1) If the office of chief justice of the High Court becomes Temporary and vacant or if the chief justice is by reason of absence or for any other reason unable to perform the duties of his office those duties shall until some person appointed by His Majesty to the vacant office has entered on the dubes thereof or until the chief justice has resumed his duties as the case may be he performed by such one of the other judges of the Court as the Governor may in his discretion think fit to appoint for the purpose
  - (2) If the office of any other judge of the High Court becomes vacant or if any such judge is appointed to act temporarily as chief justice or is by reason of absence or for any other reason unable to perform the duties of his office the Governor may in his discretion appoint a person duly qualified for appointment as a judge to act as a judge of the court and the person so appointed shall unless the Governor in his discretion thinks fit for revoke his appointment be deemed to be a judge of the court until some person appointed by His Majesty to the vacant office has entered on the duties thereof or until the permanent judge has resurred his duties
  - (3) If by reason of any temporary increase in the business of the High Court or by reason of arrears of work in that Court it appears to the Governor that the number of the judges of the Court should be for the time being increased the Governor in his discretion may subject to the foregoing provisions of this chap er with respect to the maximum number of judges appoint persons duly qualified for appointment as judges to be additional judges of the Court for such period not exceeding two years as he may specify

Section 402 High Court

402 Subject to the provisions of this Part of this Act to the provisions Jurisdiction of of any Order in Council made under this or any other Act and to the provisions of any Act of the Legislature the jurisdiction of and the law administered in the High Court and the respective powers of the judges thereof in relation to the administration of justice in the court including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in division courts shall be the same as immediately before the commencement of this Part of this Act

Section 403 Court

403.-(1) The High Court has superintendence over all Courts for the Adm n strative time being subject to its appellate jurisdiction and may do any of the following functions of High things that is to say-

(a) call for returns

(b) make and issue general rules and prescribe forms for regulating

the practice and proceedings of such courts (c) prescribe forms in which books entries and accounts shall be

kept by the officers of any such courts and (d) settle tables of fees to be allowed to the sheriff attorneys

and all clerks and officers of courts

Provided that such rules forms and tables shall not be inconsistent with the provisions of any lav for the time being in force and shall require the previous approval of the Governor

(2) Nothing in this section shall be construed as giving to the High Court any jurisdiction to question any judgment of any inferior court which is not otherwise subject to appeal or revision

Section 403

404 .- (1) Until otherwise provided by Act of the Legislature the High Court shall not have any original jurisdiction in any matter concerning Jurisdiction in rethe revenue or concerning any act ordered or done in the collection thereof according to the usage or practice of the country or the law for the time being in force

Section 404 venue matters

(2) A Bill or amendment for making such provision as aforesaid shall not be introduced or moved in either Chamber of the Legislature without the previous sanction of the Governor in his discretion

> Section 405 Additional appeal to His Matesty as respects inter

405.-(1) In addition to any other right of appeal there shall subject to the provisions of section twenty of the Judicial Committee Act 1833 (which relates to the time for appealing) be a right of appeal to His Majesty in Council from any decision of the High Court on the ground that a question pretation of this of law with respect to the interpretation of this Part of this Act or any Order in Council made thereunder has been wrongly decided

Act 3 & 4 W111 IV

(2) Nothing in this Part of this Act shall be construed as authorising the Legislature to derogate from any prerogative right of His Majesty to grant special leave to appeal in any case

> Section 406 Proceedings 12 High Court to be in English

406 All proceedings in the High Court shall be in the English language

407-(1) The administrative expenses of the High Court including all salaries allowances and pensions payable to or in respect of judges officers and servants of the Court shall be charged upon the revenues of Burma and any fees or other moneys taken by the Court shall form part of those revenues

Section 407 Expenses of High Court

(2) The Governor shall exercise his individual judgment as to the amount to be included in respect of such expenses as aforesaid in any esti-

mates of expenditure laid by him before the Legislature

(3) Nothing in this Part of this Act shall render a pension payable to or in respect of a judge of the High Court who retired before the commence ment of this Part of this Act chargeable upon the revenues of Burma

408 Any judge appointed before the commencement of this Part of this Act to the High Court shall continue in office and shall be deemed to have been appointed under this chapter, but shall not by virtue of this Act be required to relinquish his office at an earlier age than he would have been required so to do if this Act had not been passed

Section 408, Saving

#### (xxxiv)

#### MADRAS

#### Page 1557 O 16 R 4 A (2),

Substitute the following for O XVI R 4 A (2)

4 A (2) When any other party to such a sunt applies for a summons to such an officer to shall deposit in Court along with his application a sum of money for the travelling and other expenses of the officer according to the scale

#### Page 1847 O 21 R 52

- Add the following as proviso (n) and re number the existing proviso as (1) -
  - (n) Provided Inther that where the Court whose attachment is determined to be pror received or realizes such property, the receipt of realization shall be deemed to be on behalf of all the Courts in which there have been attachments of such property in execution of money decrees prior to the receipt of such essets
  - Explanation Priority of attachment in the case of attachment of property in the custody of Court shall be determined on the same principles as in the case of attachment of property not in the custody of Court

#### Page 2771, O 43 R 1, Sub-Rule (e)

- IL Substitute the following for sub rule (s) of Rule 1 of Order \LIII of the Code of Civil Procedure -
- (s) An order under Rule 1 or 4 of Order AL, except an order under the provise to Sub Rule (2) of Rule 4.

#### Page 2887, Appendix B Form 13 A

Substitute the following for Form No. 13 A of Appendix B -

No 18 A

B

CERTIFICATE OF ATTENDANCE TO AN OFFICER OF GOVERNMENT SUMMOVED AS A WITNESS IN A SUIT TO WHICH THE OOVERNMENT IS A PARTY Order VII, Tule 4 A

#### (Cause Title)

(designation) teing a Govern his is to c tl at (came) (name) was summoned to give Province of Servant apacity on behalf of the plaintiff/defendant in the in h ance in this Court from the ٦t. 193 . (inclusive) and that a sum of of ort by the plantiff/defendant towards days according to the scale e of Inamel and that tle Covernment treasure at d "\II A-Miscellaneons Fees

#### (xxxiv)

#### MADRAS.

Page 1557, O 16, R. 4 A (2),

Substitute the following for O XVI, R 4 A (2)

4-A (2) When any other pirty to such a snit applies for a summons to such an officer, he shall deposit in Court along with his application a sum of money for the traperceptude.

prescribed pay any iv. scale, and

#### Page 1847, O 21 R 52

Add the following as proviso (ii) and re number the existing proviso as (i) -

- (ii) Provided further that, where the Court whose attachment is determined to be prior, receives or realizes such property, the receipt of realization shall be deemed to be on behalf of all the Courts in which there have been attichments of such property in execution of money decrees prior to the receipt of such assets.
- Explanation —Priority of attachment in the case of attachment of property in the castedy of Court shall be determined on the same principles as in the case of attachment of property not in the custedy of Court.

#### Page 2771, O 43, R 1, Sub-Rula (e).

- IL Substitute the following for sub-rule (s) of Rule 1 of Order XLIII of the Code of Civil Procedure -
- (s) An order under Rule 1 or 4 of Order NL, except an order under the provise to Sub Rule (2) of Rule 4.

#### Page 2887, Appendix B. Form 13 A.

Substitute the following for Form No. 13 A of Appendix B -

No 13 A

CURTIFICATE OF ATTENDANCE TO AN OFFICER OF GOVERNMENT SUMMONED AS A WITNESS IN A SUIT TO WHICH THE GOVERNMENT IS A PARTY.

#### Order AVI, Fule 4 A (Cause Title)

(designation) Leing a Govern-This is to certify that (name) (name) was summoned to give ment servant from the Proxince of evidence in his official capacity on behalf of the plaintiff/defendant in the above suit/matter and was in attendance in this Court from the 193 , (inclusive) and that a sum of day of of to the has been paid into Court by the plaintiff/defendant towards his trivelling and subsistence allowance for days according to the scale prescribed by the Government of the Protonce of (name) and that the said amount has been will be remitted to the Government treasury at to be credited to Government under the head "AVI. 4-Miscellaneous Fees

and Fines. \* Dated the

day of 193 .

Presiding Judge or Chief
Ministerial Officer.

#### MADRAS.

Page 1557 G 16, B 4 A [2],

Substitute the following for O XVI R 4 A (2)

4.A (2) When eny other party to such a suit applies for a summons to such an officer le shall deposit in Court along with his epileation a sum of money for the travelling sud other exjenses of the officer according to the scale presented by the Government under whom the officer is serving and shall also pay any further sum that may be required under Rule 4 according to the sume scale, and the money so deposited or paid shall be credited to Government.

#### Page 1847, G 21 R 52

Add the following as proviso (a) and re number the existing proviso as (i) --

(ii) Provided further that where the Court whose attachment is determined to be prior receives or retules such property the receipt of realization shall be deemed to be on behalf of all the Courts in which there have been attachments of such property in execution of money decrees prior to the receipt of such essets

Explanation —Priority of ethichment in the case of ethichment of property in the custod; of Court shell be determined on the same principles as in the case of ethichment of property not in the custody of Court "

#### Page 2771, O 43, R 1, Sub Rule (s)

- IL Substitute the following for sub rule (s) of Rule 1 of Order XLIII of the Code of Civil Procedure —
- (s) An order under Rule 1 or 4 of Order AL, except en order under the proviso to Sub Rule (2) of Rule 4.

#### Page 2887, Appendix B Form 13 A

Substitute the following for Form No. 13 A of Appendix B -

#### No 13 A

CERTIFICATE OF ATTENDANCE TO AN OFFICER OF GOVERNMENT SUMMOVED
AS A WITNESS IN A SUIT TO WHICH THE GOVERNMENT IS A PARTY
Order VII Full 4.4

#### (Cause Title)

(designation) teing a Govern This is to certify that (name) (name) was summoned to give ment servant from the Province of evidence in his official capacity on behalf of the plaintiff/defendant in the atove suit/matter and was in attendance in this Court from the 193 , (inclusive) and that a sum of to the day of of has been paid toto Court by the plaints fildefendant towards Rs . .. days occording to the scale . .

(name) and that Sovernment treasure at VI A-Miscellancous Fees

and Fines '

Dated the

day of 193 .

Presideng Judge or Clief Minestereal Officer (XXXA)

#### PATNA

#### Page 2589, O 41, R 1

Add the following provise to Order MLI, sub rule (1) of Rule 1 -

Provided that when the decree appealed from is a final decree in a partition, suit and embodies the allotment papers, the appellate Court may accept a copy of the decree contaming only a portion of the allotment papers, provided fur there that the appellate Court may, subsequently, on the application of the respondent require a copy of the remaining or any further portion of the allotment papers to be filed by the appellate.

#### RANGOON

#### Page 1552 O 16 R 2

- 1 For sub rule (3) of Hule 2 as amended by item 2 of Correction List No 4 substitute the following
- (3) Subject to provisions of sub rule (2) travelling and other expenses of winesses, in Courts subordine to the High Court other than the Court of Small Causes of Rangoon, shall be payable on the following scale —
- (I) Ordinary Labouring Classes—The actual fare to and from the Court by the lowest class for pournes, which were or could have been performed by public convayance as defined in Burma Travelling Allowence Rule 6 (12), or where the journey could not have been performed by public conveyance actual travelling sepsess reasonably incurred not exceeding Rs 1 4 0 a day by bost and annas size a mule by road and an allowance for each day absence from home of annas size to those who are residents of pleces other than the place where the Court is held and of annas four to those who are residents of the place where the Lad
- (2) Petity Village Officers.—The same rates as above for journays, which were of could have been performed by public convoyance as defined in Burma Travalling allowance. Rule 0 (12), or actual travalling expenses reasonably incurred not exceeding. Ro 1 4 0 aday by boat and annas full a mile by road, and an allowance of aureas eight for each day a abonce from home.
- (3) Presons of higher ranks of hife nuch as Cletta, Trackspeople village Headmen, Headmen of Circles and Members of Circle Boards—Third class flat to and from the Court for journeys which were or could have been performed by public conveyance a, danned in Lur ma Travelling Allowance Rule 6 (12) or where the journey could not have been performed by public conveyance actual travelling expenses reasonably incurred under excepting 1, 23 of a day by boat and antity two a mile by road and an allowance not to exceed, except in special cases Re 1 for each day a before from home

Provided that the second class fare by public conveyance may be puil in any case in which the Court is statisfied into the winters is a person who ordinarily travels by see of class and did actually travel by that class. The Cont should cettify that it is about a limit and the court class fare is paid.

- (4) Members of Dutried Councils, persons staying wome tax on Fr 3000 per annuar or more and other persons of equal or supers status—The actual travelling expenses retain ably incurred to said from the Court with an allowance according to circumstances not to exceed, except in very spe in classes Kr. 3 for each day a sleepes from home.
- (5) Witnesses following any profession such as Medicine or Law -A special allowance according to circumstances, which is not to exceed Rs. 3, unless the witness is called to

(xxxv)

#### PATNA

#### Page 2589, O 41, R 1

Add the following provise to Order ALI, sub rule (I) of Rule 1 -

"Provided that when the decree appealed from is a final decree in a partition suit and embodies the allotment papers, the appellate Court may accept a copy of the decree containing only a portion of the allotment papers.

#### RANGOON

#### Page 1552, O 16, R 2

- $1\,$  For sub rule (3) of Rule 2 as amended by item 2 of Correction List No 4 substitute the following
- "(3) Subject to provisions of sub rule (2) travelling and other expenses of witnesses, in Courts subordinate to the High Court other than the Court of Small Causes of Rangoon, shall be payable on the following scale.
- (1) Ordinary Labouring Classes The schual feer to and from the Court by the lonest class for journeys which were occunid have been performed by public conveyance as defined in Burma Travelling Allowance Rule 6 (12), or where the journey could not have been performed by public conveyance actual travelling expense reasonably incurred not exceeding Rs 1 4 0 a day by bost and annua froe a mile by road, and an allowance for each day a absence from home of annua size to those who are residents of places olites than the place where the Court is held and of annua four to those who are residents of the place where the Court is held and of annua four to those who are residents of the place where the Court is
  - (2) Petty Village Officers The same rates as above for journeys which were or

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ma Travelling Allowance Rule 6 (12) of where the journey could not have been performed by public conveyance actual travelling expenses reasonably montreal not exceeding R. 2 9 0 a day by boat and annas find a mile by road, and an allowance not to exceed except in special cases Re 1 for each day a absence from home

Provided that the second class fare by public conveyance may be paid in any case in which the Court is satisfied that the witne sis a person who ordinatily travels by second class and did actually travel by that class. The Court should certify that it is so satisfied in all cases in which second class fare is paid.

- (4) Menders of District Councils, persons jaying u come taz on Ps 3 000 per annum or more, and other persons of equal or superior status—The actual travelling expenses reason bely incurred to and from the Court with an allowance according to circumstances not to exceed, except in very special cases, Rs 2 for each day's absence from home
- (5) Wrinesses following any profession such as Medicine or Law A special allowance according to circumstances, which is not to exceed Rs 3, unless the witness is called to give

(xxxv)

# PATNA

### Page 2589, O 41, R 1,

Add the following proviso to Order XLI, sub rule (1) of Rule 1 -

partition suit ccept a copy of provided furdication of the

ment papers to be filed by the appellant "

### RANGOON

### Page 1552, O 16, R 2

- 1 For sub rule (3) of Rule 2 as amended by stem 2 of Correction List No 4, substitute the following
- "(3) Subject to provisions of sub rule (2) travelling and other expenses of witnesses, in Courts subordinate to the High Court other than the Court of Small Causes of Raugoon, shall be prevailed out the following scale.
- (1) Ordunty Lobouring Claster—The actual fare to and from the Court by the lowest class for journeys which were or could have been performed by public consequee as defined in Burma Travalling Allowance Rule 6 (12), or where the journey could not have been performed by public conveyance, actual travalling expenses reasonably incurred not exceeding Re 1-4 0 a day by boes and annaa five a mile by road; and an allowance for each day a susmer from home of annas tire to those who are residents of places other than the place where the Louts is held, and of ennas four to those who are residents of the place where the Court is
- (2) Petty Village Officers —The same rates as above for journers which were or could have been petformed by public conveyance as defined in Burma Travelling Ulowance Bulle 6 (12), or actual travelling expenses reasonably incorrect not exceeding Rs 1-1-0 a day by boat and annas fuo a rule by road, and an ellowance of sunes cright for each day a absence from home.
- (3) Persons of higher reasks of life such as Clerk, Tradepeople, Village Headment of Cercles and Members of Circle Boards —Third class few to and from the Court for pournays which were or could have been performed by public conveyance at denued in Lurma Travelling Allowance Rule 6 (12) or where the porrang could not have been performed by public conveyance at denued in Lurma Travelling acquaines exceeding the 13 of a day by boat and annate 1000 a mile by road and an allowance not to exceed, every the special cases, Re 1 for each 4ay a sheeme from home
- Provided that the second class fare by public conveyance may be pail in any case in which the Court is satisfied that the wince is a person who ordinarily travely by scond class and did actually travel by that class. The Court should cettify that it is so sat shall in all cases in which second class fare is paid.
- (4) Members of Dutriet Cout air, persons paying monote far on Rs 3000 per annum or more, and other persons et qual or superior status—The actual travelling expenses reasonably incurred to and from the Court with an allowance according to circumstances, not to exceed, except in very special cases, Rs 2 for each day a shopner from home.
- (b) Witnesses following may profession such as Medicine or Law A special allowance according to circumstances, which is not to exceed Hs. 3, unless the witness is called to give

## (xxxv)

### PATNA

## Pege 2539, O 41, R 1.

Add the following provise to Order MLI, sub rule (1) of Rule 1 -

"Provided that when the decree appealed from is a final decree in a partition such and enabolise the ultifument papers, the appealate Count may accept a copy of the decree containing only a portion of the allotment papers, provided further that the appealate Court may, subsequently, on the application of the respondent require a copy of the remaining or any further portion of the allotment papers to be filled by the appealing.

### RANGOON

### Page 1552, O 16, R 2

- 1 For sub rule (3) of Rule 2, as amended by item 2 of Correction List No 4 substitute the following
- ' (3) Subject to provisions of sub rule (2), travelling and other expenses of witnesses, in Courts subordinate to the High Court other than the Court of Small Causes of Rangoon, shell be payable on the following scale.
- (1) Ordinary Labouring Classes The setual fare to and from the Court by the lowest class for journeys which were or could have been performed by public conveyance as defined in Burma Travelling Allowance Rule 6 (12), or where the journey could not have been performed by public conveyance, actual travelling exponses reasonably incurred not exceeding Rs 140 a day by boat end anna stree a mule by road; and an allowance for each day a absence from home of annas street in those who are residents of place other than the place where the Court is held, and of ennas four to those who ere residents of the place whate the Court is
  - (2) Petty Village Officers -The same rates as above for journeys which were or rayelling Allowance

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ma Travelling Allowance Rule 6 (12), or where the journey could not have need performed by public conveyance actual travelling exprass reasonably incurred not excessing R: 230 a day by boat and annas two a mule by read, and an allowance not to excess, excep, in special cases Re 1 for each day a absence from home

Provided that the second class fare by public conveyance may be paid in any case in which the Court is satisfied that the writess is a person who ordinarily travely by second class and did actually travely by that class. The Court should certify that it is so satisfied in all cases in which second class fare by paid.

- (4) Members of District Councils, persons joung success tax on Tr 3 000 per annator or more, and other persons of equal or superconstatist —The actual travelling expenses reason ably incurred to and from the Court with an allowance according to circumstances not to exceed, except in very special cases, Ins 2 for each day a sharper from home.
- (5) Witnesses following any profession such as Medicine or Law A special allowance according to circumstances, which is not to exceed Rs 8, unless the witness is called to give

## PATNA

### Page 2589, O 41, R. 1.

Add the following proviso to Order XLI, sub rule (1) of Rule 1 -

"Provided that when the decree appealed from us a final decree in a purtition autiand embodies the allotment papers, the appellate Court may accept a copy of the decree containing only a portion of the allotment papers, provided further that the appellate Court may subsequently, on the application of the respondent require a copy of the remaining or any further portion of the allotment papers to be field by the appellatin."

### RANGOON

### Page 1552, O 16, R 2

- 1 For sub rule (3) of Rule 2, as amended by stem 2 of Correction List No 4, substitute the following
- "(3) Subject to provisions of sub rule (2) travelling and other expenses of witnesses, in Courts subordinate to the High Court other than the Court of Small Causes of Rangoon, shall be payable on the following scale —
- (1) Ordunary Labouring Classes—The actual fars to and from the Court by the lowest class for yourneys which were or could here been parformed by public convayance as defined in Burme Travelling Allon-snee Rules (12), or where the journey could not have been performed by public convayance, extual travelling expensive reasonably incurred not exceeding Rs 140 e day by bost end annus rive a mule by road, and an ellonance for each day a absence from home of annus siz to those who are residents of places other than the place where the Court is held, and of annua four to those who are residents of the place where the Court is
- (2) Petty Village Officers —The same rates as above for journeys which were or could have been performed by public coursyance as defined in Burma Travelling Allowance Rule 6 (12), or actual travelling expenses reasonably incurred not exceeding Rs 1 is 0 a day by bost and annas fuo a mile by road, and an allowance of enuss eight for each day, absence from home.
- (3) Persons of higher ranks of higs such as Clerks, Tradespeople billaye Haddmen, Headmen of Circles and Members of Circle Boards—Third class first to and from the Country of which were or could have been performed by public conveyance as denued in him to Travelling Allowance Rule 6 [13], or where the poursey could not have been performed by public conveyance actual travelling serpones reasonably incurred hat exceeding R. 2002 day by boat and annas two a mile by road, and an allowance so to exceed except in special cases, Re. 16 reach day as sheened from home

Provided that the second class fore by public conveyance may be paid in 100 take in which the Court is statisfied that the witness is a person who ordurally travels by second class and did actually travel by that class. The Court should cettify that it is so and not access in which second class fore is paid.

- (4) Members of District Councils, persons jaying accome tax on Rs 3 800 per any unior more, and other persons of equal or superior status—The actual travelling expenses reason ably incurred to and from the Coart with an allowages according to circumstances, not to exceed, except in very special cases, Rs 2 for each day a absence from home
- (5) Witnesses following any profession such as Medicine or Law —A special allowance according to circumstances, which is not to exceed Rs. 3, enless the witness is called to give

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### PATNA

### Page 2589, O 41, R 1,

Add the following proviso to Order XLI, sub rale (1) of Rule 1 .-

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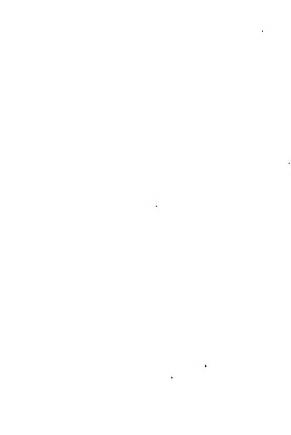
### RANGOON

### Page 1552, O 16, R 2

- 1 For sub rule (3) of Rule 2, as amended by item 2 of Correction Last No 4, a thisttute the following
- '(3) Subject to provisions of sub rule (2) travelling and other expenses of minesses, in Courts subordinate to the High Court other then the Court of Small Causes of Rangoon, shall be payable on the following scale —
- (1) Ordinary Labourrang Classes—The actual fare to and from the Court by the lowest class for portneys which were or could have been performed by public conveyance as asked in Property of the control o
- (2) Petty Village Officers —The same rates as above for journeys which were or could have been performed by public conveyance as defined in Botton Travelling Allowance Rule 6 (12), or actual travelling expenses responsibly incrred not exceeding R 1 · 10 a day by bost and annas fuo a mile by road; and an allowance of annas eight for each day a absence from home.
- (3) Persons of higher ranks of life, such as Clerks, Tenderpeople, Filloge Headmen, Headmen of Circles and Henders of Circle Boards—Third class fare to and from the Court for journeys which were or could have been performed by public consyguing a cleuned in Lur ma Travelling Allowance Kule 6 (13), or where the journey could not have been performably public corresponde, actual travelling expresses reasonably incurred in the receiping fix. 3 3 0 a day by boat and annas face a mile by road, and an allowance not to exceed, a copy in spe information of the cases, Re 1 lor each day a theorie from home

Provided that the second class fire he public conveyance may be paid in any case in which the Court is satisfied that the setters is a person who ordinarily travel by second class and did actually travel by that class. The Court should certify that it is so satisfied in all cases in which second class fare is made.

- (4) Members of District Commells, person 2 paging acconstant on Et 3 000 per onumer or more, and other persons of genul or superior adults.—The actual travelling expresse sension ably incurred to and from the Coart with an allowance according to circumstances, not to exceed, except in very special cases, Its 2 for each day's exbence from home.
- (5) Witnesses following any profession such as Medicine or Law 4 special allowance according to circumstances, which is not to exceed Rs 3, unless the witness is called to give



(xxxx)

### PATNA

### Page 2589 O 41, R 1

Add the following proviso to Order VIII, sub rule (1) of Rule 1 --

a partition suit accept a copy of provided fur

### RANGOON

### Page 1552 O 16 R 2

- For sub rule (3) of Rule 2 as amended by stem 2 of Correction Last No 4 substitute the following
- '(3) Subject to provisions of sub rule (2) travelling and other expenses of minesses in Courts subordinate to the High Court other than the Court of Small Causes of Rangoon, shall be payable on the following scale.
- (1) Ordusty Lobouring Classes—The actual fare to and from the Court by the lowest class for journers which were or could have been performed by public conveyance as defined in Burma Travelling Allowance Rule 6 (12), or where the journey could not have been performed by upinic conveyance actual travelling appears exaconably incurred not exceeding Rs 1 4 0 s day by bost and anna size or mile by road and an allowance for each day, absence from home of annas size to those who are residently oplices other than the place where the fall of annas size to those who are residents of the place where the Court is held and of annas four to those who are residents of the place where the Court is
- (2) Petity I illage Officers —The same rates as above for powners which were occupied have been performed by public conveyance as defined in Burma Trivalling Allowance. Rule 6 (12) or actual travelling expenses reasonably incurred not exceeding Rs 1 is 0 a day by boat and annas fuo a nulle by road, and an allowance of annas eight for each day a absence from home.

(3) Perso and Carcles out to for pursos which ma Travelling Allowance Rule 6 (12) or where the journey could not have been in real particularly build conveyance actual travelling erg most reasonably incurred independent in 1 230 a day by bout and annuar suco a mile by road and an allowance not to exceed every in spe in spe in sees Re 1 for each day a shearing from home

Provided that the accord class fire by public concernance may be paid in any case in which the Court is stateful with the nutners is a person who ordinarly travels by se end class and did actually travel by that class. The Court abould certify that it is so sit and in access in which second class fare as paid

- (4) Members of District Commonly persons possing a constration T 3 3000 per anisation or more and effect persons of rounder superior states—The actual travelling superiors reason ably incurred to and from the Court with an allowance according to circumstances in 2 for each day a sharenet from home according to circumstances in 2 for each day a sharenet from home.
- (5) Wilnesses following any profession such as Medicine or Law -- A special allowance according to circumstances which is not to exceed Rs 3 unless the witness is called to gi



## (xxxvi)

## RANGOON -Page 1552, O 16, R 2-(Contd)

expert evidence. In determining the amount payable under this rule the Court may, in the case of any person nummoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving svidence and in performing any work of an expert character necessary for the case.

(c) Ledging Allowance—In addition to the above, a lodging allowance not exceeding, except in special cases, annua fluriers for persons in class (3) and (8) may be allowed for each night necessarily spent away from home if the Court is satisfied that the winters had to pay fee has night's lodging. When an amount exceeding this scale is sanctioned as a special case, it shall not exceed the actual amount spent and the Court must be astisfied that they deep repositions was necessary.

### Provided that-

- (i) a servant of Government or of a Local Authority whose salary exceeds Rs 10 per mensem giving evidence in his official capacity in a suit to which Government or the Local Authority respectively it a party.
  - (a) when giving evidence at a place more than five mules from his headquarters, shall not receive anything under these rules, but shall be given a certificate of attendance,
  - (b) when giving evidence at a place not more than five miles from his headquartities, easil, in cases where the Court consider it incessary receive under those rules actual travelling expenses, but shall not receive subsistence, special or expert allowances.
- (11) a servant of Government or of a Local Authority whose salary does not exceed Rs 10 per mensem, giving evidence in his official capacity, shall receive his expenses from the Court.

[NOTE—When the journey has to be performed partly by rail or steam boat and partly by read or boat, the fare shall be paid in respect of the former and the integer or boat allowance in respect of the latter part of the bonney 1

Railway servants summoned by a Civil Court as wincesses, and travelling by rail to attend the Court, shall be paid the nailway fare to which they are entitled under the rules for , the payment of wincesse without regard to the fact that they may have travelled namer a rass and not on actual payment of the face?

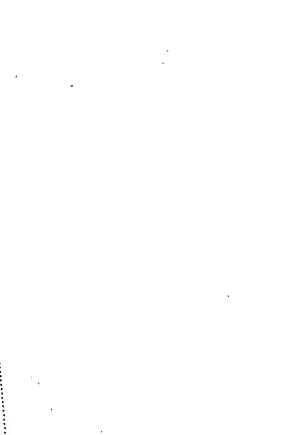
Page 2367, O 34, Rr 1 to 7.

For Order XXXIV substitute the following -

" Order XXXIV.

Suits relating to mortgages of immoveable property

- 1 Subject to the provisions of this Code, in every suit on a mortgage for foreclosure, Parties to suits sale or redemption—
- (a) all persons having an interest in the mortgage security or in the right of redemption shall be pinced as parties. Provided that a pinot mortgage need not be juined as a party to a suit relating to a subsequent mortgage except on application made by him in that tehalf.



# (xxxxn)

# RANGOON -- Page 2367. O 84, Rr 1 to 7-(Contd )

- (t) the plaint shell include a statement of all persons who to the knowledge of the plaint Z are interested in the mortgage security or in the right of redemption, and
- (c) the Court may direct that any party claiming any present remedy in respect c' the mortgaged property shall prove his claim and have such remedy as may be included in the de rice in the suit.
  - 2 In a suit by a mortispee for fere learn of a mortispe by conditional sale or an animalous riorityse whose terms provide for this remedy if the plaintiff unceeds the Court shall make an order as to which if any) of the parties shall personally pay the cests of the suit and shall

as exist the am not due by the mortgager to the plantiff (a) for the redemption of the mort agred property (i) to the costs of the suit (ii any) payable by the mortgager to the plantiff and (e) for an houter thereta and expenses if any and interest thereon as may be legally re-overable by the printiff from the mortgager in respect of the mortgage deducting therefore the crust charges and expenses if any leadly re-overable by the mortgager from the plantiff in respect of the rootgage send the costs of the suit (if any) payable by the plantiff to the mortgage.

and the Court shall pass a preliminary decree declaring the amount so found due and forther de laring that the pisintiff shall subject to the provises hereunder stated be

### Provided that-

rayable by the plaintiff to the mortgager

(a) the mortgager or any other party to the sult who has a right to redoem the pla stiff a mortgage may apply for and obtain a final decree for redemption on payment into Court of the amount so de larel to be due on or before a dato to be first by the preliminary decree (not being more than six months after the date of such decree) or such later date at the Court may substitute therefore or good cause shown and upon terms to be first by the Court and on compliance with all orders of the Court and on payment of such further sums at the Court may determine to be raviable under finite 7, and

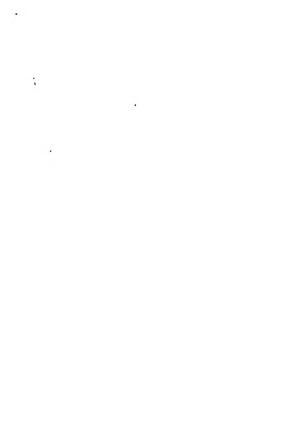
- (2) in the case of an anomalous mortgage the Court may at the instance of any party to the suit pass a decree for sale as under Rule 3 in heu of a decree for foreciosure
- party to the suit pass a decree for sale as under Rule 3 in heu of a decree for foreliosure

  3 (1) In a suit by a mortgageo lor sale of the mertgaged property if the plaintiff
  succeeds the Court shall make au order as to which (if any) of the

Suit for sele parties shall personally pay the costs of the suit and chall ascertain the amount doe by the mortgager to the plantiff (a) for p incipal and interest on the mortgage (b) for the costs of the suit (if any) payable by the mortgager te the plantiff and (c) for such costs charges and expenses if any and interest thereon as may be legally recoverable by the plantiff from the mortgager in respect of the mortgage deducting from such sums the costs charges and expenses if any legally recoverable by the mortgager from the plantiff in respect of the mortgager and the costs of the suit (if any)

and the Conrt shall pars a preliminary decree declaring the amount so found due and further declaring that the plaintiff shall subject to the proviso hereunder stated be cuittled to apply for and obtain a final decree for sale of the mortgaged property or a suffice ent write thereof

Provided that the mortgagor or any other party to the suit who has a right to redeem the plaintiff a mortgage may apply for and obtain a final decree for redemption on payment into Court of the amount is to found due on or befere a date to be fined by the preliminar escree (not being more than six months after the date of such decree) or such later date as the Court may substitute therefor on good cause showy and upon terms to be fired by the



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# RANGOON -Page 2367, O 31, Br 1 to 7-(Contd)

Court and on compliance with all orders of the Court and on payment of such further sums as the Court risy determine to be payable under Rule 7

(i) In pursuance of a final decree for sale the property shall be sold as the Court may direct, and the proceeds of the sale (after deduction above/from of the expenses of the sale) shall subject to any orders made by the Court sate setting off the amount dous against the purchase money, he paid into Court and applied in payment of the amount found due as aforesaid together with such further sums as the Court may determine to be payable under Rule 7.

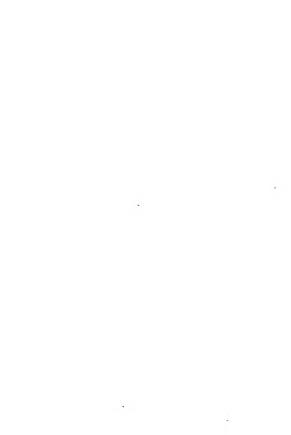
Previded that stary time before the confirmation of the sale the motigagor or any chief parts to the sunt who has a right to redeem the plaintiff a mortingge my apply for and citain a frai order for redemption on payment finto Court of the amount found due as afore said toyether with such further sums as the Court may determine to be payable under Rule 7, and a compensatory amount equal to five per cent of the purchase money (if any) paid into Court by the purchaser, which said expensatory amount shall be paid to the purchaser.

sogether with the said purchase money on his application

- (3) Where there is included in the preliminary decree a deplaration of the priorities of the parties to payment out of the proceeds of safe the Court shall (subject to the provisions of Sect in 81 of the Transfer of Projectly Act 1852) pairs a final order for payment in secondance with such priorities provided that a mortisage abuning priority over the plantiff may further to the previsions of section 57 of the Transfer of Projectly Act, 1892) elect that the property shall be seld subject to his mertigate.
- (1) Where the precedes of the sale are not sufficient for the payment of the mounty due to the plaining or any other party to this suit, and the balance due to the plaining or any other party to this suit, and the balance due to the plaining or such other party is legally recoverable by him from the mortgager the Court shall, on application made in this tebril by the plaining or such other party, pass a decree against the mortgager personally for the payment of such balance
- (5) The previsions of this Rulo shall, so far as may be, apply to every suit to enforce a charge in respect of which the Court may pass a decree for sale of the property charged
- (6) In territories to which the Transfer of Property Act, 1832 has been extended, 3 mortgages who has obtained a decree for pryment of money in stitisfaction of a claim arising under his mentgage shall not be entitled to bring the mortgaged property to call exhaustes than by a suit for sale under this Rule and he may institute such suit notwithstanding any-thing contained in O 2 11 2.
  - 4 (i) In a suit for redemption of a mortgage, if the Plaintiff succeeds the Court shall make an order as to which (if any) of the parties shall personally gat the cesses of the suit, and shall accretize the amount due by

the plaintiff to the defendant (a) for principal and interest (if any) due on the mortgage, (b) for the costs of the anil (if any) payable by the plaintiff to the defendant and (c) for anch costs, charges and expenses, if any, and interest thereon, as may be legally recoverable by the defendant from the plaintiff in respect of the mortgage, deducing therefrom the costs, charges and expenses, if any, legally recoverable by the plantiff from the defendant to the plaintiff.

- (2) If it appears that nothing is due to the defendant on the mortgage or that he has been overpaid, the Court shall pass a final decree for redemption directing further that the defendant shall pay to the plaintiff the amount (If any) overpaid with such interest thereon as the Court may deem reasonable
- (3) If the account is in favour of the defendant the Court shall pass a preluminary decree deciaring the amount found due by the plaintiff to the defendant,
- and further declaring that, on payment into Court of the sald amount on or tefore a date to be fixed by the sald deeree (not being more than aix months after the date of such decree) or such later date as the Court may substitute therefor on good cause v



# (zizzz)

### RANGOON -Page 2367 O 34 Rr 1 to 7-(Contd )

shown and upon terms to be fired by the Court and on compliance with all orders of the Court and one present of such further same as the Court may determine to the paralle under Rule 7 the pluntiff shall be entitled to apply for and obtain a find derive direction to be clear to the pluntiff or to such person as the pluntiff approximation to the present of the pluntiff approximation to the procession of the defendant and all approximation to the procession of power of the defendant estaints to the said property, and to execute and have required (as required 1), the pluntiff and at the cost of the pluntiff such existing to the pluntiff or the procession of the pluntiff or the procession of the pluntiff or the p

and further declaring that if the plaintiff fulls to make full payment as aforesaid the defendant shall be entitled to apply for and obtain a final decree for sale of the property subject to the provings of Rule 2 where the provings of Rule 2 where such remely is legally available

- 5 Where on any suit on a mortgage a party other than the mortgager claims to be Subrogation subregated to the rights of the mortgage the Court may, on the application of such party male an order declaring that the mortgage subsists for his benefit.
  - 6 In any decree passed in a sait for foreclosure sale or redemption, where interest is legally recoverable, the Court may order payment of interest to the mortgages as follows, namely —

(a) Interest up to the date on or before which payment of the amount declared due is under the preliminary decrea to be made by the mortgager or other person redeming the mortgage—

- (i) on the principal amount declared due ou the mortgage—at the rate payable on the principal or, where no such rate is fixed, at such rate as the Court deems reasonable,
- (ii) on the amount of the costs of the suit awarded to the mortgagee,—at such rate as the Court deems reasonable from the date of the preliminary decree, and
- (iii) on the amount adjudged due to the mortgageo for costs, charges and expenses properly ineutred in respect of the mortgage security by 10 the dato of the preliminary decree—at the rate agreed between the parties or, falling such rate, at the same rate as is payable on the principal, or failing both such rates, at man per cent per annum, and
- (b) Subsequent interest up to the date of realization or actual payment at such rate as the Court deems reasonable—
  - (i) on the aggregate of the principal arms specified in Clause (a) and of the interest thereon as calculated in accordance with that Clause, and
  - (11) on the amount adjudged due to the mortgages in respect of such further costs, charges end expenses sa may be payable under Rule ?
- 7 In finally adjusting the amount to be paid to a mortgages the Court shall determine Adjustment of account the sum (if any) payable in respect of costs, charges, and expenses property and interest from the date of the last adjustment."

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# (zzzzz)

## RANGOON -Page 2367 O St Rr I to 7-(Contd )

shown and upon terms to be fixed by the Court and on compliance with all orders of the Court and on prement of asch further sums as the Court may determine to be preatle under Rule? The juminf shall be entitled to apply for and obtain a final derive direction, the defendant to deliver to the plaintiff or to such person as the plaintiff appoints in this rebuilt the mortgaged properts in the possession of the defendant and all 65 minorita in the precision or power of the defendant relating to the said property, and to execute and have registered (as repaired to the plaintiff outher (than a knowledgment in writing that all rights screated by the mortgage hire been extinctuable or rights retracted to the physical form the critical results of the mortgage all from all ensumbruses created by the defendant of property freed from the in wrigage and from all ensumbruses created by the defendant of any period criticing that form him or where the defendant elimin by derived title by those under whom he claims or (cta transfer of the mortgage to such third person as the plaintiff may direct.

and insther declaring that if the plaintiff fails to make full payment as aforesaid, the delendant shall be entitled in apply for and obtain a final decree for sale of the property subject to the provisions of Rule 3 er a final decree for foreclosure subject to the provisions of Rule 2 where such remety is legally available

- 5 Where in any sult on a mostgage a party other than the mortgage claims to be
  Subrogation subrogated is the rights of the mostgage the Court may, on the
  application of such party make an order declaring that the mort
- 6 In any decree passed in a sust for foreclosure, sale or redemption, where interest Interest is legally recoverable the Constraint order payment of interest to the mortagues as follows namely:

(a) Interest up to the date on or before which payment of the amount de late! due is under the preliminary decree to be made by the mortgagor or other person redesming the mortgagor.

- (i) on the principal amount declared due on the mortgage—at the rate payally
  on the principal or, where no such rate is fixed, at such rate as the Cour,
  deems reasonable.
- (ii) on the amount of the costs of the suit awarded to the mortgagee—at aget rate as the Court deams reasonable from the date of the Prolimbarr decree, and
- (uf) on the amount adjudged due to the mertgages for costs, charges and expenses properly locured in respect of the preliminary decree—at the rate such rate, at the same rate as in payabl rate, at mue per cent per amount, and
- (b) Subsequent interest up to the date of realization or actual payment at such reaction document reasonable-
  - (i) on the aggregate of the principal sums specified in Clause (a) and of an interest thereon as calculated in accordance with that Clause , and
  - (ii) on the amount adjudged due to the mertgages an respect of such further  $\epsilon \in \text{charges}$  and expenses as may be payable under Rule 7
- 7 In finally adjusting the amount to be paid to a mortgages the Court shall deter.
  Adjustment of account the sum (If any) payable in respect of costs, charges, and agree
  property and interest from the date of the last adjustment.







# RANGOON -(Confd)

## Page 2771, O 43, R. 1.

- 2 (1) In Clause (e) cf. Rule 1, for the words and figures "under rule 2, rule 4 or rule 7" substitute the words and figures "under rule 2, rule 3 or rule 4" (2) Delete the asternal on figure "7" occurring between the word "rule" and the word "rule "and "the word "rule "and "rule "
- (2) Delete the asterial on figure "7" Geometring between the word "rule" and the word "of "in Clause (c) of Rule 1 and delete the foot note on page 157.

## Page 2°69, Appendix A, Forms 45 and 46

In Form: Nos 45 and 46 of Appendix A, re number Clause 6 as Clause 7 and insert the following as Clause 6.

'G The persons who, to the knowledge of the planutiff, are interested in the mortgage-security or in the right of redemption ere as follows, namely — '



R. 2. [S. 438.] Where there are several trustees, executors or administrators, they shall all be made parties Joinder of traster, exceptars and acto a suit against one or more of them: ministrators

Provided that the executors who have not proved their testator's will, and trustees, executors and administrators outside

British India, need not be made parties. [1877—S. 438. See S. 52, O. 2, R. 5 and O. 7, R. 4.1

# Synopsis,

Note No Note No Legislative changes "Outside British India" Several Trustees, Executors or Adminis-Administration decree trators

Other Topics. Province See Note J. Pt. (4) to (6) See also Note 3. Pts (2) and (3)

- S 52, Note 7, Pt (1) See also O. 7, R 4, Legislative changes
- 1. The word "trustees" has been added before the word "executors". 2 The words "outside British India" have been substituted for the words beyond the lo, il limits of the pro-diction of the Court",
  - 2 Several trustees, executors or administrators
- This rule deals only with suits against and not with suits by trustees, executors or administrators. All trustees or all executors who have proved
- 9 (+.20) 1931 ) 197 (202 907) 4. (1927) 1927 Hom 49 (51) : 51 Rom 16. 5 (1932) 1932 Cal 337 (838) ; 58 Cal 77 (82). 6 (1902) 26 Bons 301 (301)
  - 7 (1902) 4 Horn L Rep 358 (300)
    - 8 (1903) 7 Cal W N 817 (820, 821) 9 (1861) 1861 Sath W Rep 190 (191).

# Scope and object of the Rule

This rule cuttles a trustee to represent the beneaularies in all suntancerum, properties visited in the trustee where the confirming is between the Lean decorates and third persons. But the Rule is a conduct one and toes not describe a person who happens in the atmospher in summy in his mid-adjusted appears at his optimal vortical in local rule time, that for the purpose of suits under the Code of Civil Froedure no pets in the sent of the purpose of suits under the Code of Civil Froedure no pets in the sent of the purpose of suits under the Code of Civil Froedure no pets in the sent of the purpose of suits under the Code of Civil Froedure no pets in the sent of the purpose of suits under the Code of Civil Froedure no pets in the sent of the purpose of suits under the Code of Civil Froedure no pets in the sent of the purpose of suits under the Code of Civil Froedure no pets in the sent of the purpose of suits under the Code of Civil Froedure no pets in the sent of the purpose of suits under the Code of Civil Froedure no pets in the sent of the purpose of suits under the Code of Civil Froedure no pets in the sent of the purpose of suits under the Code of Civil Froedure no pets in the sent of the purpose of suits under the Code of Civil Froedure no pets in the sent of the purpose of suits under the Code of Civil Froedure no pets in the sent of the code of Civil Froedure no pets in the sent of the code of Civil Froedure no pets in the sent of the code of Civil Froedure no pets in the sent of the code of Civil Froedure no pets in the sent of the code of Civil Froedure no pets in the sent of the code of Civil Froedure no pets in the sent of the code of Civil Froedure no pets in the sent of the code of Civil Froedure no pets in the code of the code of Civil Froedure no pets in the code of the code of Civil Froedure no pets in the code of the

In order that this rule may apply it is esserted that

- (1) the soit should be entering property rested in the reaction or administration. Visit for a defination of planning singlet to worship in a temple and for an injune; restraining the defendant from interfering with such right is not a suit concerning property vested in a trustee executor or administration and the rate will not apply to such a suit.
- (2) the contention in the suit must be between the beneficiaries and a third person, although the beneficiaries are mascertained for dissectionable persons or body of persons. The rule does not apply where the contention is between the benchmarks themselves or between the benchmark and the trule cost into a dominant not.

Under section 43 of the Specific Kelia) Act 1877 a decleration planned in a suit in which my of the parties are trustices is binding on the homogeneous

# 2 When beneficiaries may be added as parties

In suits by or aprinst finistees, executors or administrators concerning property vested in them, it is not necessity that the beinferiries should be finish also printed But the Controlling in thus to corder them or any of them to be made parties. The beinferiries may apply to be added as pattics where their are resonable grounds to suppose that their interest will not be sufficiently represented by the trustees or will be endangered unless

\ote No

they are made parties. Thus the benchrance, can be added as parties where the trustee has no interest in the case or has in interest adverse to that o bercheirnes? or where the question in the suit is one of accounts and the iru tie is the accounting party a r where the benchmaries are absolutely e ii led to a major perturn of the property and complain of breach of trus en the part of the trus ce for where the interests of the benchearnes are likely to be affected by their in t being much ided in the suit's The trustee executor er administrat rimay also apply in a proper case for adding the benchmarie as parties for the purp of at plote ting himself a but the benchmanies may come in cals where there is a trust admitted or proceed to exist the first is the purchase the benchmarks are not necessary parties 7

Where it terefrom is added in a suit by or against trustees under t i im unt to the add tran or substitution of new plaintiff or e fer tet affir the remaining of section 22 of Limitation Act 8

What the last on channel by a trustee under this Rule the r sensibled to suc tir recovery of the benefit thereunder 9

or administrators they shall all be made parties executors and ad to a suit against one or more of them: ministrators

Provided that the executors who have not proved then testators will and trustees, executors and administrators outside British India, need not be made parties

Synopsix

MI 15 Legislative changes Outside British India Several Trustees Executors or Adminis trators

Administration decree

Other Lopic

Note 3 Pts (2) in 1 (3)

### 1 Legislative changes

1 Th v i trates lasteen allettefore the work executors 2 The v ! at he lot is hold been substituted for the words beyond the I dim to file prob tion of the Court

2 Several trustees executors or administrators

The rule deals only with suits against and not with suits by trustees, executors or administrators. All trustees or all executors who have proved

<sup>20) 19 37 1 19 (202 900)</sup> 4 (1327) 1927 I om 49 (51) 51 Hom 16 5 (1332) 1932 Cal 337 (939) 58 Cal 77 (82) (1902) 26 Bom 301 (304) 7 (1902) 4 bem L Rep 358 (300) 8 (1903) 7 Cri W N 817 (820 821) 9 (1861) 1861 Suth W Rep 190 (131)

the will or all administrators should be made parties i If this has not been done, no decree can be passed against any of them 12 Where one of them is an infant a guardian ad litem must be appointed for him and properly served, otherwise the suit will be dismissed for defect of parties 2 It has been held in the undermentioned cases that the rule applies only to suits, and not to applications, and that therefore it is competent for the Court to entertain an application for the appointment of a Receiver in a suit even though all proving executors are not made parties thereto. The proviso to the rule clearly and cates that executers who have not proved their testators will need not be made parties 4 But when an executor in ermeddles with the estates or has neted as executors he may be made a party even if he has not proved the will

## 3 'Outside British India

If a defendant insists that an executor is a necessary party the onus is upon him to show that the later is high within Braish India 1 A Court will be justified in refusing to add as defendant an executor who has abscorded' and whose whereabouts are not known

### 4 Administration decree

Where general administration is sought a general per onal representative is necessary 1 Representation by an administrator ad litem or by an executor or administrator de son tort is insufficient a

Husband of mar ried executrix not to **301**11

R. 3. [5 439] Unless the Court directs otherwise the husband of a married trustee administratus or executive shall not as such he a party to a suit by or against her

# ORDER XXXII

SUITS BY OR AGAINST MINORS AND PLRSONS OF A SOUND MIND

GENERAL

Sy1 01 113

Suits by or against minors and persons 1 Applicability of the Order to execution neoceedings

# 1 Suits by or against minors and persons of unsound mind

1

As infinitis, in law regarded as of miniature intelligence and extens and owing to his wint of opens and judgment is disabled for its did no hisself except where it is for his benefit? Thus the law will as a gestral principle resit all acts of in miniat which are for his benefit.

as a k cril principle treat all acts of an infinite which are for his benefit

's mee fooths, as bose of on infinite but will not permit him to do
anoths prepared to a quire and dispose of property but also his capacity
by reference to equil proceedings instituted by on against him! Thus a
detree of anoth in taxour of a minor without his being represented by a
first friend also his rest rullet whereas no effectival or said decree
can be proved again to a minor without his being represented by a
proper

in all leaves again to a minor without his being represented by a
proper

in the process of the first and this consequently the duty of the
to the worth his interess right inthough the duty of the
to the proper

1 ct mes who are ct unsound mind or are suffering from mental in-1 are thereby in apable of protesting their interests are placed on the 1 th k is min its for the jurposes of legal proceedings by or against

This ride las been made applieable to proceedings under the Ganjam and Virtagrams Act (NNIV of 1839) (see R 20) and to proceedings under the Chota Nagpur Tennicy Act (see Nct VI of 1908 S 265 (3))

# 2 Applicability of the Order to execution proceedings

There is a conflict of opinion as to whether this order directly applies to execution proceedings. According to one view this order applies only to mit and not directly to execution proceedings and therefore the fract that no awardism addition is appointed for a minor party in such proceedings will not visual the proceedings if, in substance, his merests were represented by the their parties on the record and if no injury lass resulted to him by such non-representation? Another view is that proceedings in execution are a continuation of the suit that this Order applies to such proceedings and that a compromise entered into by the guardian in execution proceedings is not

# Order 32 General-Note 1

In titutes of cited in Halsburs a flingband vol VIII 196, 43 file by east from the fifth Intion is to the Linear Reports 277 file in the Linear Reports 277

ture s la s of Inglini Vol VIII

Diver's reports 120 (137) Fassets case ettel in Halsbury - Line of Figlu l. Yol XVII 12gc ll.

4 See executed in Note 3 to R. 2

6 (13°2) 133° 131 233 (300) (I 1)

1 (1921) 1921 Cal 47t (474) (1977) 1927 Cal 930 (331) (1970) 1920 Cal 109 (112)

[See also (1695) 27 C 17 0 (2 5) 0 °2

R 11 does not apply to a suit after final decrease present in which case stonly senting to proceed in execu

t out]
(1920) 1920 Lait 490 (493)
(1911) 1 129 Mal 2" (242 283)
(1904) 2 Sind L R 55 (E I)

(1907) 5 Cri L Jour 434 (439 440) 3 (1902) 20 Born 109 (114)

[HE]] Are the flevel of Mad P sont 144

[See al o the cases cited in foot note 4 1 clow] [See al o (1012) If Ind Cas 519 (544

(See at o (1912) If Ind Cas 519 (544 51") (Cal) Gross negligence in the confluct of the petition to set aside

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binding on the minor if no sanction is required by Rule 7 is obtained therefor 4 It is submitted that this last view is correct. As pointed out by Nallis C J, n. Multi alt Chetter 4 Krishna Doss Varus the Code expressly provides by O 22 R 12 that nothing, in Rr 3 4 and 8 of that order shall apply to execution proceedings will be it contains no such provision in O 32. It would appear to follow from this that the Code has been drafted on the basis that an applica ion for execution is a proceeding in a suit

R. 1. [5 440] Every suit by a minor shall be instituted in his rune by a person who in such suit shall be called the next friend.

[1877-8 440]

# Local Amendments

## LAHORE

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The follo ving v or bowere a lifed -

Such persons may be ordered to pay any costs in the suit as if he were the plaintiff

NWFP

The following paragraph of all be alled Such person may be ordered to pay any costs in the suit as if he were the
plaintiff

## Synopsis

1 Scope and object of the Rule 11 Minor who is (1) When a minor may sue without a next friend	1 2 3	ill Objection in appeal to authority of next friend IV Title of suit V Liability of next friend for costs VI Effect of decree in suits by	7
(i) Minor sums, as adult see note 2 to the next Rule (c) Suit on I chalf of an al	4	minors VII Estoppel VIII Limitation IX Attorney a costs	1 2 3

c) Suit on lebulf of an all legel minor who is not a minor in fact Suits for specific performance by a minor suit of specific performance by a minor suit of possession against per

(d) Where suce tion of mino son in possession as guardian of minor plaintiff

## Other Topics

Applicable to describe proceed F \( \) (3 a) the state of 3 c certainty to 2 the first leading the state of 3 certainty whether can be proceeded with Sea B a Sea the state of the state of

rest friend of m north-inction of Court when
necessary to tept on and suc Scrit

out 12 to 11 and 1

## 1 Scope and object of the Rule

This rule provides that every suit by a minor plaintiff shall be brought in his name hi a next friend 1 The reason why no proceedings can be taken by a intant without the assistance of a next friend is on account of the int but 5 su mosed want of discretion and his mability to bind himself and make hins If Lable for c sts. But the min i is the real plain iff, the next friend is no a party to the su in the prijer sense of the term. He only represents he runers interest and act fr h n In the course of such representation he car choose his any solest rier even counge him although he is under an elligation not to make an arrontment which would be detrimental to the interests of the min ra

Though the wird shall is u ed in the rule a suit by a minor without a next friend should not normally be treated as allorities but an opportunity should be given to constitute the suit in the regular manner 4 In Doorga Tabir W I I R 22 (a) 270) Sale J observed a uld seem that the rule was intended for the protection and benefit of deterd arts first bas by a held that when a defendant wayses this benefit and ir to the sum may proceed without a next friend See Note 3 to Rule 2 fellowing a

to dies not provide for suits by or on behalf of idols. On the analogy of this rul bowever it has been held that the Manager or the Shebai' of an tdol can sue on behalf of the idol which is considered to be a perretual minor in the eye of the law \$

### 2 Mmor who is

Under section 3 of the Indian Majority Act (IN of 1875) every person domicaled in British India shall be deemed to have attained major to when he shall have completed his one of 18 years and not before. But if before the extirs of the ige of 18 a guardian for the person of for the property or for 1 of the minor has been appointed or declared by a Court of Justice (apart from the provisions of Order 32 of the Culc) or the minor's property is taken charge of by a Court of Wards then the period of minority is extended till the complete in of the age of 21 1

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Order 32 Rule 1 Note 1
1 (15 7) 4 N W I 1
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(1300) 24 1 m 23 ( 29) Mit or can sue the ugh next fri nd in Mamlatdar s

15 | 21 form 64 (90) (Do) (1321) t 1-1 Borr 114 (115) Suit against

lust and through next friend to rec (r)r jerts—Hustand as natu rit guicl 41 nnot rest the suit (192) 192) Bom 72" (528) Minor can sue as hearer of 51 ah Jaj H + ids

la (1890) 19 Ma l 127 (129) quoting Daniel's Chancery I ractice oth Edition page

105

2 (18°1) 7 Cal 13" (199) (1853) 9 Cal (29 (630)

(187 ) 3 Suth W R Act \ 139 (139)

(18 0) 14 Sutl W R 162 (162) Next friend cannot execute decree alter death of

(1923) 1923 Cal Cof (656) Thus minor cau sue in form a nauger s though next

frien l is not a pauler (189t) 3 "Ind 3 (4) (Do) 3 (190t) 29 C II 961 (970)

4 (1924) 1924 Cul 537 (539) 55 Cul 712 \$ (1970) 1920 Arg 9-1 (351)

(1979) 1929 Att 897 (889) Note 2

(18:0) O N I H G R 189 Cuardian ap pointed under Act NL of 1889-Umority exter 1s till 21

(1899) 12 Cal 612 (614) (1891) 5 Cal L R 41 1 (195) (1907) 29 Alt 672 (675)

(1881) 3 Atl 578 (CDO) Guardian appointed under ict VIII of 1890-Mineritr

extends till 21 (1924) 1974 Lah 15" (158)

(1857) 14 Cal 25 (59) Order of appe - 1

## 3 When a minor may sue without a next friend

Under Section 32 of the Presidency Small Cause Courts Act (XI of 1882), a minor if a institute a suit for any sum of monty no exceeding 500 rupees which may be due to him under 5 70 of the Contract Act, 1872. for wages of precework or for work as a servant, in the same manner is if he were of full age

4 Minor sung as adult -See Note 2 to the next Rule

5 Suit on behalf of an alleged minor who is not a minor in fact

Supposing a suit is filed through a next friend on the allegation that the plaintiff is a minor and it is subsequently found that the plaintiff was in fact I major even on the date of the suit, what is the proper procedure to be tollowed in such a case. The High Court of Mahabid in the undermentioned cases held that the suit should be dismissed the reason given being that there is no valid plant before the Court. This view has, however, been overruled by a Special Bench dees on of the same High Court which holds that where the mustake in filing suit is due to a bona fide doubt as regards the age of the mmor, the defect is a formal one not affecting the ments of the case and can be cured by amendment 2 The High Courts of Calcutta 3 Labore,4 Madras,5 the Chief Court of Oudles and the Court of the Judicial Commissioner of Nagpures have all held that the defect in such a case can be remedied by amending the plant and by removing the next friend

6 Where question of minority is in dispute

Districts as to the question of minority may arise-

(a) where the defendant who is sued as a major pleads that he is a minor. In such cases a preliminary assue should be framed for the purpose of deciding the plea of minority, and for the trial on this issue a giardian ad litem should be appointed for the alleged minor 1 See also Note 4 to R 3 infra

(b) Where the plaintiff sues as a major without a next friend and the defendant pleads that he is a minor, in such a case the

procedure prescribed by rule 2 should be followed The burden of proving minority is on the party who alleges it a As

the ugh the lab no certificate is taken pointed by will-bet on appointed to a Court of Justice out (1 107) 11 1 ont =0 (×1) (1) ) Note 5 (15 17) 21 I om 281 (285 280) Though such 1 (tsqs) 20 VII +0 (11) guar llin fedt el urg die fore 15 mino (1921) 1921 (11 "1 (") 15 (11 70). 2 (1931) 1 1 1 1 1 1 0 (11-1 rus nes ril 1 se continues titl 21

[Sec at (15-1) 112 All C70 (C71) (1907) 31 le m ' () ( () ) Herder of ap-44 (11 (71) pluten ut is a f and m north toes 3 (1891) 21 ( 1] 84 (81 -) potentee 11 H (1917) 1 127 ( 11 477 (177 178) (1-11) 1-11 (II W N 11- (II II (D)

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(1 132) 1932 Lah "11 (123) The questi 1 1131 21 dejer teen tona feles (1-71) 1 1 u I H 11 ( 10 In case of a I ir pean I nit b and at ag of

64 (1981) 7 On the tre 231 (27)
64 (1987) 107 No. 40 (17) Appeal to 1 x
from lone telephology many ... de nos Williams (IX) it if it it Rulm, Chi f not Note 6 05)667 298

friartien 31

1 (1929) 1923 1 :: 41. (1 2) 2 (1902) 26 11 11 109 (114 110) (1575) 27 5 ath W H 1 (7 b) to the quantum of evalence sufficient to prove minority, see the following cases 3

7 Objection in appeal to authority of next friend

If the miner plaintiff has the right to sue objection as to the want of is defect in the authority of the next friend is not fatal to the suit and on the rused for the first time in appeal t Such a defect does not affect the merits of the case and comes within the purview of Section 99 of the Code 2

## 8 Title of suit

(18)() 23 C (1 374 (28() (15 )1) 18 ( 11 500 (50 )

(1554) 11 31 id \*0) (315)

(1,000) 1 Ind Cas 555 (550) 31 1117

In a suit by the minor plautiff, the title and description of the minor shild be A a min r by his next friend Y, iersus A B, defendant 't Similarly when the minor is the defendant he should be described as X. a minor by guardian ad I tem Y But a defect or misdescription in title as for nearner where the mother of the mmor plant if describes herself as I for herself and as guardian of her minor daughter S, is not fatal to the suit a The defect is a format one and cannot afford a ground per se for interference 1 appeal a

9 Liability of next friend for costs

The words and may be ordered to pay any costs in the suit as if he were the plantin' occurring in the corresponding section 440 of the old Code have been omitted. But the omission does not affect the discretion of the Cour in proper cases to order the next friend to be personally liable for costs as for example when it finds that the suit was instituted by him without it a bong fides or where the sun is dismissed and the Court is no satisfied that the suit was instituted for the benefit of the minor 2 Where, however, the Cour finds that there were reasonable grounds for filing the suit and the next friend has been bong fule in his conduct, it will direct the costs to come our of the minor's estate 3

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(1 10.) 23 All 23 (*2) 32 Inl Apr 1 (1 C)
                                                         [See at o (1597) 4 \11 1 (3)]
                                                  (15-1) [5-1 11 11 \ 133 (113)
                                                2 (15-3) 18-3 Pun Re No 166 | 1ge 511
        and environtable
 (1- ) 1' Lil 181(11) Mother saufene
                                                                  Note 8
                                                1 (1550) 12 C d 45 (10)
- (1650) 12 C d 45 (43)
        all ported is he ro est -hest est
        dence
 (1-11) 17 ((131) (133) (133)
                                                  (13)3) 20 td 434 (504) 20 Jul 1pg 25
 (1 210) 7 In 1 C 4 .0 (51.) Intry m 1 rth
                                                3 (1857) 14 Cit 159 (163)
        register-ful vent evi lence
                                                  (1972) 1" Futh W R 141 (140)
 (1 102) 25 Med 184 (202) Stylem at he d
                                                  (15-0) 5 Cal 450 (153)
        ters I relative-r levent
  (18 A) Suth W R 301 (101)
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        minor can be taken into account
                                                1 (1)27) 1927 \[31 1023 (1024)
  (18 1) 1871 Suth W P 166 (216) Apr. 17
                                                  (1973) 1323 Nig 43 (45)
                                                  (1891) 21 Buth W R ? 15 (195) Lato under
        mee is not conclu iss
  (1º 10) 17 Cit #19 (h.it) Certificale of guar
        dianship under tet M of 18,9-
        Not car lence
  (190 a) 2 C at I Jour (15 (150)
 (16) ) 13 SH 176 (17)) (Do)
Note 7
1 (1889) 1883 | lan Re No 161 page 577
  (1851) 10 Cal (26 (134) It Ind 41 p 26
        (1' C)
                                                2 (158a) 11 Cul 213 (219)
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3 (1857) 10 Long 243 (204)

61 Cul 227]

[See also (1931) 1934 Cal 474 (477)

Save in exceptional cases neither the infant plaintiff nor the next friend ought to be required to give security for costs Where on the death of a deceased creditor, his minor legal representative deminds the debt, the debtor is entitled to refuse to pay until his interests are safeguarded by the production of a succession certificate or of a probate or Letters of Administration, where the minor in such a case suce the debtor for the amount, the defendant is not liable for the costs of the suit's

## 10 Effect of decree in suits by minors

If a minor is properly represented by the next friend and there is no friud or collusion or gross negligence on his part, the decree passed in the suit is binding on the minor as on an adult and will operate as res judicata. See also Note 13 to R. 3, unfra and Note 69 to S. 11, unfe

# 11 Estoppel

A Court of Equity will deprice a fraudulent minor of the benefit of the plea of infancy when by his conduct or representation he induces others to believe that he is a major. Thus where a minor, representing himself to be of full age collects rents and grants receipts or where he executes a registered sale-deed representing himself to be a major? he will be estopped from filing a suit through a next friend questioning the validity of those transactions. But the person relying upon the plea of estopped must himself come with clean hands and prove not only that fraud was practised upon him by the minor but thir he was deceived into action by such fraud 3 in other words there can be no estopped when the truth (of minority) is known to both the parties 4

# 12 Limitation

As alread, pointed out in Note 1, the suit though filed by the next friend as really that of the minor plaintiff and is governed by the law of limitation applicable to the minor. He is entitled to the exemption prescribed by sections 6 and 7 of the Lamitation Act (IN of 1908)?

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4 (1899) 23 Bom 100 (102)
(1934) 1934 111 458 (1158) There is no
provision in the Code for that
5 (1921) 64 Ind Civ 395 (386) (Lish)
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not re

presented (1926) 1926 Lab 289 (290) 7 Lab 129 Gross negligence in not putting up pro ter pleas

(1920) 1920 Mnd 379 (381) A guardian filing suit bona fide without considering legal aspects—Not guilty of gross negligence

Note 11. 1 (1909) 29 Cal 126 (127)

(1599) °C Cal 381 (355 391) 4 (1993) 30 Cal 589 (510) 30 Ind App 114 (PC)

(1807) 21 Č1 203 (270 271) (1920) 1920 Lah 372 (373) 1919 P R No 162 Note 12

1 (1891) 7 Cul 137 (139) (1872) 17 Suth W. R 419 (419) (1320) 54 Ind Cus 575 (576) (U.P. B.R.) 2 (1305) 23 Mid 57 (50)

(1692) 16 Poin 536 (537) (1882) 4 Mrd 119 (120) (1898) 21 Mrd 494 (196) Applicability of

Note 10

<sup>1 (19</sup>to) 7 Ind Cas 539 (539) (Qudh)

# 13 Attorney s costs

ĭ

The costs incurred by the attorney or solicitor of the guardian or next friend of a minor party in properly prosecuting or defending the suit are recoverable from the estate of the minor as necessaries" under section 68 et the Indian Contract Act (IX of 1872) 1 The High Court of Madras has, hewever, held that, where a suit insututed on behalf of a minor, is repudiated him on his attaining majority pending the suit, and the suit is dismissed. the solicitor cumot recover his costs from the estate of the quandum minor but car proceed against the next friend personally 2 But in any case the afterney is entitled only to a charge on the minor's estate and cannot get a personal decree against the infint 3

# 14 Suits for specific performance by or against minors

As to the maintainability of suits by or against minors for specific perference of contracts entered into by the guardian, see the cases noted hal w 1

### 15 Suit for possession against person in possession as guardian of minor plaintiff

Where A was in possession claiming to be the de jure guardian of B. a min r and C acting as next friend of B filed a suit against A for 18 1 si n it was held that the question was one exclusively falling within the priving of the Guardians and Wards Net (VIII of 1890) and that no surt las 1 See also Note 54 to S 9

### R. 2. [S 442] (1) Where a suit is instituted by or on behalf of a unnor without a next triend, the defendant B here suit is inch. may apply to have the plaint taken off the file, itel without next with costs to be paid by the pleader or other taken off the file person by whom it was presented

(2) Notice of such application shall be given to such person. and the Court, after hearing his objections (if any), may make such order in the matter as it thinks fit

[1977-8 442]

of the Lamitation Act, 1877

Sunances Note No Scope of the Rule Waiver or objection by defendant Suit by minor without a neat friend 2 | Costs

(130 ) 7 Cal W N 531 (535) (Dol) Note 13 1 (1891) 21 Cd 873 (6-0) (1875 167() 1 Cat 226 (243) 3 Ind top 7 (189t) 7 Cil 140 (114) (P C) Claim suit-Limitation (16J9) 22 Vad 311 (316 317) 2 (1891) 17 Vad 257 (209) (1898) o Cal W N 2"8 (273) Applicability of 1rt 41 8 (1917) 1917 Cil 6:2 (655) 48 Cil 676 (1895) 18 Mad 99 (103, 103 112) 5 7 Lami Note 14 tation Act does not apply to suite 1 (1895) 22 Cul 545 (5a1) under S 77 of the Registration Act (1893) 20 Cal 509 (513) (1893) 7 Pom 179 (180) Application for (1900) 27 Ctl 276 (278) execution (1895) 18 Vist 11a (416) (1892) 9 C (1 181 (182) (Do) (1835) 19 Bom (97 (700) Sut on bond exc (1891) 17 Mad 189 (192) (Do) cuted by minor Note 15 (1803) 20 Cal 714 (716) Case under Art 179 1 (1975) 1925 Nag 328 (329) 21 Nag L P 75

2,

### Other Lonics

Appeal See Note 2 Pt (2) Effect of suit ty 1) nor without next frien! -O its irregularity See Note 3 I t (1) Vinor I coming major I efore decision. See

Note ? It (") Minority apparent or found on enquiry-

I rocedure Se Note 1 1 to (1) to (1) Minor having certificate 1 guardian-Sut 1s other person as next friend-I flat See

Note 1 lt [] So application Is def ulast Rule still at plies See Note 1 1 t (1) Objection 11 no for e ifter appointment of

rext frient 5 Note It (9) Striking off of plant-When when Note 2 1 t (3)

Suit as minor-Reills mijr I flect Rule 1 Note 5

## 1 Scope of the Rule

Where a minor sues without a next friend the defendant can under this Rule apply to have the plant taken off the file. But even without in such application the Court is bound to take notice of the minority of the plaintiff if the same is disclosed in the course of the trial and suspend all proceedings in the suit until the defect is remedied by the minor getting himself properly represented by a next friend i

Where there is a certificated guardian appointed for a minor under the Guardians and Wards Act (VIII of 1890) but a sint is filed by a third person on behalf of the minor it has been held by the High Court of Alluhubud that the suit should be considered to be filed by the minor without a next friend and should be talen off the file 2

## 2 Suit by minor without a next friend

It has been held by the High Court of Calcutta that this Kule applies only to eases where the fact of minority is apparent on the face of the plant and that the rule does not contemplate an inquiry into the question of minoria where the plaint printa facie shows that the plaintiff is a major i In the latter case where on enquiry the plaintiff is actually found to be a minor the proper procedure according to that Court is to suspend all proceedings and to allow sufficient time to enable the nunor to have lumself properly represented in the suit by a next friend. If the Court purports to act under this rule, and takes the plaint off the file the order must be treated as a decree dismission the suit or an order rejecting the plaint in both of which cases an appeal will lie . On the other hand the High Court of Bombay has held that this rule applies even to cases where the fact of minority is disclosed on enquiry but that the Court should as a matter of practice stay proceedings and allow sufficient time to enable the minor plaintiff to be represented by a next friend unless the plaintiff instituted the suit with the knowledge of the fact of minority and with the intention of deceiving the Court and of eviding the payment of costs in the event of failure in which ease the suit should be taken off the file a The High Courts of Lahore 4 and Madras 5 and the Judicial Commissioner's Court of Oudh & have taken the same view

In any view where the plaintiff attains majority by the time of the

5 (1933) 1973 Wad o 3 (504) (1904) O adl Ca 9 4 (2 6) (190 ) 11 Oudh C s 159 (164)

Order 32 Rule 2-Note 1 1 (1924) 1924 L. h 188 (188) 4 Lah 390 (10 | 1 2 Rt 325 (16) 2 Ring 239

<sup>2 (19 9) 1923</sup> Notes 8 (c) 11 Ind Cas 456 (All)

<sup>1 (1886) 13</sup> Cat 18J (191)
9 (1887) 13 Cat 18J (191)
9 (1897) 13 Cat 189 (191)
10211 1021 Cat 6 (\*\*) 4 Cat 21

<sup>(1918) 1</sup> J18 Cul 55 (55 50) (1894) 10 Cal 10, (100) (18 6) 2, Sat1 W R 184 (195) (1868) 1 Ber s, L R O C 10 9 (1559) 19 Lom " (11) 4 (1921) 1721 Inl 15" (158)

enquiry as to his minority there is no necessity for an amendment masmuch as he can elect to proceed with the suit?

# 3 Waiver of objection by defendant

Where a defendant against whom a suit is instituted by a minor is a to the minority of the plantificuid we elects to proceed to trial and take the chance of obtaining a decree in his favour on the merits without using any objection under this rule he cannot be allowed for the first time in part when the trial has gone against him to contend that the suit is act maintainable owing to the minority of the plantiff. The decree presend in his use is not a nullity. The near representation of the minor by a next

h a case is not a mility. The non representation of the minor by a nexttiend is only in progulating capable of being waved by the defendant i... On the same principle ii has been held that where on objection taken

On the same principle it has been field that where on objection taken by the defendant a next friend is appointed for the plantiff, the defendant only to object in appeal that the suit was engandly filed without a next to all and was thrift to be temporarily.

## 4 Costs

Where the planta is found to be a minor and the plant is consequently aircord to be taken off the file of the Court costs should not be ordered to be a weed from the estate of the minor the plender or other person or the plant is the plant should be made liable therefor it

- R. 3. [5s 447 456] (1) Where the defendant is a minor, followed by Court from the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be qualdant for the sut? for such minor
- (2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff
- (4) Such application shall be supported by an affidavite venifying the fact that the proposed guardian has no interest in the matters in contract sym the suit adverse to that of the minor and that he is a fit person to be so appointed
- (1) No order shall be made on any application under this rule except upon notice to the minor and to any quardam of minor appointed or declared by an authority competent in that behalf, or, where there is no such quardam, upon notice to the father or other natural quardam of the minor, or, where there is no father or other natural quardam, to the person in whose care the minor is, and

(1891) 1591 | Ul | | \ 150 (1"1) (1891) Both I J 969 (203) (1690) 19 Mad 127 (129)

1 (1999) 13 I om 2 4 (196) [See also (197) 11 Cal L R to (16)]

 <sup>(1896) 13</sup> Cat 189 (191-192)
 (118) 1915 Al 71 (71) The plant must be remed to law been properly preducted on the day of the application to proceed with the plant
 (1J-3) 1J23 And 7 1 (-1)

after hearing any objection which may be unged on behalf of any person served with notice under this sub-rule.

[1877—Ss 443, 446]

## Local Amendments

Ill the following proviso to Sub R (1) -

Provided that if the minor is under ten vers of age no such notice hall be a wed to him

BOMBAY

A1.1.AHBAD

The words ' to the minor and m line 2 of sub R (4) shall be deleted LAHORE The following sub rules were substitute I for sub Ite (8) and (4) -

es of the miner il her ast lakely to be car side of The hat shall const tute

- (4) The Court may at any time after institution of the suit call upon the pla ntiff to furnish such a list and in default of compliance may reject the plant
- (5) he application for the appointment of a guardian for the suit and an he furnished under this rule shall be supported by an affidavit verifying the fact that the propose I guar han has no interest in the matters in controvered in the unit adver-e to thet of the minor and that each person proposed is a fit person to be so art omted
- (6) No order shall be made on any application under this rule except upon a ctice to any guards in of the minor appointed or declared by an authority competent in that behalf or where there is no such guardian upon notice to the lather or ther natural guardian of the manor or where there is no father or other i itui il guardi in to the lerson in whose care the immor is and after hearing any obj tion which may I migel on behalf of any person served with notice under this sub rule

Provided that the Court may if it sees fit, issue notice to the minor al o

MADRAS

Delete Hr 3 and 1 and substitute in hen thereof the nen R 8 set forth below -

(1) inv person who as of sound mind an I Oualifications to be a has attrined mijority may act as next fri ad of a next friend or guardian minor or as his guardian for the suit

- Provided that the interest of that person is not adverse to that of the minor and that he is not in the case of a next friend, a defendant or, in the case of a guardian for the suit a plaintiff
  - (\*) Where a minor has a guardian appointed or declared by computent at thorsts. no jerson other than the guardian shall act as the Appointed or declared next friend of the minor or be appoint I his guardians to be prefer quardian for the suit unle s the Court con iders, red and to be supersed for reasons to be recorded that it i for the minor s ed only for reasons welfare that another person be permitted to act or recorded be appointed as the case mix be

. 41 1/2 2 .

. .

Guardians to be ap pointed by Court

(4) in order for the appointment of a guardian for the suit may be obtained upon

Appointment to be misored by the plantiff. The application and it is it be pluntiff. The application and it is it be pluntiff. But a forth in the order where necessary after of their studied in the content of the studied in the studied in the content of the studied in the stu guardian No 11 4 set forth in Appendix H hereto) who are competent and qualibed to not as guardian

for the suit for the muor defendant The Court may, for rea ons to be recorded in any particular ease exempt the applicant from furnishing the list referred to above

(5) The apply after referred to in the above sub rule, whether made by the plaintiff

in support of the ap plication for appoint ment of guardian

r ou bebilf of the minor defendant shill be sup Contents of affidavit ported by an affidavit verifying the fact that the propo el guarian has not or that no one of the proposed guardians has any interest in the mat rers in controvers; in the suit adverse to that of tle 1 muor in I that the proposed gnarlan or guar initated pr a to be appoint ! The affidavit shall further state

of ea h a (a) particulars of any existing this is the gruin tan guarlin appented r de level b competent authority (b) the name and id ire 'the prom face who is the de facto guardian of the miner (c) the man , and alliences of persons of any who in the event of either the natural ril I fac guardish or the guardini appointed or diclared by competent and perint el to a t or by reason of relationship or interest I table | r ns to act as guardian for the miner for the suit

the re-Application for ap pointment of guardian to be separate from application for bring ing on record the legal representatives of a

deceased party

posed guardian

retitions

Notice of applica tion to be given to persons interested in the minor defendant

i" to it I il to mile many application under sub R (i) above except upon notice to any guardian of the miner appoint el or declared twon authority compotent in that lebalf or where there is no guardian upon notice

to the father or other natural guardian of the minor or where there is no fither or other netural other than the pro guarding to the jerson in whose care the minor te and after hearing any objection which may bo urged on behalf of any person served with notice under this sub rule. The notice required by this sub rule shall be sorred six clear days before the day named in the notice for the hearing of the applica

tion and may to in form to it set forth in Appendix II hereto (a) Where the application is by the plaintiff he shall along with his application and affidavit referred to in sub Rr (1) and (5) -

Special provision to shorten delay in get ting a guardian ap pointed

sub-R (i) above together the fees prescribed for ser

proposed guardians signify his or their consent to get, the Court shall appoint one of them and intimate the fact of such appointed to the pron appointed by registered post II us one of the persons served anises his consent to are, the Court shall proceed to serve animalization. another elected two if so many there be of the persons named in the list nder sub R (4) shall

e days of intimation sy the prescribed fee

(3) 'o person shall without his consent, be appointed guardian for the suit Whenever an application is made proposing the No person shall be ap

pointed guardian with out his consent

(10) Where the Court finds uo person fit and willing to get as guardian for the smit, the Court may appoint any of its officers or

Court guardian when to be appointed-How he is to be placed in funds

lian and may that officer uardian shall any one or

t of any fund

in Court in which the minor is interested and may give directions for the ic payment or allowance of the costs as justice and the circumstances of the

case may require (11) When a guardnu for the suit of a minor defendant is appointed and it is

made to agreer to the Court that the guardian is Funds for a guardian not in 1034ession of any or sufficient funds for the other than Court guar conduct of the suit on I chalf of the defendant and dian to defend that the defen lant will be prejudiced in his de 1- 11 0 me to time

his defence intiff in the 1 shall fle

SCH

#### NAGPUR

For R 3 and statute the following -

3 Where the delen lant is a minor the Court Guardian for the suit on long satisfied of the fact of his minority shall I point a I roper lerson to be guardian for the suit to be appointed by Court for minor defendant

#### OUDH

idd the following provise to sul R (4) -

Provided that if the minor is under ten seirs of age no such a circe shall be resued to hun

#### RANGOON The following shall be substituted namely -

3 (1) Where any of the defendants is a minor the Court on being satisfiel of the fact of his minority shall appoint a proper guarding for the suit for such minor

(9) -" ith the plaint a list of acting as guardian of of an application duly appointed guarlism of ich Fersons wlether he authority or a natural

min allobe obtaine l

ported by an affidavit rest in the matters in hat less a fit person

er and shall give the

to be so appointed

(5)

ile except upon natice authority competent on notice to the father is no father or other is and after hearing on served with notice

14

#### Sunopsis

Note No Scope and object of the Rule Shall appoint a proper person to be guardian for the suit Title of suit against minor 2 A On being satisfied of the fact of his minority When defendant pleads minority Non representation Absence of formal order of appoint ment of guardian-Substantial re presentation Illegal procedure in appointing guar

Note No Decree against major treating him as minor and vice versa Such application shall be supported by affidavit-Sub Cl (3) 10 Service of summons Notice to the minor and his guardian 11 Duties of a guardian- Gross negli 12 gence Effect of fraud or gross negligence of 13

guardian

Probate proceedings

Viale ability of other to execution proceed Vin u-When can impeach docree ings 5 e 0 3' Ceneral Acte 2 Notes 5 12 and 19 I terpel See Note + P1 (3) Sognitain al litem-I fic t on limitation Cuardian not appointed -Whether lecree is salid See Note 11 (1) 5 c Note 2 Pt (1)

# 1 Scope and object of the Rule

The object of the rule is to see that the minor's interest does not cuffer and that he is properly represented in a suit filed against him 1 The Court cannot, therefore be too jealous in observing the requirements of the law in regard to infants and in seeing that their afterests are properly safeguarded It should be satisfied not merely that the proposed guardian is a fit and proper person to set as guardian but also that he has no interest. directly or indirectly adverse to the ininot 2 As to the applicability of the rule to proceedings other than suits see the undermentioned cases a

#### Shall appoint a proper person to be guardian for the suit

The provisions of the rule are manufators and the Court is bound to appoint a proper guard in for a minor defendant 1 The appointment is not a more matter of form. The Court is Louis to saush itself that the proposed guardian is a fit and proper person to represent the interests of the minor 2 A decree obtained against a minor without appointing a guardian for him as required by this rule is nullity (see Note 5, infra) The principle that the manager of a joint Hindu family represents in hitigation the other members including nunor co-pareeners does not apply when minors are made parties to a suit, the Court is, therefore bound to appoint a guardian for the minor defendant even though the managing member of the family of which such runor is a member is a co-defendant?

But the fact that the validity of the proceedings depends upon the appointment of a proper guardian for a minor defendant does not mean that for purposes of limitation a suit is not validly filed until a guardian ad liter is appointed for the minor the institution of a suit is complete and saves limitation even though the further Progress of the suit depends upon the appointment of a suitable guardian 4

#### 2 A Title of suit against minor

In a sun against a minor the minor should himself be made, and

Order 32 Rule 3-Note 1 1 (1377) 13 / 1 m (13 (ct ) 2 (1902) 1 (11 53 (35 °13) 1 3

(10 0) 12 0 0 (He let lite) 3 Di 1 C 036 (199J) 15JJ li R 11, 11

" (1913) 1913 Oudh 1 > (1 >) Pul lo topply tagurtut a pro lu sunt L P I and Rev muc bet

(1971) 1331 All f o ff ; All h t 110 cce hi 25 in l evenue C ni (1927) 1927 (al 374 (374) Do s not apply to conmutation procedings unles

Bengal Ter aucy Act (197.) J Poin H C R 799 (290) 1 roccedings

to fle and enforce in award are of the nature of a suit under 5 2 of let 11 of 1361 and minor has to by telby holl a I certificate i dinni tratioi

Note 2 1 (1 U) 1 20 Non 54 (25) 44 I om "67 (1914) 1 H 1 Or dh 107 (105) 16 Oudh Cis

1 11 1 1 1317 111 477 (4 9) 09 111 8

3 (1931) 1931 \11 186 (186) 53 \11 497 # (1905) °O \11 55 (56) (1917) 1917 111 177 (479) 39 111 8

(1927) 1927 (11:787 (\*87) 49 (11:869) (13°0) 51 Ind Cas 575 (576) (UPBR) described as a defendant, some other person being named as guardian Thus a suit against CD a minor, should describe him as "CD, a minor, of whom EF is guardian ad litem."

3 On being satisfied of the fact of his minority See the undermentioned case 1

4 When defendant pleads minority

When a defendant who is sued as a major pleads that he is a minor, the preper procedure is to rust a prelim ray, issue on the question of his minority and give a finding thereon. In the proceedings for the determination of such issue however the alleged minor should be represented by a guardian ad litem appointed by the Court. If it is found that the defendant is in fact a minor then a guardian should be appointed for the suit. If not, the guardian appointed for the enquiry should cease to act i. On the analogy of this principle it has been held that where a minor applies to be brought on record as the legal representative of a deceased party the Court ought to appoint a guardian for the purpose of the enquiry as to his being the legal representative?

5 Non representation

I minor cannot be considered to be a parts to a suit inless he is represented therein by a duly qualified guardian. I decree passed against a minor not so represented must be regarded as a decree passed against a person not a party to the suit and is, therefore without juri-diction null and yould. In order to set acude such a decree it is not neces art to show that the

(1502 4 M) 97 (31) (1 101) 1901 Pt a Rt No 15, page 41 Note Z A 1 (1-73) 00 Suth W L 45 (45) [See also (1933) 133 Pat 101 (110) 12 1at 117 Minore suel ne major -Written statement filed by their mother as their guardin - Court scopted the same-Farlure to smend the cause title is a more pre-ularity (1926) 1926 Tab 82 (-2) Suit br father as next friend of his minor cou-Lind ing him a majer on that datedite of amendr ent barred be limi tation sust not to be dismi ed Note 3 1 (1920) 1920 Oudh 164 (166) 23 Oudh Cas 34, Nate 4

(1925) 1928 Cal Std (518) so Cal 1211 (1929) 1929 Cal \* ( ( sr) (tor3) 1923 Cal Cr2 (60 ) (1923) 1920 Cal 98 15 9 (1915) 1915 Cal 723 (730) (1997) ot Cal 23 ( 7) (1-87) 14 Cal 754 (757) (15-1) 12 Cat 134 1547 (15-1) 13 Suth N. h. 500 (701) (16-2) 102 Lah 5-7 (75) 8 Lah 58 (1032) 1032 Lah 5-1 (5-2) Rader of the Court appointed to conduct the sending rotice either to the minor or to the reader as regulared by R 3 O 32 C P C (191-) 191- Lah "0 ("32) 1919 PR No 113 (1917) 1 217 11:1 (4) (3-1) (1970) 19 Q Mad 713 (711) (1922) 1922 Nag 24) ('50 1- Nag L R 13 (19 3) 19-3 C 1 CY (129) (0 Cal "5" The sale in exe utor eftl. de ree : al o a nullity ever though n nor : represented to a grantua in the execution pricee line (1734) 1931 F - 200 ( )7

(11°4) 1351 Wall \*\* (\*\*\*) | 5° Wall \*\*3 (19-4) 1954 Oodh 1\*\*1 (1°\*)

(1910) Clades ( '(1 4) 1910 PR > 50 (1 9) 1911 La Re > 17 115 10 Car

fe si n el pulmitt en tehall c'

s co defer d'ut prele-De. brad ng

(1921) 1921 I it 233 (2 a)

Ι

minor has suffered any prejudice by non representation 2 It is not, however, recessary to set aside such a decree. The minor may ignore or disregard the decree 2 Not being a party to the suit the numer will not be barred by the principle of res judicata from ruising the same questions in a subsequent suit as were decided in the prior suit 3 On the same principle their Lordships of the Privy Council have held in Rashid un uissa v Huhammad Ismail, ILK 31 VII 572 that a mmor not represented in the suit cannot in execution object to the execution of the decree 31 Their Lordships observed as tell us Section 244 (now S 47) of the Civil Procedure Code applies to one tions arising between parties to the suit in which the decree na 125 ed that is to 52), between parties who were properly made parties in acco dince with the provisions of the Code It will also follow from this that a minor not properly represented in the suit and against whom an ex party decree has been passed cannot apply under O 9 R 13 to set aside the ex parte decree masmuch as under that rule only a defendant, that is a servo properly made a defendant can apply. This is the view of the High Court of Madras and the Indicial Commissioner's Court of Nagpur's The High Court of Allahrbads and the Chief Court of Oudhy have however held tha such an application is maintainable. In view of the Privy Council decision mertioned above at as submitted that the latter view is not correct

Where an incompetent or disqualified guardian is appointed for a minor party the position is the same as if no guardian is appointed at all 8 to 0 her a guardian ad litem can be regarded as a disqualified person and when not see Notes 4 to 8 to R 4 infra

Where a minor is represented in the suit by a duly qualified guardian to becomes legally a party to the suit and the Court acquires jurisdetion to decide his cases. The decree passed against him in such a case is binding on I im as much as on an adult and the judgment will operate as res judicala igan't him an subsequent proceedings to The law however recognises a

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[See also (1919) 1919 Cul 436 (485)
                                                                 " (19) | 19) Oudl 1 3 (1 4)
Decree cin be set a flo in an appeal
by another prity ]
2 (192) 1921 Mid 52 (893) 46 All 44
24 (194) 1921 Mid 52 (893) 57 Mad 973
                                                                 8 (1J31) 19 t Wad 6 4 (6 )
                                                                              Se also I ofes 4 and o to Rule 4
                                                                            t ifra]
                                                                 9 (19 1) t9 3 Lat 949 (250) 9 Pat 39
                                                                            (See also (1903) 30 Cal 10 1 100 )
                                                                0 [ d App 15 (P c) ]
10 (15 ) 10 V( 12 | 1 )
3 (10 ) 1 t 5 (0 )
            416 10 3 ...
                                                                                        1( €
                                                                    15J 19 Bo
                                                                    (10 8 19 9 11) (21 6 2
                                                                    119 6 13 C All 36 (40 41 48 All 44
                                                                    (19 19 11 601 (60
9 19 11 91 (35)
1301 3 111 4 3 (461
                                                                          13 2 3 191 (34) 44 All 50 Court
                                                                             an go nto tue men Is of the prior
                                                                            su tand se vlether minor vas pro
                                                                    | 1erly represented
| (1916) 1916 \lambda 13 3 4 (3 ) 38 \lambda 11 45
            to m nor to alleat from the lecree or apply for a review For the rea
                                                                    (1909) 30 111 10 (109)
                                                                    (1894) 1894 All W N 141 (14 )
(1900) 94 Bern 54 (559)
            sons g ven in the commentary tl s
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(1886) 10 Lom 91 (21)

(19 ) 192 Cal 86a (866 86 ) (190 ) 34 Cal 83 ( 9)

NEW 19 also rot correct

(15 | 1933 All 116 (116) | 55 All 136 (1993) 1993 All 91° (214)

- described as, a defendant, some other person being named as guardian Thus I suit against CD, a minor, should describe him as "CD, a minor, of whom E I is guardian ad litem i
  - On being satisfied of the fact of his minority See the undermentioned case 1

4 When defendant pleads minority

When a defendant who is sued as a major pleads that he is a minor the proper procedure is to ruse a preluminary Issue on the question of his minority and give a finding thereon. In the proceedings for the determination of such issue, however, the alleged minor should be represented by a guardian ad litem proported by the Court If it is found that the defendant is in fact a minor, then a pardom should be appointed for the sun. If not the guardian appointed for the empury should cease to act 1 On the analogy of this principle it has been held that where a minor applies to be brought on record as the les il representative of a decensed parts, the Court ought to appoint a guardian for the purpose of the enquiry as to his being the legal representative a

#### 5 Non representation

(188 | 131 ( ) (1 (1) 1 01 1 1 1 R N 18 pig 11

Note 2 A

A minor cannot be considered to be a party to a suit unless he as represented therein by a duly qualified guardian. A decree passed against a minor not so represented must be recarded as a decree passed against a person not a party to the sur and is therefore nathout jurisdiction null and sould be order to set aside such a decree it is not necessary to show that the

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1 (18 1) Obuth W I 45 (18)
        [Se ilse (1 197) 1331 1 it 101 (110)
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        date of amou lment 1 arred by I mi
        tition sint not to be distributed
                 Note 3
1 (1970) 1970 Oudh 164 (166) 97 Oudh Cas
        311
                 Note 4
1 (1993) 16 7/2 1 114 (916)
  (10 c) 10 CI at 450 (4 0)
  (1 121) 1021 Mad 81° (-14)
                 Note 5
1 170.) "Cal 2% ("1" "I ) " Ird im
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(1 + 4) 1929 ( 1914 (449) 35 Cal 1911
 (1) 1) 1 199 Cil ( (599)
 (19 3) 19-3 (3) (3) (693)
 (1923) 1928 Cit 338 (9-9)
 (1915) 1915 Cal *29 ( 30)
(199 ) 21 Cal * (27)
(1887) 11 Cal *54 (*57)
 (15°4) 12 Fen J R Api (') (1)
(15°4) 11 Sutl W R 00 ( 0t)
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(19_0) 19 0 Mad 713 (711)
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miror has suffered any prepulse by non-representation 2 It is not, however, rece are to set aside such a decree. The minor may ignore or disregard the decree ' Not being a party to the suit the minor will not be barred by the pri cube of res unheata from raising the same questions in a subsequent sur . s were decided in the prior suit 3 On the same principle their Lordships of the Priva Council have held in Rashid-un missa v. Muhammad Ismail. ILL 31 All 572 that a minor not represented in the suit cannot, in executive object to the execution of the decree 34 Their Lordships observed as till vs. Section 244, now 5, 47; of the Civil Procedure Code applies to questions arising between parties to the suit in which the decree vas jas ed that is o six between parales who were properly made parties in accordance with the provisions of the Code. It will also follow from this that a 1 10° no properly represented in the suit and against whom an ex parte e ce has been passed cannot apply under O 9, R 13 to set aside the ex parte le rec in a much as under that rule only a defendant, that is, a person plojeth made a detendant can apply. This is the view of the High Midras and the Indical Commissioner's Court of Nagpur's The of Allahatads and the Chief Court of Oudhat have, however, held and apply it in is maintainable. In view of the Privy Council decision ubmitted that the latter view is not correct

Where an incompetent or disqualified guardian is appointed for a farty, the position is the same as if no guardian is appointed at all a Noto then a guardian ad litem can be regarded as a disqualified person and wife not, see Notes 4 to 8 to R. 4, infra

Where a minor is represented in the suit by a duly qualified guardian, he le once lefally a party to the suit and the Court acquires jurisdiction to 11 has case? The decree passed against him in such a case is binding on lix 15 much as on an adult and the judgment will operate as res judicata.

1.1 I him an subsequent proceedings 19 The law, however, recognises a

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Decree can to set aside in an appeal
        ts another [ erts ]
(15 4 19.1 Mt 53) (593) 46 AH 744
1 1 191 Mt 1 246 (352) 57 Mad 973
                                                          infra!
  1 44 1 414 1 am 11° (t1°) 39 Pom 29
1 0 1 21 All "21 - 1 30 Ind App 168(PC)
        See al o (1 117) 1917 (at 811 (517)
          1 627
  1 1 - 1 1 ( to 26 (2") (Call)
         W 1 H C JS (98)
  1514
 (1 1, 1) 1 / 1 Jul 115 (116) 5 Fah 51
        lut off ( a) 1928 Mad 10.7 (10°9) }
 (, P ) 1329 Mrd _15(21 ) 52 Mad 275 (I B)
       Per Devaloss J (obiter)
4 ( )21) 1921 Mal 45J (457)
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See also (1919) 1919 Cal 436 (43a)

 8 (1971) [39\*1 34-d GT (1977) [50\*2 4 nul 5 to Rule 4 nul 5 to

7 (1927) 1927 Oudh 173 (174)

(1907) 34 Cal 83 (89)

Scn

- 2296
  - substantive right in him to avoid the decree so passed if he can establish that the guardian has been grossly negligent in the conduct of the suit and if he suffered prejudice by reason of such negligence ii The minor can exercise this right in various ways -
    - (1) If the decree is an ex parte one, he may apply under O 9, R 13 to set aside the ex parte decree. The negligence of the guardian may constitute a sufficient cause for setting aside the decree within the meaning of that rule is
    - (2) He may prefer an appeal from the decree 1211
    - (3) He may apply for a review of the judgment 124
    - (4) He may file a suit to set aside the decree 13
    - (5) He may even, in defence, show that the decree is not binding on him on the ground of gross negligence of the guardian and consequent prejudice 14

Where a decree is set aside on the ground of non-representation or on the ground of gross negligence of the guardian in the conduct of the suit. the minor is remitted to his original rights as it stood before the decree, and the Court, can, under its inherent powers, revive the first suit and proceed with it from the stage at which it was declared that the proceedings were illegal as against the minor is

#### 6 Absence of formal order of appointment of guardian-Substan tial representation

Where a minor defendant is effectively represented by a guardian with the sauction of the Court the mere fact that a formal order of appointment was not passed will not render the decree a nullity as in the case of nonrepresentation. The absence of the order of appointment is only an irregularity which in the absence of any prejudice to the minor resulting therefrom, will not be a ground for setting aside the decree 1 On the same principle it has

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(1896) 12 Cil 69 (75 76)
                                                         (1919) 1919 Lah 13 (185) 1919 P R No 24
  (1871) 16 Suth W R 231 (2.2)
                                                                If the minor became a major on date
  (1672) 17 Suth W R 371 (374)
                                                                of judgment and treated as such he
  (1687) 1887 Pun Re No 72 pige 151
(1919) 16 Ind Cas 182 (183) 37 Mad 535
                                                                cannot attack the decree
                                                         (1921) 1924 Mad (09 (608 609) 17 Mad 476
  (1918) 1918 Oudh 95 (97)
                                                         (1976) 1976 Mad 90 ( 105)
   (1910) 7 Ind Cas 599 (589) 13 Oudh Cas
                                                         (1922) 1922 Mid 213 (279) 45 Mad 473
          158
                                                         (1895) 22 Cal 6 (13)
                                                         (1917) 1 317 Lah 83 (81)
                                                         (1919) 13 Ind C15 20 (21) (L1h)
                                                         (1918) 1918 Lah 22 (924) 1917 I R No 103
                                                         (1907) 10 Oudh Cts 321 (330)
                                            (2:8)
                                                      14 (1923) 1923 Wad 719 (718)
          S Lat: 88 1
                                                      (1915) 1915 Mtd 384 (385)
15 (1928) 1928 Wrd W N 27p (279) Dissenting from 1974 Mtd 489
17 (1995) 1925 Pvt 512 (514)
   (1930) 1933 All 116 (117) au 111 136 In
          such a case the manor can apply
                                                         (1924) 1974 All 27, (225) 45 All 605
(1917) 1917 All 477 (417) 33 All 8
          through another guardian
   (1885) 12 Cal (9 (75 76)
   (1880) f Cul L R G) (70)
                                                         (1930) 1930 All 641 (646) 52 411 924
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1211 (1933) 1919 \11 116 (116) 55 \11 176 12a (1876) 25 Suth W R 44J (450) 2 Cal 253

(1938) 1939 All 110 (116) 55 All 186 (1916) 1916 All 324 (823) 38 All 452

(1912) 16 In 1 Cas si3 (545) (Cul)

13 (1918) 1918 Nag 187 (189) (1933) 1933 All 116 (116) 55 MI 136 (1915) 1915 Yead 891 (385) (1907) 6 Cal L Jour 148 (151 452)

(1 12a) 1925 Cal 512 (513)

(19%) 1J76 Lah 441 (44a)

(19%) 19% Ondb 32 (33) Note 6

(LC)

1 (1903) 30 Cal 10 1 (1031) 30 Ind App 162

teen held that the want of a correlicate required by S 3 of the Bengal Mu ors A t 1858 now ten sted by Guardens and Wards Act VIII of 1890/2 o a my description of the man way to the adequate are only irregulationes which c or crossaph fatal a the ser-

#### 7 Illegal procedure in appointing guardian

A defect or me, it my in procedure in the appointment of a guardian clifter is it o only an irregularity and will no be a ground for setting aside the decree wales in had the effect of causing prejudice to the minor 1 In Walten & Barly Helan 1 1 R 30 Cal 1021 their Lordships of the Judicial ( ) in the after unpressing upon the Courts in India the importance f fe'll ving strictly the rules had down by the Code proceeded to observe at page 1031 But it is one another thing to say that a defect in following the enter is necessarily lated to the proceedings. Applying this principle it has been hel? but a failure to usue notice as required by Sub Rule (4)2 or the absence of the owns on the file an affidavit as required by Sub Rule (3 i are nere arregular ies which by themselves cannot render the decree youl and cannot be a gr and for setting, aside the decree unless prejudice is proved to have resulted to the minor. The question whether the minor was prejudiced in any paringlar case depends upon the facts and excumstances of that case and does not necessarily follow from the arregularity in the appointment of a \_uardian ad litem +

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(1 )10) 1013 Ial 9c (90)
                                                                            2 (1657) 9 \11 05 (40)
(1914) 1914 All 1 (25.)
                                                                                (1859) 1857 I un Re No 16s 12ge 577
(131 ) 1 In 1 C 34 903 (401) (310) (140) 2 1 213 25 (2.00) (154) 0 Bom 2 1 (3.)
                                                                                (169)) 11 (a) '00) (a18)
                                                                            (1870) 11 C41 17 (918)

(1870) 17 C41 17 (91) 17 In1 411 195 (PC)

3 (131) 1915 Ma1 25 (90)

(1881) 16 C41 (91) 15 1n1 4 pp 195 (LC)

(1887) 14 C41 91 (92 90) 913)

(150) 12 C41 15 (19)
(19 0) 1 + 0 Cal 4 + (tre)
(19,") 137" (11 20" ( 04)
(13 0) 11-0 (-1 73 ("-1) D erre set and
                                                                               (185) 11 Cri 109 (10)
(185) 11 Cri 109 (514)
(185) 13 Cri It Rej 17 (13)
(1830) 13 Met 480 (153)
           Lecause minors prejadice 1
 (1015) 131' Cil 10 ((1)
(131) 11 Int C 14 845 (-1 ) (Cal)
(1847) 14 Cd Ol (212 217)
(1305) 8 Cd I Jour 31 (32 23)
(1574) 22 Sutl W 12 (25)
                                                                                (1591) 17 16 1 816 (33" 3 1
                                                                                (1896) 23 C 1 696 ((9))
(1893) 20 C 1 11 (11)
 (1.J. 11.)" Interi (8 1)
 (1 07) 1315 I ali 166 (167) 1915 I 1 No CL
                                                                                                          Note 7
 (157) 16)7 I un le No (7 1 mg 209
 (15 3) 19 31-1 30 (31)
 (1320) 1476 N or 07 (203)
(194) 134 0 115 178 (178)
 (132") 1323 Oudh 20 (207) or Oudl C
           113
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1 (1970) 1970 Outh 101 (16 ) 3 Oudh Cas
  (1 131) 1931 Ordh 1 1 (1"3) Order for ap
       logitment of gu rd n should be
       male talore minor is asked to file
        written statement and not at a late
       stire when the case comes up for
       evidenc
  (1316) 1916 431 851 (355)
  (19 %) 13 % Lah 435 (135)
2 See cases cited in Note 11 rifra
  [Sec also (1933) 193º Mad 179 (1-0)]
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3 (1973) 1973 VI id 465 (467) 4 (1916) 1916 (11 853 (355) (1971) 1971 (11 893 (595) 43 (11 104

#### 8 Decree against major treating him as minor and vice versa

A major defendant who is described and impleaded as a minori or a minor who is treated as a major and impleaded as such cannot be treated as a party to the suit and is not bound by the decree passed in the suit. But if the major defendant is aware of the defect or takes part in the proceedings withour object on he will be extended from questioning the validity of the decree later on 3

# 9 Such application shall be supported by affidavit—Sub clause (3)

An application for the appointment of a guardian should be supported by an affidavit stating the fact of minority of the defendant and that the proposed guardian is a fit person to be appointed as guardian. The Court must be satisfied that the person it appoints will safeguard the interests of the minut and that he has no interest of his own which will come into conflict with that of the minor 1 But as already pointed out in Note 7 the absence of such an affidavit is only an irregularity and cannot render the decree invalid 2

See sub-R (3) of R 3 substituted by the Madras High Court as to the contents of the affidavit in support of a petition under this rule

#### 10 Service of Summons

There is no specific mode provided for the service of summons on a minor defendant. It should therefore be served in the minner prescribed for service of summons under O 5 ante 1 Where however a guardian has been appointed in the suit for the minor notice of an appeal from a decree in that suit need only be served on the guardian 2

#### 11 Notice to the minor and his guardian

No order should be made under this rule appointing a guardian for a minor defendant imless and until the necessary notices are given to the persons referred to in the rule 1 The object of giving a nouce to the minor is twofold he may not be a minor at all in which case he may come to Court and defend

#### Note 8

- 1 (1919) 1919 Pat 10 (19)
- (1916) 1916 O idh 907 (981)
- 2 (1976) 1976 All 357 (387) 48 All 362 (1913) 18 Ind Cas San (560) (Cal)
- - (1916) 1916 Yad 38 (36) 38 Yild 10°C (1917) 1917 Yad 318 (390) 89 Yild 1031 (1925) 1995 Pat 36° (368) (1979) 1929 All 148 (151) Yinor sued along
- with other pirtners of a firm as major - Decree not bid
- 3 (1900) 28 411 416 (417) (1924) 1904 All 91 (9a) 15 All 603
- (19°1) 1921 Cal 581 (599)
- (189 ) º1 Mad 16 (169) (See al o (1891) 9 Cal L Rep 213

#### (215)]

- 1 (1903) 21 411 193 (193) (1 0 ) 10 0 all Crs 341 (331)

- Note 10
- 1 (1898) % Cal 267 (278) (1900) 27 Cul 850 (851)
- (1909) 35 Gal 182 (184)
- (1897) 2 Gal W N 100 (103 105) 2 (19 %) 19 % Cal 1106 (1107)
- Note 11
- 1 (1927) 1927 Bom 613 (615) (1934) 1934 All 219 (214)
- (1917) 1917 Mad 655 (655)
- (1930) 1930 \11 609 (610) Substituted ser vice improper
- (1971) 1921 Nag 120 (196 127)
- (1915) 26 Ind Cas 712 (712) (1918) 1918 Pat 211 (213)
  - [See (1934) 1931 Inh 132 (133) \ \o near relation of minor on father's side - Mother refusing service -
  - Plaintiff is not bound to mike a searching inquiry as to whether
    - in sub Rute 3 1



# part of the guardian which has resulted in prejudice to the minor's 13 Effect of fraud or gross negligence of guardian

It has been observed in Note 5 ante that when a minor is represented a suit by a didy qualified guardian lie, becomes legally a party to the suit and that the decree passed against him is binding on him as much as on an adult and that the judgment will operate against him as ics indicate in subsequent proceedings. But where the guardian has been guilty or trand or collusion the minor like any other party to a suit can under the provisions of S 44 of the Indian Pridence Act avoid the bar of res judicata against 1 im by proving such fraud or collusion. It has been held by the High Court of Madras that on the analogy of the same section the minor can avoid the bar of res julicata by showing that the guardan was guilty of gross negligence in the conduct of the sut 1 In the undermentioned case the High Court of Allahabad has also held that the judgment obtained against a minor in a suit in which the grardian has been guilty of gross neglinence is not res judicata against him it has hovever reached this conclusion on the view that the principle of S 44 of the Friderice Act cannot be applied to such a case but that the minor ceases for all practical purposes to be a party to the suit when the guardian is guilty of gross negligence and that tl erefore the previous decision was not one between the parties to the subsequent suit and that therefore there could be no res in legie. It is submitted that the reason me is not correct. Where once a guard an ad litem is dul appointed for a minor party he becomes as has been seen already levall a party to the suit aid the Court acquires jurisdict on to hear his case. He cannot cease to be a party or continue to be a party from time to time according as the guardian is acting regligently or otherwise

#### 14 Probate proceedings

Although as a rule of practice it may be extedient to have a guardital appointed where a will of which probate as sought affects the interests of a

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                                                       (190 ) 130 VI rd 909 ( 09)
       about on at offer g tlough
                                                    6 it 19) 1319 Lat 415 (414)
              sp est-Hellgosieel
      v t
                                                       (19 4) 13 1 N 1 (0 (609) 4 N d 47
(13 4) 19 4 Na 1 615 (640)
       60 €
(1 2 ) 1 11 (15)
                                                       (19 9) 19 8 VI d 115 (31 9 0) F ! e to
                                                    ~ (19 0) 19 0 (31 1 8 (153)
4 (19 c) 1 c 111 8 (41) 4 (11 44
(133 ) 133 411 9 (50 ) (F 21)
                                           ı
                                                                         Note 13
                                            Ca
                                                    1 (13 3) 19 3 Wed 18 ( 15)
                                                       (133 ) 193 11 93 (302 0 311) (I T)
```

et S 141 of the Code and consequently O 32 will not apply to occe lings in probate which live not reached a contentious stage ?

R. 4. [S. 440 413 445 156 457] (1) Any person" who as of Who may a se sound mind and has attained majority may act as next friend rican next friend of a minor or as his quardian for pointed ar infr

Provided that the interest of such person is not adverse5 to that of the minor and that he is not in the case of a next friend, a detendent or, in the cas of a quardian for the suit, a plaintiff

- Q. Where a minor has a guardian appointed or declared by omportent authority, one person other than such guardian shall act is the next terend of the minor or be appointed his gnardian for the suit unless the Court considers for reasons to be recorded that it is for the minor's welfare that another person be permitted12 to it is by uppointed as the ease may be
- No person shall nethout his consent be appointed quardian
- 4) Where there is no other person fit and willing to act as gundian for the suit the Court may appoint any of its officers to such guardian" and may direct that the costs to be incurred by such officer in the per for mance of his duties as such guardian shall be borne ofther by the parties or by any one or more of the parties to the sent, or out of any fund in Court in which the minor is interested, and may que directions for the repayment or allowance of such costs as rustue and the crecumstances of the case man require.

11877--> 440 443, 445, 456; ef RSC O 65 R 13]

#### Local Amendments

#### ALLAHABAD ti file i g for F 4 -

I

- 4 1 Wi c . numer laca guardin appointed or lectured by competent author rit a reas in their than such guardian shall act as next friend except by lease of the Court
  - hill to the ir secon of sub R (1) any lereo a who is of a ind mind and attained it its may bet as next friend of a minor unless the laterest of
- there is to be recorded con there I mu unft to act at in al shall except as otherwio provided by Cl (a) of the rule t tled to fo sen abarse I from the e tate of the m nor any expenses incurred
- t linkli complor tlein or 4) The ( rt may mate la cretion for reaso to be recorded award costs of the suit or comp n itio : unler \$ 35 tor S 95 against the next friend personally
- is if he were a plaintiff ( ) C sty or compensation as and all under Cl (1) shall not be recoverable by the g arl in from the estato of the mar or unless the decroe expressly directs
- that they shall be so recoverable

#### CALCUTTA

Substitute the words Except as otherwise provided in this order," for the words Where there is no other person fit and willing to act as guardian for the suit

#### LAHORE

MADRAS

New sub R (2 1) was inserted -

(2 a) Where a minor defendant has no gnardian appointed or declared by competent inthority the Court may, subject to the proviso to sub R 1 appoint as his guardian for the suit a relative of the minor

If no proper person be available, who is a relative of the miner the Court shall appoint one of the other defendants if any, and failing ench other defendant shall ordinarily proceed under sub R (4) of this rule to appoint one of its officers

and the following words were added to anh R (3) -

but the Court may presume such consent to have been given, unless it is expressly refused

See Local Amendments to R 3 supra

#### NAGPUR

rocc

For R 4 substitute the following -

Who may act as next 4 (1) any person who is of sound mind and friend or guardian for his attained majority may not as next friend of a

minor or as his guardian for the suit Provided that the interest of such person is not adverse to that of the miror and that he is not in the case of a next friend, a defendant, or, in the case of a

guardian for the snit, a plaintiff, (2) Wh no or .

# OUDH

net in either expanity " Substitute the following for R 4 -

(1) Where a minor has a guardian appointed or declared by computent authority no person other than such guardian shall not as next friend except by leave of the Court

(2) Subject to the provisions of sub R (1) any person who is of sound mind and has attimed majority may act as next friend of a minor, unless the interest of such person is adverse to that of the minor, or he is a defendant, or the Court for other reasons to be recorded considers him upfit to act

(3) Every next friend shall, except as otherwise provided by sub R (5) of this rule, be entitled to be re imbursed from the estate of the minor any expenses incurred by him while acting for the minor

(4) The Court may, in its discretion, for reasons to be recorded, award costs of the snit, or compensation under S 35 1 or S 90 against the next friend per onally to if he were a pluintiff

(5) Costs or compensation awarded under sub R (4) shall not be recoverable by the guardian from the estate of the minor, unless the decree expressly directs

PATNA

In sub R (4) for the words "where there is no other person fit and willing to act as guardian for the smit , in the first sentence of the sub rule substitute the following "Where the person whom the Court, after hearing objections, if any, under sub-

R (4) of R 3, proposes to appoint as guardran for the suit, fails within the time fixed in a notice to him to express his consent to be so appointed '

RANGOON For R 4, the following shall be substituted, numely -

that they shall be so recoverable "

4 (1) any person who is of sound mind and has attained in apority may act as next friend of a minor or as his gnardian for the suit, provided that the . . . the minor and that he is not, the ease of a guardian for the

> ared by competent authority. the next friend of the minor,

or be appointed his guardian for the suit unless the Court considers for

the inoi his

the g to hehalf of the . . . . officers to be ach officer in ther by tho the minor is

interested and may give directions for rejayment or allowance of such costs as justice and the eigenmistances of the case may require in advocate or pleader of the Court shall be an officer of the Court for this purpose

	Syno	psis	
Note No		Note No	
1 Legislative changes	t	Act	7
II Scope of the Rule	2	VI Appointment of person as guar dian without his consent	В
dian of a minor (a) Varried woman	3	VII Officer of Court as guardian ad litem-Sub R (4)	9
(b) Persons with adverse in		Viti Washer of the minor of should be considered	10
terest IV Guardian appointed by competent	5	IX Probate proceedings—See Note 14 to R 3 supra	11
V Another person he permitted to	6	X Leave to sue or defend on behalf of a minor	12

#### Other Topics

thsence of affidavit-Effect of See R 3 Note 7, Pt (3) and Note J It (9)

#### 1 Legislative changes

Ţ

Sub R (1) corresponds to Se 445 and 457 of the old Code and sub R (9) to Ss 440 and 413 second parigraph Sub R (3) is new Sub R (4) corresponds to the second paragraph of S 456 of the old Code The provision as to the direction with regard to the costs to be incurred by the Court guardian is new

#### 2 Scope of the Rule

This Rule deals with the question as to who can act as next friend or be appointed as guardian of a minor for the suit. The general rule is that any person who 15 of sound mind and has attained majority may so act or be so appointed, provided his interests are not adverse to that of the minor (sub-Rule 1) 1 Where there is a certified guardian for the minor, it is he that should be allowed to act as next friend or be appointed as guardian and not any other person unless it is for the welfare of the minor that another person should be appointed (sub-R 2) Where there is no other person fit and willing to act as guardian, the Court may appoint its own officer to act as guardian (sub R 3)

The powers of the Court under this Rule and R 11 of this Order are evercisable by the Registrar under S 105 of Sch I of the Rangoon Small Cause Courts Act (VII of 1920)

# Order 32 Rule 4-Note 2

1 (1930) 1930 I th S02 ("02) In a suit to set aside alienation by mother

Court is justified in allowing minor to be represented by one of other plaintiffs though fither does not wish to sne

#### 3 Who may be next friend or guardian of a minor

Any person can be the next friend or the guardian of a minor, providedi--

- (1) he is not of unsound mand (2) he is himself not a mmor,14
- (3) his interests are not adverse to that of the minor the and.
- (4) he is not the opposite party, i e, a defendant in the case of a next friend or a plaintiff in the case of a guardian

Provided these conditions are satisfied the mere fact that he happens to be an undischarged insolvent will not invalidate his appointment is a ouardian 2

#### 4 Married woman

Under S 457 of the Code of 1882 a married woman was disqualified from being appointed as guardian ad litem in a suit. Consequently it was held that a decree obtained against a minor with a married woman as his guardian was a nullity a But it was held that the prohibition did not apply to the case of a next friend and that a married woman could validly represent a minor plaintiff 2 Under the present rule the disqualification has been removed altogether so that a married woman can now represent the minor plaintiff as well as a defendant

# 5 Persons with adverse interest

The proviso to sub-R (1) prohibits the appointment of a guardian ad litem whose interests are adverse to that of the minor Such a person is disqualified to be the guardian of the nunor 1 \ mnor represented by such a person is not legally represented at all and a decree obtained against him will be a nullity 2 In the undermentioned cases,3 however it was held by the

11£

#### Note 3

left open [See (1920) 1920 Lah 417 (417) 1 Lah

Mother appointed guardian (1932) 1922 Mad 273 (274) 45 Mad 42. Minor entitled to a next friend who will be diligent in his interests (1926) 1926 Ondh 406 (407) (Do)

(1890) 13 Mad 197 (199) Collector em be . 3

Note 4 1 (1909) 3 Ind Cas SGI (906) 31 AH 572 36

Ind App 168 (P C) (1907) 29 M 728 (723) (1007) 29 Uli 728 (72J) (1001) 23 Uli 199 (100) (1001) 23 Uli 199 (100) (1801) 18 Uli W N 200 (70) (1801) 18 Uli 195 (100) (1804) 1804 (100) (1804) 1805 (100) (1804) 1806 (

[But see [1906] 29 Mad 59 (61)] (1914) 1914 Oulh 310 (311) 17 Oudh Ci-318 A widow held to be not a mir ried woman

2 (1990) 17 Cal 458 (487) (1885) 11 Cal 733 (734) Overrule 1 in 17 Cal

Note 5 1 (1905) °1 \11 372 (552) 35 Ind \pp 168

(PC) 2 (1908) 31 All 572 (58") 36 Ind App 16. (PC)

High Court of Madras that the mere fact that the interest of the guardian was adverse to that of the minor is not sufficient to invalidate the decree passed against the minor, but that the minor should be shown to have suttered prejudice by such appointment. The decisions do not advert to the decision of their Lordships of the Privy Council in Rashid Unnissa v. Muhammad Ismail, II.R 31 All 572, in which it is laid down that a person having an interest adverse to that of the minor is a disqualified person and that the minor cannot be deemed to have been legally represented by lum. The said decisions cannot, therefore be considered to be correct

The question whether the interests of the guardian are adverse to that of the minor depends on the facts and circumstances of each case 31 There is a conflict of opinion as to whether a person who has executed a document or entered into a transaction on behalf of the minor is a person whose interests are adverse to that of the minor in a suit on that document or transaction. According to the High Courts of Allahabads and Patnas his interests are adverse and he cannot therefore be appointed as guardian of the minor According to the High Court of Madras,6 and the Chief Court of Oudhoa his interests are no necessarily adverse to that of the minor in all cases but whether they are so in any particular case depends upon the tacts of that case

6 Guardian appointed by competent authority

Where a minor has a guardian appointed or declared by a competent authority, the Court is bound to appoint that guardian as guardian ad lifem of the minor unless for reasons to be recorded it considers that in the interest and welfare of the minor some one else should be appointed a According to

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(Sca 1) v (1021) 1921 Wad 333 (391)
         Sec d o (1920) 1929 Mul 645 (615)
         43 Mid 412
on (1922) 1322 Nrs. 239 (211) Minor benami
         dar for next friend-Held interest
         not adverse
   (1915) 1915 Vad 483 (481) Indebtedness of
         next friend to minor-Court can dis
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miss the suit (1890) 6 Cal L R 413 (415) Uncle of a Ma homedan infint can represent (1907) 16 Mid L Jour 357 (357) Held to

1005085 an adverse interest (1-13) 1993 MI W N 101 (105)

Sce also (1935) 1935 Lah 44 (16) Step ! rother of minor appointed guardan -That is not by itself suffi cient to hold that his interests are adverse to those of the mmor]

4 (1922) 1922 411 91 (93) 41 41 525

500 (700) Mortgare lond by grand father - Mortgage suit - Minor s lither appointed guardian ad litem -Hell minor properly represent

6 (1929) 1923 Mad 219 (222) 52 Mad 275 (1933) 1933 Mad 503 (812) Assignment by mother of mortgage in favour of C P C 289 & 290

both minor daughter and herself-Suit on such mortgigo-Merely In fact of such assignment interest of mother is not adverse to that of minor daughter so as to disquillfy her from being appointed as guar-

(See also (1926) 1926 Mad 1110 (1147) Son born subsequent to mortgage-Appointment of fither as guarding-Interest not adverse) (1924) 1924 Mad 297 (234) 47 Mad 79 Suit

on a mortgice by fither-Fither appointed guardian of plinor son-Hold interest adverce

61 (1935) 1935 Oudh 193 (199) Note 6

1 (1915) 1915 Cil 40 (41)

(a33) 1935 Cal 100 (lba) Certificated guar dien appointed guirdian al litem-Merels because he couses to be certifirsted guarcian he does not 1117 facto cease to be guardian in the suit (1895) 20 311 162 (164)

(1- n) 1-91 AH W N 42 (1")

(1993) 9 Cal 176 (179) (1591) 8 Cal 656 (t 62) 9 Ind App 27 (P C). (1979) 5 C il 219 (220, 221)

the High Courts of Allahabad,2 Calcutta,3 and Patna,4 the violation of this provision is only an arregularity and does not, by itself, vinate the decree Thus where the mother of certain minor defendants was appointed their guardian ad litem in ignorance of the fact that there was a certificated guardian, it was held that the decree could not be set aside in the absence of any proof of prejudice to the minors 5 The High Court of Madras has, on the other hand held that in such a case the appointment is illegal and the decree obtained against the minor, l'out

The words 'appointed by competent authority' do not include the case of a Hindu father purporting to appoint a testamentary guardian to his son even assuming that he has the power to appoint a guardian under the general Hindu Law 7

## 7. 'Another person be permitted to act"

A Court can in the interests of the minor permit a person other than the certificated guardian to act or appoint him as a guardian ad litem of the minor notwithstanding the existence of a certificated guardian. Thus where the appointment or the identity of the certificated guardian is not known1 the Court may appoint another person as guardian ad litem of the minor.

# 8 Appointment of person as guardian without his consent

Sub-Rule (3) controls both Sub-R (1) and Sub-R (2)1 and provides that no person, shall, without lus consent, be appointed guardian for the suit. The consent may, however, be express or implied 12 The object of the rule is to safeguard the interests of the minor by ensuring that the guardian has taken (1935) 19 Bom 432 (633)

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(1880) 5 C vl 450 (453)
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(1895) 19 Bom 300 (317) (F L)
  (1895) t9 Bom 96 (93)
  (1893) t7 Bom 500 (562)
  (1933) 17 Bom 266 (569)
  (1892) 16 Bom 684 (6:6)
  (1903) 30 Cul 613 (616)
  (1892) 19 Cal 301 (311)
  (1890) 17 Cul 944 (949) Case under Act IX
        of 1875
2 (1907) 29 All 290 (291)
  (1895) 20 All t62 (165) The plant should
        be returned for amendment
3 (1908) 7 Cal L Jour 270 (273)
4 (1919) 1918 Pat 520 (522)
5 (1907) 29 411 290 (291)
       [See however (1866) 1 Agra H C R
       175 (177) A decree against a minor
       represented by his uncle without
       any legal authority - May be set
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aside by lawful guardian though no

fraud or collusion] 6 (1920) 1920 Mad 745 (746) 48 Mad 803 (1928) 1929 Mad 1057 (1059)

7 (1907) 31 Bom 413 (417) (But see (1900) 8 Bom L R 522 (524) Note 7

1 (1916) 1916 Oudn 209 (211)

Note 8 ann fon t

(FB)

1 104.

I.

upon himself the onerous duty of detending the interests of the minor 2 Where a person is appointed guarding of a minor without his consent express of implied there is a conflict of opinion as to whether the decree passed must be deened to be one passed against the minor who has not been represented in the sunt and to be therefore a mullity. The High Courts of Allahabad and Calcutta have held that the decree passed under such circumstances as a nullity The High Courts of Madras and Patra have expressed conflicting or muons on this point, holding in some cases that it is a nullity,4 and m others that it is only an irregularity which, in the absence of proof of prejudice to the minor will not vinate the decree of it is submitted that the last view as correct As has been seen in Note 5 to R. 3, ante, where, on the face of the record the minor is represented by a person and such person is not disqualified to be a guardian the Court has jurisdiction to deal with the suit against the minor and the non-comphance with the various requirements in the process of appointing the guardian cannot render the judgment a nullity. but would only amount to pregularities which may be grounds for setting aside the decrees in proper proceedings on proof of prejudice to the minor 6

It has been held by the High Court of Calcutta that the consent of a guardian cannot be presumed merely from the fact that a notice under O 21. R 22 has been issued to him 7 The Chief Court of Oudh has also held that a person who is named as guardian but who does not appear in the suit cannot be said to have consented to be appointed as guardian 8 Where. however, the guardian has had an opportunity to object to his appointment and does not do so, the consent, according to the Allahabad High Court, can be presumed a See also the amendments to this rule made by the various High Courts

#### 9 Officer of Court as guardian ad litem-Sub R 4

(1924) 1924 Lah 97 (98)

(1927) 1927 Oudh 173 (174)

(1923) 1923 Pat 231 (235) 2 Pat 230

Where the proposed guardian does not appears or declines the guardianship,2 the proper procedure is to apply to the Court for the appointment of an officer of the Court as guardian. The Court should however appoint an officer

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| Irregularity | 1925 | 1925 | 1925 | 13d 30 (32) | 47 Vid 783 | Order of reference to Full Bench -- Per Phillips J Irregulantly -- Per Ven Latsaubb Rao J Nullity | (1923) 1923 Pat 242 (250) | 2 Pat 335
2 (1915) 1918 Pat 211 (214)
                                                                          (1917) 1917 Pat 6.7 (657) 2 Pat L Jour 390
   (1851) 5 Lon 305 (203)
3 (1916) 1916 All 22 (23) 35 All 315
   (1927) 1927 Cil 485 (491) 54 Cil 450
   (1921) 1971 (41 600 (601)
   (1923) 1923 Cul 692 (693)
   (1924) 1924 C 11 1012 (1049)
(1915) 1915 C 11 203 (705)
                                                                                   rountment
   (1912) 18 Ind Las 90 (91) (Cal)
            [See al o (t921) 1971 Cal 534 (535)
            Want of con ent even on technical
                                                                                                 hates
                                                                       1 (1912) 17 In l L 15 263 (264) (Cal)
(1912) 14 Ind C15 345 (S17) (Cal)
            grounds sufficient to mixledite ap
            pointment as guardiin]
                                                                         (1891) 5 1 om 310 (312)
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1

(1890) 7 Cal L Rep 407 (410) 2 (1 121) 1931 Cal 534 (535) (1925) 1925 Notes 15 (c) 110 Ind Cas 346 (Lah)

o (1904) 14 Mad L Jour 342 (343)

irregulanty

(1909) 4 Ind Cas 1108 (1108) (Vind) Material

4, of the Court as guardian only when there is no other person fit and willing to act as guardian 3 But the fact that a Court guardian was appointed without any enquiry as to whether there was any other person fit and willing to act as guardian 4 or the fact that the appointment of Court guardian was obtained by the fraud of the opposite party instead of another who could have conwill the case better on behalf of the minor is only an irregulanty which will not render the decree null and void though it may be a ground for setting the decree uside if the minor is shown to have been prejudiced by such irregulants.

Where a Court guardian is approinted the Court may provide for the payment of the costs to be incurred by lum in conducting the proceedings on behalf of the minor where the Court guardian is not put in possession of any funds for defending the suit with the result that defences open to the minor are not ruised the decree can be avoided by the minor in appropriate proceedings 7

# 10 Wishes of the minor if should be considered

The wishes of the minor should, if possible be considered and given due weight in the matter of the appointment of a person as his next friend or guardian ad litem 2. This is the reason why notice is to be given to the minor See Note 11 to R. 3.

# 11 Probate proceedings -See Note 14 to R 3 supra

12 Leave to sue or defend on behalf of a minor

Under the present rule leave to sue or defend is necessary only in cases where there is already a guardian for the minor appointed or declared by a competent authority and some other person wishes to represent the minor as the next friend or guardian ad litem. But the absence of a formal order granting leave to sue is not necessarily fatal to the suit 1

For cases under the Bengal Minors Act (\L of 1858) and the Bombay Minors Act (\L\ of 1864) (both of them now repealed by Act VIII of 1890) the provisions whereof required the granting of a permission or a certificate to sue on behalf of the minor, see the following cases 2

2 J. J." 1917 Mad do 5 (625) (1918) 1918 Cal Sta (Sta) (1918) 1918 Cal Sta (Sta) (1920) 1930 Oudh 110 (112) 5 Lick 453 Port officers lave neither the time nor the opportunity to do justice to the cuse of the minors and they are good nines under own good nines under the country of the country of the ments of the country of the country (See (1934) 1931 Cal 4"4 (4"5) 61 (1933) 1933 Nag 3'9 (3'90) Appellate Court

61 CAL OOT Guardian ad literal respiring position only on undertaking that prois on will be made for his costs—Court has pur literan to pass are orders it thinks fit—Minors remedy as to get guardian dicharge do or to have order for cot set as do or sun guard in for daininger for neil gence!

Court apported - Appointment is

lvote 10 1 (1973) 1929 Lah 237 (260) 2 (1971) 1971 Pat % (26) 6 Pat L Jour 92 Note 12

1 (1909) 1 Ind Grs 555 (556) 31 All " 2 (1886) 12 Cal 131 (139)

d 553

#### Local Amendments (Rule 4-A)

#### ALLAHABAD

Ald the following R 4 4 -

- "4 A (1) where a muor has a guirdan appointed be competent authority no per on other thin such guirdan shall be appointed his guirdan for the autualies the Court considers for reasons to be recorded that it is for the minors willow that unother persons be appointed.
- (2) Where there is no such guirdain or where the Court considers that such guirdain, should not be appointed at shall appoint a guirdain for the suit the natural guirdain of the numer of qualified or where there is no such guirdain the jarson in whose are the numer is or any other suitable person who has notined the Court of his willinguess to act or failing any such person an officer of the Court.
- Frilanation An officer of the Court shall for the purposes of this sub-rule include a legal practitioner on the roll of the Court
- (3) No person shall without his consent he approinted guardian for the suit, provided that in all cases the consent of such person shall be presumed unle a within fifteen dive of receipt of notice from the Court he notifies to the Court his retireal to receipt appointment as such guardian. Refinal to accept in the shall be presumed to be refusal to it.
- (4) Where in officer of the Court's ipposited gaudins for the suit under Sub R (3), the Court may drace that the rosts to be monried by such officer in the performance of his duties as such gaudins shall be borne either by the pirties or for any non-on-more of the pirties to the suit, or out of any land in Court tu what the name is untrocted and may give carcumstances of the case may require.

#### NAGPUR

Add the following R 4 A -

- Procedure for ap pointment of guardian for the aux.

  4 A (1) No person except the guardian appointed of declived by competent authority, shill without his consent by appointed guardian
- for the suit

  (7) In order for the appointment of a guarding for the suit may be obtained upon application in the name and on behilf of the minor or by the pluntiff
- plintiff
  (3) Unit a the Court is otherwise satisfied of the fact that the proposed guar
  din his no interest adverse to that of the minor in the matters in contro

versa in the suit and that he is a fit person to be so appointed it shall require such application to be supported by an affidiate verifying the fact (i) No order shall be mide on any application for the appointment as guar diam for the sout of any pelson other than a guardatu of the minor appointed

- or declared he competent unborsts except upon notice to the prope of curidum for the sunt and to ans guarding of the inmor appointed or declared by competent unboards or where there is no such guarding the proton in whose care the immore is und after their many objection that may be urged on a day to be specified in the notice. The Court may in any case, if thinks fit, issue notice to the numer also.

  (a) Where our Linux the specified day such proposed guarding fails to
- 19) where on or taken the specified division proposed guarant airs to affect and express his consent to act to guarant for the suff or where he is considered must be disjudited under but R (s) the Court rise, in the distinct of any other jetson fit and militage to set appoint not the guarant for the suff.

(1887) 14 Cil 15J (164) (1911) 10 Cil 102 (105 106) Voluntecr(1887) 4 All 1 (3) (1884) 8 Bom 27J (240) (1887) 11 Bom 53 (55) [1884) 8 Bom 39 (497)

(1898) 20 111 302 (304) Case under 1ct VII of 1899

[see all o (1859) 17 Cal 658 (693) 17 Ind App 5 (P C) Case under S 55 of the Bengal Court of Wards Act (Ben gal 4ct IX of 1879)]

(1852) 1 All 165 (167) (1865) 2 Agril H.C. R 92 (92) (1867) 8 Suth W. R 137 (198) (1865) 2 Suth W. R 218 (219) (1865) 1 Suth W. R 260 (261)

Note No

(b) In any case in which there is a minor delegating the Court may direct that a sufficient sum shall be deposited in Court to the plantal from which sum the expenses of the minor detendant in the suit shall be paid. The matter shall be adjusted in according with the final order passed in the suit in respect of costs "

OUDH

Add the following R 4 A .-

- '4 A (1) Where I minor has a guardian appointed by competent inthority, no person other than such gnardian shall be appointed his gnardian for the suit unless the Court considers, for recons to be recould that it is for the minor - well ire that mother per-on be appointed
- (2) Where there is no such guardim or where the Court considers that such guardian should not be appointed it half appoint as guardian for the suit the natural guardian of the minor of qualifical or where there is no such guirdian the person in whose cire the miner is it and other suitable prison who his notified to the Comt of his willingness to it or firling any such per son an officer of the Court
- Explanation in officer of the Court shall for the surross of this sub-rule include a legal practitioner on the roll of the Court
- (3) No person shall without his consent to appointed guirding for the sur-prouded that in all eases the consent of such person shall be presumed unless within fitteen days of recept of notice from the Court in ordine to the Court his reducid to recept appointment as such guirding. Refusal to accept notice shall be presumed to be refusal to act
- (4) Where an officer of the Court is appointed guardian for the suit under Sub R (2) the Court may direct that the costs to be mentred by such officer in the performance of his dulies as such guardin shall be horne cither by the pirties or ly my one or more of the pittes to the suit or out of any fund in Court in which the miner is interested and mis give directions for the represent or allow race of shi h costs as pastice and the circumstances of the case may require

Representation suinor by next friend or guardian for the sunt

Who may apply

friend or guardian

[Ss 441, 444] (1) Every application to the Court on behalf of a minor, other than an applica-tion under Rule 10, Sub-Rule (2), shall be made by his next triend or by his guardian for the suit.

(2) Every order made in a suit or on any application. before the Court in or by which a miner is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the ease may be, may be discharged, and, where the pleader of the party at whose instance such order was obtained knew, or might reasonably have known, the fact of such minority, with costs to be paid by such pleader.

[1877—S. 441.]

Synopsis

Note No long continues 1 Effect of an application without a next Pleader s liability for costs Sust for custody of minor

Appointment of guardian ad litem how 1. Who may apply.

Sub-R I of the rule errors that every application on behalf of a minor other than an application under R 10 sub-R 2 shall be made by his next friend or guardian An application by a guardian who has been di-charged by the Court is thus not valid and ought to be rejected 1 Where before a guardian is appointed for a minor defendant in a suit it was found necessary to apply for the transfer of the suit to another Court it was held by the High Court of Cabutta that the next frend of the minor could make such an application on behalf of the minor planning 2

### 2 Effect of an application without a next friend or guardian

It has been seen in Note 5 to R 3 above that where a minor is not repre ented in a suit the decree passed against him is a nullity. On the same principle an order mide on an application without the minor being properly repre ented therein 1 y a next friend or juardyin does not bind the minor I Sub-R 2 provides that such an order may be discharged.

3 Appointment of guardian ad litem how long continues

Where a guardian ad litem has once been appointed his appointment entire for the whole of the lis in all its ramifications unless and until it is revoked by the Court or the guardin dies or retires. The appointment continues for purpoles of ovecution, and appeals

It has been held that the Deput, Registrar of the High Court who has been appointed guardam ad liten ceases to represent the minor as soon as the appeal to the Priv, Council is admitted although he can represent the minor in an application for leave to appeal 4

4 Pleader's liability for costs

Where the pleader representing the minor knew or might have known, of the fact of minority and yet files an application without a next friend or guardian he is liable to be saddled with the costs to the opposite pirty!

# 5 Suit for custody of minor

This rule does not apply to a suit for the custody of a minor. It is not necessary in such a suit that the minor should be separately represented:

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Note 2 1 (18 2) 20 S ith W P 120 (122) (15 ) 4 S th W R 10 (100)

(16 ) 4 S th W R 10 (100) (15 ) 1 1 0m 234 (236) Will st c fr a 2 2 2 2 2 2 2

15

 person wants to appeal he mit applies to remove the guard and d less under R 11 (1879) 18.09 Mt W > 93 ( 0.1) (1879) 18.09 Mt W > 93 ( 0.1) (1879) 19.10 ( 0.1) (1879) 19.10 ( 0.1) (1879) 19.10 ( 0.1) (1879) 19.10 ( 0.1)

[See if o (137") 19 1 th 60" (f t)]

4 (193) 1935 Cil 266 (5) 1 Cil 26

(See if o (1901) 4 O dil Cis 35 (39)

Any per on cun rept. ent the runor

in in q plestion for live 10 appeal

to 1 tris (2000)

(1921) 19 4 \ag 138 (134) 7 \ig I Jone 110

(19 0) 1930 \ag 17. (1"s) If ome other

Note 4

1 (1 × ) 11 C t L Pep 15 (1c) Note 5

1 (1913) 21 Ind Cas 789 (190) (Mad)

fr end can appeal

(1971) 1J71 \ag 157 (153)

Receipt by next friend or guardian for the suit of pro perty under decree for minor

- R. 6. [S. 461] (1) A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other moveable property on behalf of a unior either:
- (a) by way of compromise before decree or order, or
- (b) under a decree or order in favour of the minor

(2) Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or, having been so appointed or declared, is under any disability known to the Court to be either money or other moveable property, the Court shall, it it grants him leave to becaute the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application.

[1877—S 461]

#### Local Amendment

#### MADRAS

Ald the provise to Sub R (9) -

"Provided that the Court may in its discretion dispense with such security in cases where the next friend or guardain for the saits is the manager of a joint Hindui family or the karnavan of a Malabar Tarwad and the decree is passed in favour of the joint family or the tarwad.

#### Synopsis

Note No

Note No
Payment to next friend without leave 2
Security for protection of minor a pro

The object and applicability of the Rule Joint Hindu family—Right of manager to withdraw money or give discharge

\_

#### ther Topics

Object of the Rule See Note 1 F N (2) Note G A to S 145 Remedy against surety — Procedure See

#### 1.A The object and applicability of the Rule

This rule as well as rule 7 unfra are based upon the general principle of law that an infant hugant becomes the ward of the Court and the Court has got the right and also the duty to see that the guardians act properly, and bona fide in the interests of the minors and that no suits are instituted or carried on by them for their own benefit only irrespective of the benefit of the minors i

This rule does not in any way control the substantive provisions of law contained in S 194 of the Indian Succession Act of 1925 2

1 Joint Hindu family—Right of manager to withdraw money or give discharge

It was held by their Lordships of the Privy Council in Ganesha Ron

Tulin Ram Ran (1913) I L R 36 Mad 29S, that where the managing mem
Order 32 Rule 6—Note I A 2 (1933) 1933 Cal 17 (19)

ber of a joint Hindu family is himself the next friend or guardian of a minor party 'his powers are controlled by the provisions of the law and he cannot do any act in his capacity of father or managing member which he is debarred from doing as next friend or guardian without leave of the Court to the High Court of Madias, these observations apply equally to cases coming under this rule and the Larta, who represents minor parties to the suit as their next friend or guardian cannot without leave of the Court inder this tule, give a valid discharge of the decree or withdraw any monies deposited by the judgment debtor for the bencht of the minor members i A contrary view was taken in the undermen ioned cases one of which was before the date of the decision of the Privy Council in Ganesha Row's case and the o her, though decided after the decision of Ganesha Ron's case, did not advert to it. It is submitted that they are not correct

But the rule will not apply where the managing member is not the next triend or guidden of the minor party. His right to give a discharge on behalt of the tamily under the Hindu Law is not affected by this rule 3 According to the High Cour of Bombay where the decree itself dispenses with the separa c application and sanction which might be necessary under this rule and allows the manager to receive the amount so long as he furnishes security the later on give a valid discharge without the leave of the Court under this rule +

#### 2 Payment to next friend without leave

A payment made by the judgment-debtor to the next friend or guard an without the leave of the Court under this rule is not a valid payment and wall not prevent the decree from being regarded as a subsisting one i

# 3 Security for protection of minor's property

The fact that the next friend or guardian is the manager of a joint Hindu family does not exempt him from giving security under sub-R 2 1 The bond should be duly stamped and affixed with Court-fee stamp as required by Art 6 Sch II of the Court Fees Act 2

As to the manner in which security given under this rule may be enforced we Note 6-A to S 145 sunra

#### Note 1

1 (19 of 17 of 12 of (232)

(1925) 1325 Mad 8 (80) 47 Mad 920

2 (1905) 37 Cal of 1 (365 517) Olact of the Rule state 1—Decide 1 before (1918) 36 Vad 295 (503) (P C)

(1915) 1915 Lah 155 (15t) Assumed 3 (1927) 1927 Pat 37J (330)

4 (1933) 1939 Bom 292 (381)

Note 2

1 (1921) 1924 Mad 279 (250) 19.0) 1930 Luli 496 (4 %) Trial Court directing next friend under R 6 to refund money to Pank drawn without its permission [See also (1924) 1974 Lah 681 (682) Note 3

execute a bond under S 37pl [But see (100s) 11 Oudh Cis 216 (247)][See however (1903) 1933 Cal 17 (18 19) This rule does not con trol 5 194 of the Succession Act (NAIX of 1920) Possession of moveables ordered without security ! 2 (1925) 1925 Cal 906 (907) 53 Cal 101 (F B)

Agreement or com promise by next friend or guardian for the suit

R. 7. [S 462] (1) No next friend or guardian tor the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalt of a minor with reference to the suit in which he acts as

next friend or guardian

(2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor 5

[1877—S 462 See S 147.]

# Local Amendment

# MADRAS

Invert the following is Sub Rule (1 a) -Where in application is made to the Court for leave to enter into an agreement or compromise or for withdrawal of a suit in pursuance of a compromise or for taking in other action on behalf of a minor or other person under disability and such minor or other person under disability is represented by counsel or pleader the counsel or pleader shall file in Court with the application a certifi cate to the effect that the agreement or compromise or action proposed is in his opinion for the benefit of the minor or other person under disability. A decree or order for the compromise of a suit appeal or matter to which a minor or other person under drability is a party shall recite the sanction of the Court thereto and shall set out the terms of the compromise as in Form No 24

in Appendix D to this och	edule		
	Syn	opsis .	
I Legislative changes II Scope and object of the Rule III Without the leave of the Court expressly recorded (a) Where leave is granted inder vinitable (b) Effect of compromise without leave of the Court (c) Bond evented by minor and an adult in pur- suince of i compro- mise without the leave of the Court (d) Compromise by natur-	Syn	Hindu famils 8  (g) Comptomise by the Court of Watds, on behalf of the ward if a compromise Vabandoment of issue—If a compromise Vabandoment of issue—If a compromise in execution proceedings the compromise in execution proceedings the compromise in execution proceedings that the compromise in execution proceedings that the compromise when carbitra toom.	
i il gusidium, father or in incign member of a joint Hindu family (c) Compromise by adult inembers of a Taiwid (f) Compromise by adult members of a joint	7 8		

Other Topics

Compromise against wishes of next friend or Ruardin See Note 2 Pts (6) (7) and (8) Note 5 1't (13) Compromise due to misapl rehension of mate till ficts See Note 4 Pt (1) I scentials for validity of compromise decree

agunst a minor See Note 16 Materials for Court's consideration in grant ing leave Sos Note 2 Pt (2) , Note 8 Pts (1) to (10)

Snb R (2) See Note 5 See also Note 2. Pt (9)

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#### 1. Legislative changes

The word extressly record d in the tio endings are new See Note ? infra

#### 2 Scope and object of the Rule

This Rule as well as the other Rules of this Order are enacted for the protection of minors who are mindle to look after their own interests and to whom the Court sands in a quasi-turelary position. The guardams and next friends are not invariably honest and even if honest are sometimes careless and occasionally lacking in intelligence. Therefore the duty of saleguarding the interest of the minors so far as is practicable, is thrown upon the Court i

The rule forbids the next friend or guardian to enter into agricment or compromise on behalf of the minor without the express leave of the Court and by implication requires the Court to consider in the exercise of its judical discretion the propriety of the same in the interests of the minor 2 But the rule applies only where the minor is a partly to a pending suit and not to a case where his interests may be affected by reason of a compromise in a suit to which he is not a partly 3 Nor can a person other than the next friend or guardian compromise the suit on behalf of the minor 4

No application for leave as necessary to negocate the priricular terms of a compromise, but such an application is necessary to enter into a compromise. Where such an application is made, the Court will, having regard to the interests of the minor pass a decree in terms thereof under O 23, R 3,53 unless the guardrin withdraws his consent or refuses to assent to the compromise before the Court passes the decree 6. The reason is that the Court cannot force a compromise upon the minor against the wishes of his guardrin 7 but if it appears to the Court that the guardian is acting improperly in refusing to assent to a compromise which is prima face beneficial to the minor, the Court can, in the interests of the minor, remove the guardian and appoint another 8.

Sub R 2 contemplates the case of a minor on one side ranged against adults on the other. It has no reference to the effect of any compromise between adults alone although the minor may be a party to the suit. A compromise between adults is governed by the general law and not by this rule 9

#### Order 32, Rule 7-Note 2

1 (1912) 15 Ind Les ICI (I(S) 1012 PRNo 97 (See also (193 ) 1 27 27 d 500 (911) infinit litty into Jecome Wards of Court—Therefore Court Ins to see that meet friends action flow in the interests of the inner and not in their own intrests!

2 (1934) 1934 Mid 455 (157)

(189) 17 VII 231 (\* 12) (1891) 2 VI d 103 (101)

(1971) 1931 All 42) (420) (Sec. (1931) 1931 Mat. 260 (269)

tion of any agreement letween minor and any picty to the suit)

3 (1927) 1927 C 1 870 (873) 55 C 1 - 10 (1905) 1 C d I Jour S (\*\*97) 4 (1920) 19-0 1 cm 47 (\*\*) 14 Bern 574 5 (1974) 1974 Nag 190 (182)

55 (1934) 1931 Ping 169 (170 171) Petition for kine to compromise-Country should experience whether it in its terest of numer-Hiber accountry comprome schoull keep feel and decree passed in word may there with-Court can make alterition in

C (1899) 22 315 7 74 (350)

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7 (1925) 113 111 70 (771) 47 111 7-2

(1973) 1325 C 11 (55 (655)

9 (1325) 19 × C il 247 (215) 9 (1325) 1 125 C il 506 (500) The rule applies to compromises by all guardians including a certificated guardian. So a regards the applicability of the provisions of this rule to other proceedings, see the following cases in

### 3 Without the leave of the Court expressly recorded

The requirement as to leave of the Court is based on the principle that a suit relating to the estate of an infant and for his benefit has the effect of making him a ward of the Court and no act can be done affecting the property of the minor unless under the express direction of the Court. The leave of the Court should be express in all cases: and cannot be implied from the mere lact that a decree his been passed by the Court adopting the terms of the compromise 3 As pointed out by Lord Macnaghren in Manohar Lal v Jadunath Smith (1906) 1 LR 28 All 585 (P. C.)

There ought to be evidence that the attention of the Court was directly called to the fact that the minor was a party to the compromise and it ought to be shown by an order on jet tion or in some way not open to doubt that the leave of the Court was obtained."

The fact that the minor is described as such in the title of the suit and that the terms of the compromise are before the Court is not enough 4

The Court should before granting leave exercise a judicial discretion as to the propriety of the compromise in the interests of the minors. In other words, the Court must have materials before it to satisfy its mind that the proposed compromise is for the benefit of the minor. No compromise involving an apparent surrender of the infant's rights ought to be sanctioned by Courts? No hard and fast rule, can be laid down as to what particular materials a judge may call for before being satisfied that the compromise is in the interests and for the benefit of the minor it is a matter for the exercise of judicial

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10 (1903) 7 C d W N 90 (93)
11 (1914) 1914 All 500 (557) Does not apply
to Lund Revenue Att
(1918) 1918 Oudh 217 (270) 21 Oudh Cas
220 (Do)
(1932) 1932 Oudh 44 (45) (Do)
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(1932) 1932 Outh 14 (45) (DD)
(1930) 1930 Lih 250 (251) Compromise
sunctioned under this Rule—Permission under S 29 of Guardinis and
Wards Act (VIII of 1890) not neces

(1922) 65 Ind C14 997 (937) (C14) (Do) Note 3 1 (1921) 1921 Pat 14 (17) 6 Pat L Jour 190

(1904) 27 M td 377 (380) (1904) 27 M td 377 (380) (1902) 29 C tl 735 (737) 2 (1889) 13 Bom 137 (146)

(1978) 1929 Pat 40 (44) (1930) 1930 Notes 9b 125 Ind Cas 587 (588) (All)

(1-91) 1831 All W N 46 (47) (1864) 1864 Suth W R 5up Vol 39 (40) (See however (1926) 1926 Sind 128 (123) 20 Sind L R 116)

(1912) 14 Ind C14 6 (6 7) (Oudh) 3 (1925) 1975 All 570 (571) 47 All 782 (1925) 1978 All 571 (597) Even under S 402 (1882 Code) leave of Court is necessary though not expressly recorded—Court has to see whether compromise is for minor's benefit—It leave is not given, compromise is, sojidable at minor singit ince]

5 (1908) 8 Cal L Jone 274 (277) (1933) 1933 Lah 408 (469) (1903) 7 Cal W N 90 (93) (1909) 4 Ind Cus 467 (464) (Cul) (1896) 1896 All W N 197 (129)

[See also (1932) 1932 Vird 303 Court not considering benefit to innor— Order bid] (1932) 1932 Lah 521 (522) (Do)

[See also (1933) 1973 All 149 (100)
The directions in this Rule are not intended to be merely formul-Court abould apply its mind to see that compromise is for the benefit of the minor?

minor]
6 (1927) 1927 Ct 1 796 (799, 800)
(1890) 1839 Pan Ro No 17, page 107
(1859) 1839 Pau Re No 105 | 138 308
(1898) 21 Mid 91 (93)

dicretion in each case 8 It has been held that an affidant by the guardam enting forth the terms of the compromise and how he considers them beneficial to the minor should be filed. In heavy cases there should also be an opinion of the counsel or a statement by the counsel at the bar that the compromise is a nit and proper one to be sunct oned in the interest of the minor? It the undermentioned case their lordships of the Judicial Committee called for a certificate from the High Court is regards the propriety of a compromise on levals of a minor before sanctioning the same observing that there should be a clear expression of opinion by the proper Court in India that such a compromise is beneficial one to the minor. There is a conflict of judicial opinion as to the form and nature of the order granting leave to compromise under this rule. In Kolindi is, Check Lala the High Court of Allahabad held that

The C urt houll record the fact that such application was made to it that the terms of the proped are ement or compromise were considered by the Court and that having regard to the interests of the minor the Court granted leave to the making of the agreement or compressing the court granted leave to the making of the agreement or compressing the court granted leave to the making of the agreement or compressing the court granted leave to the making of the agreement or compression.

The High Court of Madras in the undermentioned case<sup>12</sup> also expressed a similar view and held that the order should in terms state that the question of benefit to the minor was considered by the Court But in a later caseis the same High Court however, dissented from that view and held that the order need not on the face of it state in so many words that the Court had conjugged and come to the conclusion that the settlement was for the minor's benefit and that a mere order on the petition saying granted implied that the Court had applied its mind to the matter. In Virupax v. Shiddappa14 Sir Lawrence Jenkins C J expressed the view that the form of expression used for indicating that the Court granted the leave is of slight importance provided the Court really after a consideration of the circumstances intended to grant the required leave but Chandwarkar J disagreed with this view and held that a mere order of the Court saying granted was not a sufficient compliance with the rule. The High Court of Calcutta has expressed conflicting opinions on this point some decisions15 following the earlier Madras case, while the case cited belows proceeds upon a reasoning similar to that of the later Madras case The High Courts of Laboreit and Patnais also hold the same tien as that of the later Madras case

#### 4 Where leave is granted under a mistake

A compromise is only a contract and if entered into under a misapprehension as to material facts or brought about by the mistake of the parties and of the Court with regard to the subject-mitter of the suit is not viuld and binding upon the minor even though sancioned by the Court See also S. 20 of the Courtage Act

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<sup>11 (1905) 17</sup> MI 531 (592) [See al. o (1970) 1970 Cul 178 (183)]

<sup>12 (1906) 29</sup> Wrd 104 (106) 13 (1919) 1 H9 Wrd 305 (30") 14 (1907) 26 Bom 109 (114)

 <sup>(1977) 1977</sup> Cul. 96 (799)
 (1903) S.Cul. L. Jour 966 (70). Minor represented by h. s. moll er and guardian (1912) 16 Ind Cus. 307 (3993) (Cul.)
 (1908) S.Cul. L. Jour 31 (33)

<sup>17 (1977) 1977</sup> Lah 330 (3,2) (1917) 1917 Lah 113 (114) 1917 P R No 36

<sup>18 (192&</sup>quot;) 1933 I at 315 (27") 2 Pat 588 Note 4

<sup>1 (1979) 1929</sup> Lah 279 (780) (1920) 1970 Lah 408 (409) 1 Lah 844 2 (1891) 6 Cal 687 ( 05)

#### 5 Effect of compromise without leave of the It was held by then Lordships of th Chetty v Raia Raiesu ara Dorau that the obtain the leave of the Court is the interests of the minors and in behalf of the minor cannot ! a nullity so far as regard Rule itself say In other word a elf The I moc 1 to nna heco hand absolut in subst minor an on the con 33 hr. of want of s regard to th conflict of our No 1 (1015) 1915 1 ( [See al o [1 ] 97) 16 0 11 40 In 1 1pt 1 2 (1910) 5 Ind Ci 6 1 good igun tali i (1975) 1975 Nig 375 ( [See al oca es t ] (4) and (51) 3 (1971) 1971 311 675 (13 ) 1

minor in a separate suit t

(1890) 7 Oudh Cas 67 (7 f) (1931) 1931 Cal 711 ( 1") 3 L (1910) o In 1 C15 691 (69') (6 1)

> told against minor [See also (191.) 21 Ind C15? \(^2\) 16 Ondh C15 247 35 All 487 40 I App 182 (P C) Though in the ci their Lordships an that the compr mise without sunction is to against them this must be unler stor I with reference to the context as meaning only that the minor a not bound by it but can avoid it]

Madra and Paints and the ludical Commissioner's Court of Oudhio no prejudice need be shown. The High Courts of Allahal adii and Liborer have on the other hand held that it is no essars for the minor to establish that he has been prejudiced by the decree before setting it aside. It is submitted that this later view is not correct. Where the next friend or guardian has himself not con-cuted to the compromise on behalf of the minor the compromise is of cour e void in tota is

#### 6 Bond executed by minor and an adult in pursuance of a compromise without the leave of Court

Where a compromise is entered into without the leave of the Court and in pursuance thereof a minor defendant and an adult party jointly execute a lone the bond cannot be enforced as against the minor. But the adult cooblight cannot be expressed from hability owing to the failure to obtain leave to compreme on behalf of the minor t

#### 7 Compromise by natural guardian father or managing member of a joint Hindu family.

A father or managing member in a joint Hindu family may in certain circums at ces and abject to certain conditions enter into agreements which may be lunding on the minor members of the family 1 But, as pointed out by their Lord hips of the Jud cial Committee in Ganesha Row v Tulja Ram Row [(1913 ILR 36 Mad 295 (P C)] when in a suit in which the minor is a parts, the father or managing member is appointed the next friend or guardian of the minor his powers are controlled by the provisions of the law and he cannot do any act in his capacity as father or managing member which he is debarred from doing as next friend or guardian authout the lease of the Court To hold otherwise their Lordships observed, would be to defeat the object of the enactment 2 The same principle will apply to the case of a natural guardian of the minor dealing with minor's interests a

#### 8 Compromise by adult members of a Tarwad A compromise of a doubtful claim, entered into by the adult members

of a Tarwad bong tide and in the interests of the Tarwad is binding on the b (1911) 12 Ind C1 (499 (\*00) 34 Mad 314

(1911) 11 Jud C14 523 (525) 1912 P R No 2 (Sec al- (1900) 1905 Pun Re No 3 Or page 19 Can be set aside at the instance of the minor if the equities

> on to

Note 6

1 (1916) 1916 I C 2 (3) 89 Mad 409 43 Ind Am 99 (P U)

1 (See (1914) 1914 Vind 70 (77)] (1595) 9 Bom 365 (367)

[See also (1913) 20 Ind Cas 44 (15 46) 35 411 429 Compromise decree against Hindu father-No collusion -Pinding on cons though not per ties to the suit?

(1904) 27 All 203 (950) (1905) 15 Mad L Joni 494 (495) Bona file compromise of doubtful claim by grandmother binding in absence of

collusion 2 (1913) 19 Ind Cas 515 (517) 36 Mad 295 40 Ind App 132 (P C) Overruling the decision in 19 Mad L Jour 4 1 Ind

Cas 390 (See also (1920) 1920 Oudh 164 (167) 56 Ind Cas 313 (316) 23 Oudh Cas 396]

(1925) 1925 All 32 (33) (1931) 1931 Mad 218 (\*21)

3 (1920) 1920 Bom 37 (39) 44 Bom 574

minor members thereof: But if the Karnavan or adult member happens to be the guardian ad litem or next friend of the minor in a suit then on the principles mentioned in Note 7 above, leave of the Court is necessary before he can enter into a compromise binding on the minor

8 a Compromise by adult members of a joint Hindu family

In Rameshuar Prasad v Ram Bahadur Sungh (1907, ILR 34 Cal 70, PC) their Lordships of the Judicial Committee held that where a compromise was entered into by the adult co-parceners in a joint Hindu family in a pending litigation in which the minor co parcener had no interest separate from that of the adult members of the family and the Court pronounced the compromise beneficial to the numer, the compromise was bending on the minor.

9 Compromise by the Court of Wards on behalf of the ward

It has been held that in cases coming under the Bengal Court of Wards Act (IV of 1879) no leave of the Court is necessary for entering into a compromise on behalf of the minor i The reason is that S 51 of that Act makes it obligatory on the Civil Court to recognise the Court of Wards as the next friend or the guardian as the case may be in a suit by or against the minor Turther S 18 of that Act itself gives power to the Court of Wards to enter into a compromise on behalf of the ward Rule 16 of this Order also contains a saving clause in respect of local laws:

10 Agreement to be bound by oath if a compromise

An ofter by the next friend or the guardian as the case may be of a minor to be bound by the evidence given on onth by the opposite party or his watness under S 9 of the Indian Oa'hs Act (X of 1873), does not amount to an agreement or compromise within the meaning of this rule and no leave of the Court is necessity in such a case 1 The evidence so given is binding upon the minor under S 11 of that Act unless there is fraud or gross negligence on the part of the guardian in the conduct of the suit which results in prejudice to the minor z

But an offer by the guardan ad lifent to suffer a decree on the oath of the plantiff would amount to a compromise and, if not sanctioned by the Court, is not binding on the minor 3

11 Abandonment of issue-If a compromise

The abandonment or giving up an issue on the part of the next friend or guardian ad litem in the course of the conduct of the suit does not amount to a compromise within the meaning of this rule and therefore no leave of the

Note 8 1 (1895) 18 Mad 38 (10) Note 9

1 (1921) 1921 P C 22 (23) 48 Cul 469 48 Ind App 27 (P C)

promise 1s di qualifiel projinetor without such senetion is not valid] 2 (1918) 1918 Cal 879 (810) 11 Cal 899 [See however (1897) 27 Cal 993 (911) 29 Led 41p 75 (P. C) Consent to a decree by anager of Court of Wirds without authority from the Court of Wirds—Invalid]

Note 10 1 (1927) 192" All 584 (584) 49 All 842 (1900) 27 Cul 229 (281)

(1930) 1970 Cul 473 (164) (1891) 1891 Pun Ro No 18 page 110 (1989) 12 Mad 483 (181)

)) 12 Vand 483 (481) [But see (1904) 17 C P L R 147 (155)]

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Court is necessary. Such abandonment will bind the minor inless the guardian is proved to be guilty of fraud or gr s 1 gl ence 1

#### 12 Withdrawal of suit

General

A withdrawal of a suit by the next friend of a minor plantiff in pursuance of an agreement or comprome e it red into with the defendant can only be made with the leave of the Court be use it will be voidable at the instance of the minor. Applications 1 all is a suit or appeal to be withdrawn where there are parties who are no minors are not granted without grave consideration. In the underment oned case the Judicial Committee granted leave to withdraw an appeal only after being assured by the counsel at the bar that the terms on which it was proposed to be withdrawn were beneficial to the minor. But a mere withdrawal of a suit not in pursuance of any agreement or compromise does not come within the purview of this rule although such a withdrawal is open to attack by the minor on the ground of fraud or collision or gross negligence on the nart of the next friend.

13 Compromise in execution proceedings -See Note 2 to Order 32,

#### 14 Transfer without leave of decree in favour of minor

The provisions of this rule apply also to a compromise entered into even after a decree has been passed and an adjustment of a decree to which a minor is a party is not binding on the inition unless leave of the Court has been obtained therefor: On the same principle a transfer of a decree obtained in favour of a minor is not binding on the minor unless leave of the Court has been obtained for such transfer?

#### 15 Agreement to refer to arbitration

This rule does not apply to references made without the intervention of the Court inasmuch as there is no stuff pending in such cases? A decree passed on an award passed on such a reference and filed into Court under paragraph 20 of the Second Schedule is not bad for want of sanction, though it may not be binding on the minor for other reasons? But an application made under paragraph 20 of the Second Schedule is a stuff and if, during the pendency thereof the guardian agrees not to object to the filing of the award, the agreement must, like any other agreement be sanctioned by the Court?

There is a conflict of opinion as to whether this Rule applies to agreements to refer to arbitration made pending suit. The general consensus of opinion

Note 11 3 (1902) 99 Cal "35 (737) 1 (1899) 22 Mal 588 (546 IJ) (1919) 1919 Lah 395 (396) 1919 P R \o J (1914) 1914 All 254 (2 6) Confession of Note 14 1 (191") 191 Nad 409 (411) indement when no valid deferce exists as to wanter by guar? an [See al o [1898] 17 Bom f 6 (689) [See (1893) 17 I om 939 (909)] (1891) 19 Cal 99 (100) 17 Ind Apr 30 (I C] 690 ] o (1971) 1971 Wad 55 (> ) D s enting from Note 12 17º1 Vlad 113 1 (1904) 2" Wad " Note 15 (3.8) 1 (1°02) 2 I om 293 (301) (158J) 1° B m 1,7 (146)

(103) 103° Tah 23 (31) Such will from 95 (801) (103) 103° Tah 23 (31) Such will from 10 creet limbs major to plantiff or 10 creet limbs major to (103) 103 Long 103 (10°) 43 Eom 38 (10°) (100) 17 Eom 28 (10°) 17 Eom 28 (10°) (10°) 17 Eom 28 (10°) (10°) 18 Eom 28 (10°)

(1 C) 3 {1536] 183 Lom P J C09 (610)

C P C 291 t 292

in all the Courts except the High Courts of Allahabad and Calcutta is that this rule applies to such cases and that the leave of the Court is necessary 4 According to the High Court of Allahabad the provisions as to arbitration proceedings are self-contained and this rule does not apply to such proceedings 5 The High Court of Calcut a has taken conflicting views on the matter 6 It is subm ted that the Allahabad view cannot be accepted as correct

#### 16 Compromise when can be set aside

A compromise in order to be valid and binding upon the minor must fulfil the following conditions ---

- (1) The leave of the Court must have been expressly obtained (See Note 3)
- (2) It should have been granted by the Court after the exercise of a judicial discretion as regards the propriety of the compromise in the interests of the minor See also No e 3)
  - (3) It should not be visated by fraud or mistake (See Note 4)
- (4) There must be proper representation of the minor by the next friend or guardian ad I tem He should not have been guilty of fraud or gross negligence in the matter of compromise (See Notes 17 and 18 below)
  - (5) The minor should have continued to be a m nor till the passing of the compromise decree (See Note 19 below)

# 17 Gross negligence of next friend or guardian

on the part of the next friend or guardian ad litem if established will entitle the minor to avoid any decree passed against him. There must be the strictest good faith on the part of the guardian and his acts must be based on considerations of actual necessity and advantage to the minor and not on calculations of any possible benefit 1 It is his duty to place the Court in

As has been seen in Notes 12 and 13 to R 3 ante gross negligence (1912) It Ind Cas G (G) (Oudh) But sanct on need not be express [See also (1930) 1930 Oudh 439 (434) Bom 902 Reference after decree-Leave not necessary as the suit not pending on date of reference ] (1923) 1923 Lah 103 (104) Suit abunst a firm consisting also of minor mem bers made parties-No leave noces sarv 1000 į Cases p 5 (1931) 1931 Cul 911 (21 ) 58 Cul 698 It up

phes-Issumed Note 17

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Guar ithout ermsT

possession of all essential and material facts and any concealment thereof would amount to constructive fraud: But if he acts bona fide and compromises a doubtful claim with the lene of the Court the compromise would be binding en the minor a See also Note 5 to R 9 below

#### 18 Fraud

A comprome c duly entered into by the guardian and sanctioned by the Court in the exercise of its discretion will not be disturbed except upon very strong grounds 1 The grounds must be such as to amount to fraud in the party claiming the benefit of the compromise meaning by fraud not moral fraud but what in the eve of this Court is considered as amounting to fraud It there be no fraud and equal knowledge on both sides the compromise cannot be disturbed but if there is knowledge on one side which is withheld the compromise cannot stand, because the withholding of knowledge amounts in the view of a Court of equits to fraud 12 The question is not whether the Court was sausted with the information before it and could have called for further information but whether the parties having had this further information in their possess on were justified in withholding it 2 Fraud however must be strictly proved 4 man cannot complain of fraud simply because he regrets a bargain entered into with open eyes. Nor can a minor attack a compromise sanctioned by the Court on his behalf on the ground of fraud on the Court unless he can prove not merely that the compromise was not profitable to him or that his opponent put forward a false plea but also that the Court was deceived either by that plea or about the facts of the case or was decreved into believing that the compromise had been accepted by the minor's guardan or next friend with free consent and knowledge of the facts when it had not been so accepted 3

If the next friend or guardian is proved to be guilty of fraud or collusion then the compromise entered into by him and the decree passed thereon will not bind the minor 4

# 19 Minor attaining majority pending suit Court will ordinarily relieve minor

from its effect and give him opior

If the defendant who is a minor attains majority during the pendency

3 (1909) S1 Cal 111 (131)

8 (1929) 1929 Mad 95 (10") Per Reilly J.

4 (1904) 1 All L J 180 (182)

(1889) 13 Bom 137 (143 146) (1893) 1893 Pun Re No 24

(1925) 1925 Vad 1285 (1286) Subsequent change of law cannot vitate com tunity to defend the suit-But this promise by guardian Note 18 1 nature of compromise is on person Mortgage by futher-Sust against [See also (1890) 17 Cal 575 (889) 17 him personally and as guardian of Ind App 65 (P C)] his minor daughter-Decree against 13 55 Eng Rep Rolls Court 445 Brocks v Lord Mostyn cited in 11 Ind Cas him alone-Appeal by bun to make her share al o linble-Compromi e 100 (108) (Oudh) with plaintiff accordingly - Court everei ing no control over compro 9 (1891) 6 Cal 687 (703)

mise - Compromise not binding on minor 1 (See also (1904) 14 Mad L Jone 442 (442)]

of suit, a compromise entered into by the guardian subsequently is not binding on the minor even though sanctoned by Court 1 But the High Court of Lahore2 has taken a contrary view, which it is submitted is not correct

20 Procedure to set aside a compromise decree

A minor can file a separate suit to set aside the compromise decree or file an application for review in the same suit i He cannot take any objection as to the validity of the decree in appeal as no appeal has from a consent decree under the present Code (vide S 96, sub-S 3) 2 Nor can the validity of the decree be attacked in execution proceedings 3 Sec also Note 5 above

If a compromise decree is set aside at the instance of the minor the effect of it would be to remit the minor to his original position in the suit 4

R. S. [S. 447] (1) Unless otherwise ordered by the Court, a next friend shall not retire without Retirement of next first procuring a fit person to be put in his friend place and giving security for the costs already

incurred.

(2) The application for the appointment of a new next friend shall be supported by an affidavit showing the fitness of the person proposed, and also that he has no interest adverse to that of the minor

11877-S 447 Cf R 3, Sub-R (3) and R 4, Sub-Rr (1) and (4) and Rr 9 and 10 of this Order

Sunovsis

Retirement of next friend Note No 1

Note 19

 (1928) 1928 Mad 294 (296) 51 Mad 763
 (See also (1864) 1864 Cap Suth W R 63 (84) Compromise by mother as guardian of her daughter of sust after latter a majority, not com petent

2 (1922) 1922 Lah 407 (407)

Note 20.

1 (1839) 23 Bom 620 (673) (1831) to Bom 591 (597, 598) (1903) 30 Cal G13 (615)

(1907) 31 C:1 83 (83 90) When a suit her and when review lies discussed

(1906) 3 Cal L Jour 119 (180) (Do) (1908) 8 Cal L Jour 266 (271)

(1891) 10 Cal 357 (367)

(1926) 1926 Mad 119 (120) Can be revew ed also under S 151 (1921) 1924 Lah 427 (428) Lamitation for

suit is three years from attaining (1.317) 1917 Mad 672 (650) 29 Mad 853 Minor can avoid compromise decree in toto and not in part

Minor's guardian ad litem settling the suit out of Court without leave of Court-that may be a ground for suit But the attorney cannot go behind the instructions from the guardian and continue to represent the minor

[See (1932) 1932 Bom 401 (401)

2 (1905) 30 Cal 618 (615) (Case under 1893 Code) Hold no appeal hes

(1901) 5 Cal W N 8:7 (878) (Do)

(1895) 17 All 531 (533) Do but objection entertained in appeal

3 (1889) 12 Mad 503 (504 505)

(1921) 1921 Mad C45 (646) (1923) 1923 Pat 375 (378) 2 Pit 538 (1893) 1 Oadh Cas 49 (50)

[See also (1318) 1918 Cal GO2 (604)] 4 (1913) 21 Ind Cas 288 (291) 16 Oudh Cas 247 35 \11 487 10 Ind \pp 192

(P C) (1935) 1935 Hom 51 (60)

(1876 74) 2 Cal 181 (196) 3 Ind App 291

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#### Other Tomes

Sub equent appointment of guardin under Guarlines and Ward, Act-Suit to set vile lecree on that ground-If hes See Note 1 I N (1)

Retirement of next friend

The provisions of Sub-Rule (1) are mandatory. The mere fact that a guardian of the person and property of the minor plaintiff is appointed under the Guardians and Wards Act (VIII of 1890) during the pendency of the suit superseding the next friend will not amount to a valid retirement in the ab ence of any application on the part of the next friend i

R. 9. [5 446] (1) Where the interest of the noxt friend of a minor is adverse to that of the minor or Removal of next where he is so connected with a detendant whose friend interest is adverse to that of the minor as to

make it unlikely that the minor sinterest will be properly protected by him or where he does not do his duty, or, during the pendency of the suit corses to reside within British India, or for any other sufficient cause application may be made on behalf of the minor or by a detendant tor his removal, and the Court, if satisfied of the sufficiency of the cause assigned, may order the next triend to be removed accordingly, and make such other order as to costs as at than Is fit

(2) Where the next triend is not a guardian appointed or declared by an authority competent in this behalf, and an applica tion is made by a guardian so appointed or declared, who desires to be himself uppointed in the place of the next friend, the Court shall remove the next friend unless it considers, for reasons to be recorded by it that the guardian ought not to be appointed the next friend of the minor, and shall ther cupon appoint the applicant to be next friend in his place upon such terms as to the costs already incurred in the suit as it thinks fit

[1877-5 446 (f R 4. Sub-R1 (1) and (2) above and sec

R 10 below1

Synopsis

Note N Legislative changes Appeal after the expiry of limitation Where the next friend does not do his persod Non appearance of next friend Death of next friend des it 10 infra 5 Adverse interest of next friend

1 Legislative Changes The words an I male s ch order as to costs as at thanks fit an sub I ule (1) have been

newly alded In Sub Rule (9) tle word and alall thereupon appoint the applicant etc , are also new

Order 32 Rule 8-Note 1 1 (1908) °0 111 105 (108 109) Suit to set aside decree owing to next friend

R 9.

₹ 10

35

ì

2 Where the next friend does not do his duty

The next friend is liable to be removed under this rule if he fails do his duty,1 or if he ceases to reside in British India and leaves the count Where the Court finds that the next friend does not do his duty in relat to the suit, it should not permit him to prejudice the interest of the mi but should adjourn the suit in order that some one interested in the mi may apply on behalf of the minor for the removal of the next friend and appointment of a new next friend or in order that the minor plaintiff him may, on coming of age, elect to proceed with the suit or withdraw from Similarly, as seen in Note 2 to R 7 if the next friend refuses improperly assent to a compromise which is clearly beneficial to the minor steps may taken to remove him 4

3 Adverse interest of next friend

If the next friend has an interest adverse to that of the minor plain or his personal interests will come an'o conflict with his duty towards minor, he can be removed under this rule 1

4 Appeal after the expiry of limitation period

Where a decree is passed against the minor and the interest of minor requires that it should be appealed against but the guardian ad life refrains from doing so with a view to safeguard his own interest and for I private benefit, it has been held that the minor can on attaining majority permitted to appeal and that the delay can be excused under S 5 of t Limitation Act 1

5 Non appearance of next friend

Where the Court finds that the next friend is guilty of neglect a commits default in appearance the proper course is to stay further proceeding and not to dismiss the suit for default a

6 Death of next friend-Sec R 10 infra

R. 10. [Ss 448, 449]. (1) On the actuement, removal or dea of the next friend of a minor, further procee Stay of proceed ings shall be stayed until the appointment of ings on removal etc of next friend next friend in his place

(2) Where the pleader of such minor omits, within a reaso able time, to take steps to get a new next friend appointed, an

1 (10°8) 1928 Nag 166 (167) (1872) 18 Suth W R 169 (170) 9 (1907) 17 Mrd L Jour 179 (179) 3 Lah 417 (1993) 1929 Luh 271 (272) Guardian leaving jurisdiction of the Court-Minor cur appeal through another next friend - No formal order of remotal necessary [See also (1874) 21 Suth W R 312 (914) 3 (101) 27 Mrd 377 (378) (18 1) 10 Suth W R 143 (146) (1923) 15 in 500 Ref in 5 Cal W N 434 (437)

Order 32 Rule 9-Note 2

(183°) 183° Pun Re No 125 1age 366

(1875) 23 Suth W R 278 (250) 4 [See cases cited in Note 2 foot note 8

R 7 antel Note 3

1 (1970) 1920 Cul 178 (183) (1979) 1929 Vrd 303 (391)

(1925) 1995 Mad 7°4 (73a) Held fath acting as next friend possesses i adverse interest and can con promise Note 4

1 (1896) 20 Born 104 (109)

1 (1921) 1921 Pat 103 (103) 6 Pat L Jour 31

person interested in the minor or in the matter in issue may apply to the Court for the appointment of one, and the Court may appoint such person as it thinks ht

[1877-S 448 See R1 S and 9 above ]

S mor us

Removal or death of next friend Note No 1

1 Removal or death of next friend

The suit does not aba e by reason of the death of the next friend. The Court should either appoint a new next friend or keep the stat pending till the minor atta no majority 12 An order dismissing the suit is a nullity 1 The same rule will a ply where the minors are appellants and their guardian dies perding appeal. Where however the decision is given in favour of the minor it s not on the principle mentioned in No e 1 to O 32 void by reason merely of the omission to appoint a fresh guardian for him 3

R. 11. [So 458 459] (1) Where the guardian for the suit desucs to retire or does not do his duty, or where Te re e t reno al or death of guardian other sufficient ground is made to appear, the frillsut Court may permit such quardian to retire or may remove him and may male such order as to costs as it thinks fit

(2) Where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit, the Court shall appoint a new guardian in his place

[1877—Ss 458 and 459]

Sunonsis Note No Note No Retirement of guardian moval retirement or death of guar Removal of guardian dian Appointment of new guardian on re Costs

Other Tomes Gatel tagashe to Enl lands-lering

Not so to major—For appointment of new Guardian See Note 3 Pt (1)

on to ret re See Note 1 P N (I) Retirement of guardian

When once a guardian has been duly appointed he cannot retire except with the leave of the Court 1 The Court is not bound to grant permission to retire whenever the guardian wishes to do so It has a discretion to refuse the

## permission in a proper case 2 Order 32 Rule 10-Note 1

- 12 (1315) 1915 Mal 461 (461) (1933) 1933 Cal503 (509) 1 (1315) 1915 Mal 461 (162) 2 (1917) 1917 Mal 969 (9 1) 3 (1906) 28 All 328 (380)
- Order 32 Rule 11-Note 1 1 (1975) 1925 All 214 (215)

- (1926) 1926 All 437 (438)
- (1891) 14 11: 35 ( ) (1911) 9 Ind Cas 435 (435) (Mad) Guardian unalle to find funds-Permitted to
  - retire (1889) 12 Bom 553 (55a) (Do )
- 2 (1926) 1926 411 437 (438) Distinguishing 1972 411 416 (1978) 1978 Mad 950 (950)

A mere statement on the part of the guardian that he declines to act has not the effect of removal unless sanctioned by the Court 3

### 2 Removal of guardian

It is the duty of the Court to project the interests of a imnor A guardian is appointed for that purpose and for that purpose alone. If the Court finds that the guardian is not acting properly it would be its duty to remove him in the interests of the minor i

The only way of getting rid of a guardian ad lilem, who has once been properly appointed, is under the provisions of this rule 2 Where in a suit against a minor the certificated guardian of the minor is appointed guardian for the suit, the mere fact that he subsequently ceases to be the certificated guardian does not of itself impose such a disqualification as to make him functus officio 3. He will continue to be the guardian until he retires or is removed by the Court under this rule.

# 3 Appointment of new guardian on removal, retirement or death of guardian

It is the duty of the Court to appoint a new guardian where the guardian ad litem diest or retries or is removed by the Court Where the guardian of a minor respondent dies pending appeal a decree obtained against him without appointing a fresh guardian for him would on general principles be a nullity, though a decree obtained in favour of the minor would not 3 Sea Note 1 to 0 32

It has been held by the High Court of Patna that no notice to minors is necessary before an order of fresh appointment is made 4

The power of the Court under this sub-rule may be exercised at any time during the pendency of the suit and the same is not taken away by the fact that an order to try the suit ex parte has been previously passed 5 The powers of the Court under this rule are exercisable by the Registrar under S. 105 of the Rangoon Smill Cause Courts Act (VII of 1920)

## 4 Costs

Section 35 ante empowers the Court to make an order as to costs against any party to the suit, while this rule empowers the Court to pass an order for costs against the guardina ad litem who is not a party to the suit. This rule cannot be construed so as to restrict the operation of S 35 and, therefore, when the guardian ad litem is himself a party to the suit the Court has

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3 (1927) 1927 Mad 5.3 (541) of Mad 35"
                                                              [But see (1930) 1930 Pat 473 (475)
  (1905) 1 Nag L R 128 (129)
                                                              Submitted wrongly decided]
                   Note 2
                                                     3 (1912) 14 Ind C ts 500 (507) 81 All 321
  000 000 4 1 100 (100)
                                                     1 (1923) 1923 1 at 355 (386) 2 Pat 273
                                         (775)
                                                       (1931) 1931 Pat 111 (113)
                                                       (1933) 1933 Pat 473 (477)
                                                     5 (1920) 1970 Vind 213 (714)
         Before order of appointment is
         made it is better to record a formal
                                                                        Note 4
         order of removal of the old guar
                                                     1 (1929) 1929 111 18 (20) 50 111 733
         dian 1
2 (1935) 1935 Cal 160 (165) 61 Cal 1097
8 (1935) 1935 Cal 160 (167) 61 Cal 1023
```

Note 3 1 (1917) 1917 Mal 979 (970) {1026] 1926 N 18 40 (41) (1927) 1927 Nag 1 N (139) 23 Nag I R 146 power apart from the provisions of this rule to make an order for costs against ( him \*

Where the guardian takes upon lumself to file an unnecessary and unsuccessful appeal on behalf of his ward 3 or where he is guilty of gross misconduct in the conduct of the case + the Court will order him to pay the costs

Course to be fol lowed by minor plain tilf or applicant on attain 12 r ajord

R. 12. [85 450 to 453] (1) A minor Culturation a minor not a party to a suit on whose behalf an application is pending shall on attaining majority elect whether he will proceed with the suit or application

(2) Where he elects to proceed with the suit or application he shall apply for an order discharging the next friend and for leave to priceed in his own name

(3) The title of the suit of application shall in such case be corrected so as to read honceforth thus -

1 B. late a minor by C D his next friend but now having attained me jointy"

(4) Where he elects to abandon the suit of application he shall it a sole plaintiff or sole applicant, apply for an order to dismiss the suit or application on repayment of the costs meuried by the detendant or opposite party of which may have been paid by his next friend

(5) Any application under this Rule may be made ex parte but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without notice to the next triend

[1877-Ss 450 to 453]

Sunorsis Note No Note No Minor defendant becoming a major Scope of the Rule Title to be corrected during the pendency of su t

Otl er Tonics

on compliance with Rule-Ratifeato - Notice t quo lam i nor Se Note 1 Iffect See Note 1 1t (a)

1 Scope of the Rule

The rule is based on the substantive right of a person who has become sut juris to himself proceed with a suit instituted on his behalf during his minority i The Court should as a matter of course give him leave to proceed or act in his own name and cannot ignore his application 2 If on attribung majority the minor elects to abandon a suit instituted by his next friend he must pay the costs of the next friend unless he can establish that the suit was improperly instituted 2. See also Rule 14 infra Where it is discovered in the course of the suit or appeal that the minor has attained majority the Court cannot dismiss the suit or appeal for default but should issue notice to the quandam minor to elect whether he intends to proceed with the suit uppeal 3 If he elects to continue the sur his rights should be determined as on the date on which the suit was originally instituted 4 Where the minor continues to be represented bona fide by a pleader even after his attaining majority and subsequently the quondum minor ratifies such acts they cannot be treated as invalid on the ground of non compliance with this rule s

#### 2 Title to be corrected

It has been held by the High Court of Calcutta that the provision of this rule requiring the title of the suit to be corrected applies only where the suit is nending and no to proceedings taken after a final decree has been passed in the suit i

3 Minor defendant becoming a major during the pendency of suit

No provision has been made in the Code in respect of a minor defendant attuining majority during the pendency of the suit. The reason for the omission is that while a plaintiff on becoming a major can as a dominus litis elect either to go on or put an end to the higgation the defendan has no such choice available to him and the sint must proceed against him notwithstanding he becomes a major. The minor defendant the comes of age may if he thinks fit come on the record and conduct the defence himself. If however he does not do so he must be deemed to have elected to abide by the representation of the auondam guardian and the judgment eventually passed will be binding upon lum. The decree passed in such a case cannot be said to be a nullity or made without jurisdiction 1

R. 13. [8 454] (1) Where a minor co plaintiff on attain

ing majority desires to repudirte the suit, he Wlere minor co shall apply to have his name struck out as co plaintiff alfar ir in plaintiff and the Court, if it finds that he is not najority desires to a necessary party, shall dismiss him from the repudiate suit

suit on such terms as to costs or otherwise as it thinks fit (2) Notice of the application shall be served on the next

friend, on any co plaintiff and on the detendant

Note 2 1 (189 ) 00 Cal 0 (274 0 5)

<sup>1 (1928) 1929</sup> Mad 201 (2)1 205) 51 Mad 63 (19 8) 1998 Lah 371 (3 8)

- (3) The costs of all parties of such application and of all O or any proceedings theretofore had in the suit shall be paid by such persons as the Court directs
- (4) Where the applicant is a necessary party to the suit the Court may direct him to be made a detendant

[See R 12 above Cr O 1 R 10]

R. 14. [8 455] (I) A minor on attaining majority may, of it as sle planniff apply that a suit instituted in the name by his next triend by dismissed on the

memore with the third of dismissed of the quantitative with the served of the application shall be served on all the pruties concerned; and the Court man being satisfied of such un

prities concerned; and the Count upon being satisfied of such unleas mableness of impropriety may grant the application and o'der the next friend to pay the costs of all prities in respect of the application and cf anything done in the suit or make such other order as it thinks hit

[See R 12 Sub-R (4) above]

Synopsis
Scope of the Rule \ota \o 1

Scope of the Rule

T

This rule deals with the procedure to be followed where a minor plannik becomes a major and considers that the suit instituted on his behalf was impropor or unicasonable. The Court can in such cases order the next friend to pay the costs of all the parties if it is saussied as to the impropriety or unreasonableness alleged is But no order as to costs can be made after the death of the next friend i.

# MADRAS Local Amendment

All the following as P 14 1 -

l or guardin for the suit ourt in its appellate juris Council shall be deemed 128 [7] [1] of the Code of

Note No

2

Girl Fracelure and may be performed by \$10 Registrat provided that contested in the conservations and applications regresented out of time shall be posted before a Julige for disposal

R. 15. [S 463] The provisions contained in Rules 1 to 14, 0.

Application of so far as they are applicable, shall extend to persons adjudged to be of unsound mind and to persons ulso, though not so adjudged, are found

by the Court on inquiry, by reason of unsoundness of mind or mental infilmity, to be incapable of protecting their interests when string or being such

[1877—S 463]

Synopsis
Note No | (a) Mental infirmity

Persons of unsound mind
Order 32 Rule 14-Note 1

1 (1918) 1918 Oudh 21 (27) 20 Oudn Cas 300

Yote Yo (b) Persons adjudged to be 3 of unsound mind (c) Persons of unsound mind not so adjudged

II Appointment of next friend or

Note No guardian for persons of un sound mind III Decree against lunatic not re presented if can be challenged in execution proceedings IV Revision

SCH

Otler Topics Finding as to afirm ty - latue of See Lunney 1ct-Gase nã Note Note 4 It (2) F Leg slative changes See Note 9 Pt (1) Lunat -Definition of See Note F N (1

1 Persons of unsound mind

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The present rule places persons of unsound mind in the same po its as that of minors and makes the provisions of Rr 1 to 14 applicable t them. Hence a suit on behalf of a person of unsound mind has to be filed by a next friend and where the defendant is of unsound mind the Court has to appoint a guardian ad litem 1

## 2 Mental infirmity

The corresponding section in the old Code was applicable only to persons of unsound mind Now the scope of the rule has been widened by the addition of the words or mental infirmity. The result is that even a person of weak mind can sue through a next friend provided the Court is satisfied that he is incapable of proceing his interests 1 The High Court of Labore has held that the rule applies also to persons who are absolucly deaf and dumb

The fact that a person of high position has renounced the world and become a Sansasi neglecting worldly affairs would not of itself justify the Court in holding that by reason of unsoundness of mind and mental infirmity he is incarable of protecting his interests willing the meaning of this Rule But a persistent delusion of being haunted by demons of persecution by innormary to ces and religious magalominia which makes him regard himself as destined to be in some sort a saviour of the world are symptoms which would justify the conclus on that the person is suffering from delusional institute and incapable of managing his own affairs 3

## 3 Persons adjudged to be of unsound mind

A person can be adjudged to be of unsound mind under the provisions of the Lunacy Act IV of 1912 For cases under the Lunacy Act and evidence relating to lunacy see the following cases 1

Order 32 Rule 15-Note 1	3 (19 ) 19 I C 1°3 (1 6 1 ) (I C
1 (1919) 1919 VII 407 (41°) [See al o (18 o) % Sut1 W B C4 (%) Co ts against next friend of a l nate - Precutable personally	Note 3 1 (1896) 90 Form 1 0 (154) (1909) 3 Ind Cas 959 (38) 3 Mad 953 (1896) 90 Form 659 (664)
ga ust the next fr end who can re	(1898) °1 Mad 40 (403) (1898) °3 Cal 595 (591) F I Fr d nee e

Note 2 1 (102 10

2 (19

## 4 Persons of unsound mind not so adjudged

The old section applied only to across of unsound mind adjudged to be so under Act XXXV of 1858 or under any other law for the time come in force. And even so the decisions under the old Code held that the Court had inherent power to appoint a guardien for persons of unsound mind though 1 of so adjudged 1 Now the lexislature has given effect to these decisions a providing also for cases of persons not so adjudged. If the defendant alleges that he is of unsound mind and the plaintiff denies it the Court must hold a judical enquity and come to a finding as to whether he is incanable I protecting his oun interests? It is only when the Court on moury finds that the defendant by reason of unsoundness of mind or mental infirmity, is the mable of procedure his in crests that it is necessary to appoint a guardian ad litem 24 Thus where a defendant alleged to be a lunate dies before the i sue of process, it cannot be said that the suit was not validly instituted against the deceased on account of the fact that no guardian was appointed ab A finding in the lunicy proceedings that a person is not of unsound mind and pregrable of managing his affairs does not preclude a finding under the present rule that the same person is by reason of mental infirmity incapable of preference 1 s interests in the suit 3

guirlat under Act NNN of

1 Or 1 Coll Jurilly [HT to H9] Lunatic a diffued in S. H. (te N.N.) of 1.5 Instanding Indianosprotes manifer ones own affires both roded. Tatter without former— Here Iyis only under S. G. U(d) of Vel N. J. 1873. the Corried Ward

(18 if 24 Such W R 124 (124) Unsoundness f mind rot sufficient

(18"2) 15 buth W.R. 26 (920) Clear grounds for supposing unsoundness of mind i ed. 1 before i sung notice under 4 50 (1858)

167 + 76 Suth W P 45 (55 56) Paguiry neel 1

1- 4: 12 Sull, W. 1. 23 (3.) Sufficience of viden c. is to lunicy - Requires arcful consideration

(186 4 M 13 J (162 163) High Court of Allahatad his no original presidetion (1901) 24 M (d =01 (508)

(190) 190; UBRC:: 1 ro 30 |But sco (1889) 13 Hom 6.6 (6.9

(1683) 6 N td 280 (381)

(1687) 1887 Pun Re No 91, page 198 (1896) 1896 Pun Re No 13 page 39 [See at 0(1890) 14 Mad 250 (707 293) Lunate's 1 roperty under Court of

adjudged lunatio - Suit by next friend untenable]

2 (1922) 1922 Cal 86 (86 87) (1933) 1933 All 149 (151)

(1935) 1935 Cil 224 (221) Unsoundness of mind alone is not sufficient—He should be incapible of protecting his interest by reason of such unsound ness—Where the neess it w for in jury arises in appeal the inquiry should be held by the amplitic

Court (1921) 62 Ind Crs 770 (771) (Cal) (1839) 23 Bom 6-3 lo56)

(19%) 1926 All 212 (214) 48 All 3.6 (See also (1865) - Suth W R Mia 7

(7) Defendant not appearing and illeged insune—Court not to strike off the case but to make enquiry as to insunity under let XXXI of 18,8

2a (1934) 1931 Cal 833 (833) 2b (1934) 1934 Cal 833 (833) 3 (1929) 1928 All 109 (109 110) 50 All 335

### Note 4

1 (18.7) 20 011 2 (4) (1829) 15 10m 193 (191) (1895) 19 1 0m 193 (191) (1897) 17 C<sub>3</sub> (110) (1096 1094) (1831) 7 C<sub>3</sub> (213 (214) (190), 190) 1 ton 16 No. 31 page 117 (190), 190) 3 L B II: 100 (172) (1900) 2 Jpd C<sub>3</sub> S 18 (419) (Call (1871) 154 (15 toth W. R. 28 (279)

#### 5. Appointment of next friend or guardian for persons of unsound mind

As already seen, the Court is bound to appoint a next friend or guardian in the case of persons of unsound mind. If he is not represented by a guardian in the suit, the decree will be null and void 2 See also Note 5 to R 3 Where a manager of the property of the lunatic has been appointed under the Lunacy Act such person ought to be appointed as the next friend or guardian ad litem in the suit 2 See also R 4, sub-R (2)

### 6 Decree against lunatic not represented, if can be challenged in execution proceedings

As already seen in Note 5 to R 3, having regard to the decision of their Lordships of the Judicial Committee in Rashid-un-nissa v Muhammad Ismail [(1909) ILR 31 All 572 (P C)] an objection as to want of proper representation is not one falling under \$ 47 of the Code and cannot be raised in execution proceedings masmuch as the person not represented cannot be deemed to be a party to the suit 1

## 7 Revision

In the undermentioned cases the High Court of Allahabad interfered under its inherent powers and ordered a stay of proceedings in the suit, pending decision in the lunacy proceedings against the defendant under the Lunacy Act

R. 16. [S 464] Nothing in this Order shall apply to a Sovereign Prince or Ruling Chief suing or Saing for Princes being sued in the name of his State, or being and Chiefs sued by direction of the Governor-General in

Council or a Local Government in the name of an agent or in any other name, or shall be construed to affect or in any way derogate from the provisions of any local law for the time being in force relating to suits by or against minors or by or against lunatics or other persons of unsound mind

[1877-S 464 See Ss 85 to 87]

Synopsis Scope of the Rule Note No 1

Note 5 1 (1917) 1917 Mad 616 (619) (1915) 1915 Cal 19 (20) (1931) 1981 Cal 168 (169)

[but see (1914) 1914 L B 141 (141)] 2 (1809) 23 Bem 403 (405, 406)

(1806) 23 Cal 512 (514) ~ (P 0)

can so act - Award good if insine only after award was substantially finished - Alienations by manager f foog (1874) 22 Suth W R 200 (201) Lunatic

under Court of Wards -- Court of Wards can sug as next friend only during his lifetime - After his death, Court of Wards has no right to sue, but legal representatives of the de

ceased lunatic alone can sue Note 6

1 (1917) 1917 Cal 814 (817) 41 Cal 627 (1917) 1917 Pat 140 (141) Note 7 1 (1996) 1936 ATI OLD (OLD) 40 ATI 150

5 (6 7 minager of Court of Wards - Act as next friend but only the manager

O 3

### Other Topics

Bengal Court of Wards let Se Note 1 Ruling Prince-Not domicaled in I ratish Pt (2) al o R 7 Note 9 Pt (1) India-Minority See Note 1 Pt (1)

### 1 Scope of the Rule

A Ruling Prince not domiciled in British India is not governed by the Indian Majority Act and therefore, is not a minor for the purpose of O 32 even though he may be under 18 years of age. He can act through his manager under S 85 of the Code 1 For cases under the Bengal Court of Wards Act (1X of 1879) see the following decisions 2

### Local Amendment

### MADRAS

I

All the following as R 17 -

17 In suits relating to the person or property of a manor or other person under the sucrintendence of the Court of Wards the Court in fixing the day for the defendant to appear and insmer shall allow not less than two months time Letween the date of summon- and the date for appearance

## ORDER XXXIII

#### SLITS BY PALPERS

R. 1. [S 401] Subject to the following O 3 Suits may be sn mousions, any suit may be instituted2 by a sti'utel formı pauperia nanner

Explanation -A person 10 is a "pauper" when he is not possessed of sufficient means' to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed.4 when he is not entitled to property worth one hund ied tupees other than his necessary wearing apparel7 and the subject matter of the suit 6

[1877-5 401; 1859-S 297]

### Local Amendment

#### BOMBAY

The following sentence shall be added to the Explanation namely --In determining whether he is possessed of sufficent means the subject matter of the suit shall be excluded

## Sjnopsis

Note No Note No considered in deciding sufficient Suits by paupers Suit may be instituted by a pauper 2 means Necessary wearing apparel Is not possessed of sufficient means 3 Minor plaintiff Where no such fee is prescribed -See Pauper defendant 4 note 3 above Person -meaning of 10 5 When he is not entitled to property Suit by executor administrator or Subject matter of the suit of can be legal representative of pauper 11

Order 32 Rule 16-Note 1

(1925) 1975 Cal 513 (514) 2 (18 9) 17 Cal (39 (GJ3) 17 Ind tap 5 (P C) Case under Bengal Court of Wards

1ct 1\ of 18 9 (1919) 1918 C il 833 (810) 41 Cal 829 (Do) (1891) 18 Cal 500 (501) (Do)

7

9

(1683) 16 Cal 83 (91 95) (Do)

Note No Suit by a rofficial I quidator or official receiver Suit by mutwall; trustee or shebait Married woman

Note No Leave to sue in forma pauperis for removal of trustees Award of costs and order for security for costs against pauper 16

Otl er Topics

13

14

Continuing a su t as a painer See Note ? Pt (1)

#### 1 Suit by Paupers

The State derives a revenue from Court fee stamps and a plaintiff suing in Courts is under the Court Tees Act 1870 bound to pay the Court fee prescribed at the time of filing the plaint. But in view of the fact that there may be persons who by reason of their poverty, are unable to pay the fee provisions have been enacted in this Order exempting such persons from paying in the first instance the Court fee prescribed and allowing them to prosecute their suits in forma pauperis 1 But if such pauper succeeds in the suit the Government can recover the amount of Court fee as a first charge from our of the subject matter of the suit (See R 10) And even if the plaintiff fails in the suit the Court should order him under R 11 infra to pay the Court fees due by him

The executor of a deceased person is entitled to obtain a probate in forma pauperis though the pention for grant of probate is not a suit in the ordinary sense unless careat is entered?

The provisions of this order are not applicable to proceedings under the Agra Tenancy Act (III of 1926) and the Madrus Estates Land Act (I of 1908)

### 2 Suit may be instituted by a pauper

It is competent to the Court to allow a suit not originally instituted in forma pauperis to be continued in forma pauperis 1 The substitution of the word instituted in this rule in place of the word brought in S 401 of the old Code has not made any change in the law in this respect "

## Is not possessed of sufficient means

The explanation to this rule furnishes two different tests to determine the nauperism of a person1 --

(1) Where a fee is prescribed by law for the plaint in a suit a person who is not possessed of sufficient means to enable him to pay such fee is a pauper for the purposes of that sunt la

Order 33 Rule 1-Note 1

1 (1893) °0 Cal 111 (115) ° (1893) 15 Bom °3 (°3J)

Note 2 1 (16 7) 9 Cal 130 (1"1) (189 ) 90 Cul 319

( 91) 1931) 1931 Cal 2 (5) 60 Cal 52 1932 Cal

690 d at gt shed 1133 Wal 498 (199) Application to

nt nue as a purper made within ne er telfr pa ment of lefeit cou t fee (1) 7 1 7 ( (0 g)

30 (69 ) No provis on exists for subsequent

pruperi m (obiler)] 9 (1909) 1934 NE 1 198 (198)

1 (1914) 1914 Cal 53 (537) 13 (See also (1934) 1931 Nag 101 (10a) I ist excelessuess is irrelevant for considering present powerty]

 $\mathbf{O}$ 

Thus where a claim requires a Court-fee of Rs 1.775 and the applicant is possessed of means to the extent of Rs 1,600, only. he is a pauper for the purposes of that suit 2

(2) Where no such fee is prescribed a person who is not entitled to property worth one hundred rupees other than his necessary nearing apparel and the subject matter of the suit, is a pauper for the purposes of that suit 32

A person may be entitled to property but may nevertheless be not possessed of sufficient means to pay the Court-fee. It cannot therefore, be assumed that everyone who is cutified to property is possessed of means to the value of that property 4 Where though a person is entitled to property, yet if it is out of his reach and is thus not a realisable asset or convertible into cash, it cannot be said that he is possessed of sufficient means to pay the Cour-fee 5 Thus a mere turding that the applicant is jointly interested in a property with another but over which he has no dominion, would only show that he is entitled to property but not that he is possessed of means 6

The word means is according to the High Court of Lahore intended to cover and include all forms of realisable assets, which can be converted into cash and as such can be used for bn ancing the langation? Thus according to that Court, it would include an interest in a decrees or a mortgages in favour of the petitioner The High Court of Calcutta has on the other hand held that a debt which is due from a third person cannot be said to be means of which the applicant is possessed, and that the words is not possessed of must mean that the applicant has no actual control over it 10 Where the pentioner is possessed of some property which is not cash the test according to the High Court of Madras to decide whether he is a pauper, is not whether in the abstract he has the nower of raising money but whether in the concrete circumstances of the case he can succeed in raising anything substant at by exercising that power 10a

According to the Judicial Commissioner's Court of Nagpur a person owning a non-transferable occupancy right which is not capable of conversion

2 (1906) 8 Bom L R 642 (644) 3 For some such suits see S 19 of the Court

fees Act 1870 31 (1924) 1924 Pat 27 (32) 2 Pat 879 (Sec also (1933) 1933 Vid 679 (679) Suit for redemption-Equity of te

demption is suited maiter of suit within R 1-It should be excluded in determining whether plaintiff pauler] 4 (1929) 1923 Nag 311 (321) 26 Nag L R 115

5 (1928) 1928 Lab 271 (271) (1933) 1933 Lah 523 (528) Fquits of re demption is not asset when mo is can of lar ada

6 1

jointly belonging to her and her husband-She cannot le sud to le possessed of any definite share in the house

C P C 293 & 294

[See however (1925) 1975 All 517 (517) 47 All 872 Where a minor son ol a member of joint Hindu family suce to set acide in chemition by the lather and where there is chare which had not been transferred at the time of the suit the minor can not sue as a pauper

(Sec (1934) 1934 All 396 (397) Share 10 most family property may amount

to means]

7 (1998) 1995 Lih 271 (271) 5 (1928) 1929 Lab 271 (271) 9 (1929) 1379 Lah 871 (877) 10 (1927) 1927 Cal 300 (310)

10: (1933) 1933 Mid 893 (994) Hindu widow in possession of her husband a pro perty applying for leave to sue as a pauper-Court should take into consideration the fact that she will neither be able to borrow money

nor sell the property (1931) 1931 Vad 561 (561) Petitioner having

Note No Suit by an official liquidator or official receiver Suit by mutwalli trustee or shebait Married woman

Note No Leave to sue in forma pauperis for removal of trustees Award of costs and order for security for costs against pauper 16

14 Otl er Tomes

12

13

Continuing a sut is a pruper See Note ? Pt (1)

### 1 Suit by Paupers

2336

The State derives a revenue from Court fee stamps and a pla ntiff stung in Courts is under the Court Pees Act, 1870 bound to pay the Court-fee prescribed at the time of filing the plaint. But in view of the fact that there may be persons who, by reason of their poverty, are unable to pay the fee provisions have been enacted in this Order exempting such persons from paying in the first instance the Court fee prescribed and allowing them to prosecute their suits in forma pauperis 1 But if such pauper succeeds in the suit, the Government can recover the amount of Court-fee as a first charge from out of the subject-matter of the suit (See R 10) And even if the plaintiff fails in the suit the Court should order him under R 11 unira to pay the Court fees due by him

The executor of a deceased person is entitled to obtain a probate in forma pauperis though the petition for grant of probate is not a stift in the ordinary sense unless carcat is entered 2

The provisions of this order are not applicable to proceedings under the Agra Tenancy Act (III of 1926) and the Madras Estates Land Act (I of 1908)

2 Suit may be instituted by a pauper

It is competent to the Court to allow a suit not originally instituted in forma pauperis to be continued in forma pauperis 1 The substitution of the word instituted in this rule in place of the word brought in S 401 of the old Code has not made any change in the law in this respect

## Is not possessed of sufficient means

The explanation to this rule furnishes two different tests to determine the pauperism of a person1 -

> (1) Where a fee is prescribed by law for the plaint in a suit a person who is not possessed of sufficient means to enable him to pay such fee is a pauper for the purposes of that suit 12

Order 33 Rule 1-Note 1 1 (1893) 90 Cal 111 (115) 9 (1993) 15 Bom 937 (23J)

1 (15 7) 9 Cal 130 (131) (189 ) 90 Cal 319

(1931) 1934 Cal 2 (75) 60 Cal 85" 1937 Cal 685 dist ugus bel 1 1333 Mal 498 (499) Application to

nt n e as a pruper made within cortife (19 Ċi 9731

(1894) 8 Bom 61, (610) (1929) 1929 Mad 8 8 (609) 53 Mad 43 (1920) 1920 Mad 930 (231) Assumed But see (1939) 1939 Cal 685 (681) To provision exists for sub cluent

9 (19a3) 19 3 Mal 198 (198)

1 (1911) 1914 Cal 53" (537) In [See also (1931) 1934 Nag 104 (100) Past carelessness as arrelevant for considering p chent poverty]

0

Thus where a claim requires a Court-fee of Rs 1,775 and the applicant is possessed of means to the extent of Rs 1,600, only, he is a payer for the purposes of that suit 2

(2) Where no such fee is prescribed a person who is not entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject-matter of the suit is a pauper for the purposes of that suit 33.

A person may be entitled to property but may nevertheless be not possessed of sufficient uneans to pay the Court fee. It cannot therefore be assumed that everyone who is entitled to property, is passessed of means to the value of that property. Where though a person is entitled to property, yet if it is out of his reach and is thus not a realisable asset or convertible into eash it cannot be said that he is possessed of sufficient means to pay the Cour-fee. Thus a mere finding, that the applicant is jointly interested in a property with another but over which he has no domination would only show that he is entitled to property but not that he is possessed of means.

The word means is according to the High Court of Lahore intended to cover and include all forms of realisable assets which can be converted united and an advantage of the humaning the lugation? Thus according to that Court it would include an interest in a decrees or a mortgages in favour of the petitioner. The High Court of Calciuta has on the other hand held that a debt which is due from a third person cannot be said to be means of which the applicant is possessed, and that the words is not possessed of mist mean that the applicant has no actual control over it is Where the petitioner is possessed of some property which is not cash the test according to the High Court of Madras to decide whether he is a pauper is not whether in the abstract he has the poner of raising mone; but whether in the concrete circumstances of the case he can succeed in raising anything substant all by exercisnig that nower <sup>104</sup>

According to the Judicial Commissioner's Court of Nagpur a person owning a non transferable occupancy right which is not capable of conversion

2 (1906) 5 Bom L R 642 (644) 3 For some such suits see S 19 of the Lourt

fees Act 1870 3a (1924) 1924 Pat 27 (32) 2 Pat 879

T.

[See the (1933) 1333 Vad 679 (679) Suit for redemption Equity of redempt on is subject matter of suit with n R 1—It should be excluded in determining whether plaintiff is pauper]

4 (1929) 1923 N 1g 319 (371) 26 N 1g, L R 115

5 (1928) 1978 Lah 71 (271) (1933) 1933 Lah 578 (578) Fquits of redemition is not a set when mones

cannot le 111sed ou it 6 (1928) 1928 Nag 94 (27)

(1930) 1930 Rain, 324 (323) I uriness I ud dhist wife aiplying to sue as a pru per-ler only projects a louse jointly telonging to her and her husbrid—The cumot be suid to le possessed of my definite share in the house

C P C 293 4 294

[See however (1925) 1995 All 547 (547) 47 All 872 Where a minor son of a member of joint lineau family sues to set aude an ulternation by the father and where there is share which hid not been transferred at the time of the suit the minor can not sue as a pupper] [See (1934) 1934 All 395 (397) Share

not sue as a pauper] [See (1934) 1934 All 395 (397) Share in joint family properly may amount to means]

perts applying for leave to sue as a pauper—Lourt should take into consideration the fact that she will neither be able to borrow money

nor sell the property (1934) 1931 Wad 561 (561) Petitioner having into money cannot be considered to be 'possessed of means" for the purposes
of this rule,

Where the applicant himself is proved to be a pauper he is entitled to the benefit of the Rule and the fact that he has co heirs or relations who are men of means is immaterial iz

The burden of proving that a person is a pauper within the meaning of the explanation lies on the applicant is

- 4 "Where no such fee is prescribed "-See Note 3 above
- 5 When he is not entitled to property -See Note 3 above

It has been held by the Judical Commissioner's Court of Nagpur, that interest of the tenant of a non-transferable occupancy holding is not 'property' but is more in the nature of an expectant claim under an inchoate right i

6 Subject matter of the suit, if can be considered in deciding sufficient means

The words 'other than his necessary wearing apparel or the subjectmatter of the suit" do not qualify the first part of the explanation, but apply only to cases where no specific Court-fee as prescribed 1 But this does not mean that in dealing with the first part of the explanation the subject-matter has always to be taken into consideration? The subject-matter of the suit may, in some cases, be in the possession of the petitioner and in some cases not. In the former class of cases it canno be excluded from consideration merely on the ground that it forms the subject-matter of the suit 3 Thus where A files a suit for certain ornaments in the possession of B and obtains a decree and B applies for leave to appeal in forma pauperis, the ornaments in her possession will have to be taken into account in determining whether she has sufficient means to pay the Court-fee on the memorandum of appeal 4 In the latter class of cases the subject-matter of the suit cannot be taken into consideration. The reason is that the word 'possession' sufficiently indicates that any amount which forms the subject-matter of the suit and is not in the actual possession of the petitioner, cannot be taken into account for the purpose of determining his means 5

a mortgage in his favour on which he had swed—Held to be a puper (1931) 1931 Mad 562 (662) Peritioner a properties heavily encumbered by mortgages—Court should consider whether he can raiso money on

11 (1925) 1925 Nag 438 (439, 440) 21 \ng L R

1 (1925) 1925 Nag 438 (139, 410) 21 Nag L R

Note 8
1 (1906) 80 Bom 593 (507)
(1934) 1934 4H 923 (321)
(1933) 1933 Pat 203 (204)
(1924) 1924 Nag 105 (108)
(1927) 1926 Nag 273 (278)
(1926) 1926 Wad5 67 (508)

(1930) 1930 Cal 147 (149) 57 Cal 950 [But see (1977) 1927 Cal 309 (310) Ornaments in petitioner s possession were treated as being in the natura

....

2 (1930) 1930 Cal 147 (149, 150) 57 Cal 950 3 (1929) 1929 Ang 319 (371) 26 Nig L R 115, (1931) 1934 An 373 (321)

(1931) 1931 All 3º3 (321) (1933) 1933 Pat 203 (201)

(1910) 8 Ind Crs 484 (481) 33 411 297 Chum for redemption of mortgrgc-Applicant able to ruse money upon security of equity of redemption is

not a pauper [But see (1882) 1882 Pun Re No 99

page 291 ]
4 (1929) 1929 Nag 319 (321) 26 Nag L R 115
5 (1930) 1930 Cal 117 (149 150) 57 Cal 980
(1934) 1934 Mad 653 (653)

Now suppose that in unsuer to an application by a plaintiff to sue as a pauper, the detendant admits a part of the hability and produces or offers to produce into Court the property or the amount in discharge of such hability. can it be considered in determining whether the plaintiff is a pauper or not? The High Courts of Bombays and Calcutta have held that in such a case the time when the application for leave to sue as a pauper, is made is the point of time which the Court has to consider in determining whether the oc in her is a rauge. The High Court of Widras has on the other hand held that f at the time of the hearing of the application he has become possessed of afficient means the Court has no jurisdiction to grant him leave to sue as pauper a It has also been held by that High Court in the undermentioned cases that where the plaintiff gets a decree in the lower Court, but wants to appeal as a pauper for a higher amount the amount deposited in Court by the judgment debtor to the credit of the plaintiff in pursuance of the decree should b taken into consideration in determining whether he should be allowed to appeal as a pauper

#### 7 Necessary wearing apparel

According to the High Court of Calcutta ornaments which a woman ordinarily wears should be regarded as being in the nature of wearing apparent The High Court of Lahore appears to dissent from the above view 2

### 8 Minor plaintiff

Where an application is filed on behalf of a minor for leave to sue in forma pauperis the circumstances of the next friend should not be considered, the fact that the next friend is possessed of sufficient means will not disentule a minor plaintiff from sung in forma pauperis. Nor will the fact that such next friend is himself a pauper disentitle him from sung on behalf of the minor in forma rauperis?

### 9 Pauper defendant

It has been held by the High Court of Calcutta in the undermentioned cases that a defendant may, under the inherent powers of the Court, be allowed to defend a suit in *Jorma paupers*, although there is no provision to that effect in the Code But the Chief Court of Punjab has taken a contrary tieve: The High Court of Rangoon also has taken a view contrary to that

(1873) 3 Mad 249 (250) I erson who applies for permission to sue as a pringer is not bound to try and raise funds by mortgaging his clum (1892) 189' All W. N. II. (12) (Do)

(1)74) 1971 Nag 44 (46) 19 Nag L R 165 In a suit to redeem a morigage of property of which the plannell is not in possession the right to redeem the property is the subject matter of the suit

- 7 (19°0) 1930 Cul 147 (149 150) 57 Cal 960
- 6 (1921) 1921 Mad 97 (95)
- 9 (19\_6) 1926 Mad 567 (565)

- Note 7 1 (1927) 13°7 Cal 309 (310)
- 2 (1925) 1978 Lah 971 (271) Note 8
- 1 (1881) 3 Mad 3 (4) (1924) 1924 Bom 440 (441) (1993) 1993 Cal 656 (656)
- (19°3) 19°3 Cal 6:0 (656) (19°9) 1929 Lab 746 (747) (19°0) 1920 Cal 99. (995)

[But see (1933) 1933 Sind 82 (84) % Sind L R 491 Verns of next friend considered and minor s petition for leave refused Revision disallowed ]

- 2 (187s) 11 Beng L R 373 (374) Note 9
- 1 (1890) 5 Cul 819 (570)
- (190a) 83 Cal 927 (932) (1919) 18 Ind Cas 207 (208) 40 Cal 955
- 2 (1905) 1905 Pun Re No 51 page 189

of the Calcutta High Court It has further held that, in any case, the Court has no inherent power to allow a party to prosecute in *forma pauperts* an application for review of an order passed in appeal 3

## 10 "Person' -- Meaning of

The word person occurring in the explanation to this rule has not been defined in this Code. According to the definition given in the General Clauses Act (V of 1897) it includes not only individual human beings but also companies or associations or bodies of individuals whether incorporated or not. It has, therefore, been held by the High Court of Madras that the word person indicates a juridical person. But the High Court of Rangoon has however, held that it means a natural nerson that is a human being and that it does not include a juridical person. Even according to this view a firm can be considered to be a person. Thus, where a firm brings a suit for damages and afterwards becomes insolvent and the Official Assignee refuses to prosecute the suit and the suit is dismissed, the firm can be granted leave to appeal as a pauper.

# 11 Suit by executor administrator or legal representative of

The High Court of Madras has held that an executor or an administrator or the legal representative of a deciased person is entitled to institute or maintain or continue a suit in forma painers in his representative cypicity, provided he has not come into possession of sufficient means out of the estate of the deceased 1 it proceeds on the view that the plantiff in his private capacity and in the capacity of the representative are two different persons in the eye of the law. The High Courts of Bombay and Calciutta and the Judicial Commissioner's Court of Nagpur have taken a contrary view that he could not do so, unless and until it was shown that he himself is a pruper. The above view is based on the ground that the provisions of this Code seem to negative the idea of anybody but an actual pauper, a real pauper, a man without means being permitted to maintain a suit in forma pauperis. The decisions of the High Court of Lubore are conflicting 3

See also Note 10 to O 22, R 1 and the undermentioned case 4

## 12 Suit by an Official Liquidator or Official Receiver

Applying the definition of the word 'person as mentioned in Note 10, ante, the High Court of Madras has held that the Official Liquidator of a company, though not a pauper hunself, may file a suit in forma paupers on

- 1 (1925) 1925 Vad 76a (766)
- 2 (1930) 1930 Rang 249 (267 263 264)
- 3 (1930) 1930 Rung 272 (272)
- Note 11
- 1 (1925) 1978 Mad 66 (67 fb) (1925) 1925 Mad 765 (766 777)
  - (1984) 7 Mad 700 (301) (See al (1805) 3 Suth W R Mis (Rt 1 0120) 1 (See al (1805) 3 Suth W R Mis (Rt 1 0120) 1 (See al (1805) 3 Suth W R Mis (But 1 181) 1938 Mad 883 (685) 1 (But see (1955) 1925 Mad 819 (819) 1
- 2 (1911) 36 Lom 279 (291 282) (1933) 1933 Nng 331 (335)
- [See also (1894) IS bom 237 (239)]
  (1906) 33 Cul 1163 (1163)
  8 (1930) 1930 Luh 735 (736) Can sue as a
  - (1927) 1927 Lah 665 (665) Cannot continue
- (1927) 1927 Lah 665 (C65) Cannot continue suit as a puper 4 (1903) 25 All 137 (134) Decree in favour of
- puper in ignorance of his deathAppeal by defendant against legal
  repre entature—Remand and decree
  on retrial—Defendant cannot object
  that pluntiff is not entitled to sue
  as a rouper

<sup>3 (1930) 1930</sup> Rung 980 (281) 8 Rung 423 Note 10

behalf of a pauper company 1 The High Court of Allahabad has applied the same principle to the case of an Official Receiver of the estate of an insolvent A contrary view has been taken by the High Court of Rangoon that the word person in this Rule does not include a juriducal person such as a receiver 3 Seculso Note 10, antel 1t is submitted that this view of the High Court of Rangoon is not correct.

#### 13 Suit by Mutawalli trustee or Shebait

As his already been observed in Note 11, ante, the chiracter of a person sung n a representative character must be kept distinct from his personal catacity. Thus when a plaintiff sues in a representative character, for example as a multan illi trustee or a shebait unless he is in possession of property belonging to the unit estimate or trust or the idol for whom he sues, sufficient to enable him to profit the Court fee he may be allowed to sue as a pauper, even if it is shown the hos sufficient personal property of his own i

Where a shebait brought a suit for recovery of endowed property against one who claimed to be the ahence of their property and against three of his co-chebaits who purported to have alternated it and the planning did not either in his personal capacity or in the capacity of a shebait possess sufficient means to pay the Cours-fee it was held that the mere fact that the shebait-defendants possessed sufficient proper its belonging to the idol, did not discintile him from suing as a pauper?

#### 14 Married woman

The fact that the applicant's husband has got sufficient property to pay the Court-fees due on her glaint is not a ground for refusing the application of a pauper married woman for permission to sue as a pauper i

## 15 Leave to sue in forma pauperis for removal of trustees

S 402 of the old Code imposed certain restrictions on the right to sue as a pauper. It was held under that section that it did not preclude a person, who had obtained leave to sue under S 18 of the Religious Endowments Act (XX of 1863) for the removal of the trustees of a temple, from being permitted to sue in *Jorna pauperis*: The said section has now been omitted in this Code.

## 16 Award of costs and order for security for costs against pauper

It has been held by the High Court of Bombry that the Court cannot pass an order for costs against the purper in interlocutory applications in the suit i The High Court of Rangoon has, on the other hand, held that the Court has power to pass an order for costs against the pauper in such cases 2

A woman who has been permitted to sue as a purper cannot be asked to furnish security for cos s under O 25, R 13 The reason is that it would render nugatory the order permitting her to sue as a pauper.

Note 15

Note 12 1 (1918) 1918 Wad 362 (903) 41 Wed 624

<sup>2 (1918) 1918 411 17 (177)</sup> 3 (1930) 1950 Rang 259 (261 263) Note 13

<sup>1 (1927) 1927</sup> Cal 309 (310) (1934) 1934 Pat 331 (531)

<sup>2 (1911) 11</sup> Ind Cas 892 (537) (Cul) Note 14

Note 14 1 (1916) 1918 Pat 329 (329) 3 Pat L Jour 178

<sup>1 (1901) 24</sup> Ved 419 (421)

<sup>1 (1701) 24</sup> VIII 417 (4:

<sup>1 (1922) 1972</sup> Born 28a (38a) 47 Born 101 Ap

plication for amendment of plaint 2 (1928) 1998 Rang 306 (307) 6 Rang 561

Costs of adjournment

<sup>3 (1917) 1917</sup> L E 163 (164) 8 L B R 387

An order for security for costs passed in a suit ceases to operate as regards the antecedent costs, if leave is given to continue the suit as a pauper. before the period for furnishing the security has expired 4

See also Note 10 to O 25, R 1

R. 2. [S 403] Every application for permission to sue as a pauper shall contain the particulars required in regard to plaints in suits: a schedule of any moveable or immoveable property belonging to the applicant, with the estimated value thereof, shall be annexed thereto; and it shall be signed and verified in the manner prescribed tor the signing and vorification of pleadings

[1877—S 403, 1859—Ss 299, 300]

Sunonsis

Note No Contents of Application Verification Cause of Action-See Notes to R 5

2342

Death of Applicant See O 72 R 1 Note 10

1 Contents of application

Application for leave to sue in forma pauperis should set forth with the utmost good faith a schedule of all the moveable and ammoveable property belonging to the applicant, with the estimated value thereof i Where the applicant fails to do so the application is not properly framed and is liable to be rejected under Cl (a) of R 5 unfra 2 It does not however follow that this rule is to be meticulously interpreted against the petitioner. The Code is not designed as a trap which a litigant must try to avoid by all means in his power's The object of the rule being to help the Government in ascertaining whether the applicant is in a position to pay the Court-fee payable on the plaint, the Court should not throw out the application unless the omission was an act of bad faith 4 Thus the application should not be rejected merely on the ground that an item of property has been omitted to be given in the schedules or that the schedule has not been signed and verified by the applicant or that the applicant was unable to name all the persons in

1 (1930) 1930 Pat 308 (369) [See also (1934) 1934 VII 396 (JC) Share which a minor has in joint family property mu t le mentioned is it may amount to means within

the meaning of Rule 1)
2 (1930) 1330 1 at 363 (369) (1923) 1925 Ot dh 118 (119)

(1 108) 11 Oudh Cas 19 (20) Following 1993

(1 113) 0 Ind (2 610 (611) 7 L 1 R 60 lo (1331) 1931 Cd 63? (C33)

111 to to sue in forma pameris

1 pirtly under Fital &

1 to td 1 rtly under other 1 11h ation although de

fective so far as clima under Fatil Accidents let is concerned but in

form as to claim under other lets should be allowed] S (1992) 1933 Lah 328 (32) 3 0) 4 (1932) 1J3 Pit 203 (309)

5 (1915) 1910 Mad (57 (603) (18-7) 1-9" I an Re No \_7, 1700 59 (1331) 1934 Cal (10 (141) 6 (1932) 1932 Lah 548 (519) There is no

of allowing amer discrete may be an 11 ed to all heation to sue in ferma pangeris (1933) 1933 All 295 (297) 55 All 216

<sup>4 (1911) 12</sup> Ind Cas 539 (539) 37 Iom 115 Order 33 Rule 2—Note 1

possession of the property left by the deceased in an administration suit to the proper course in such cases will be to return the application for amendment, and on such amendment being made the presentation will be deemed to be a proper presentation as from the date of the original presentation 74

Where a plaint is filed with a stamp duty and registered as a suit and its subsequently found that additional Courr-fee is required and the plaintiff thereupon applies to continue the suit in forma pauperis, the fact that the application is not in the form prescribed by this rule will not necessarily entail the dismissal of the application is

### 2 Verification

ĭ.

Where the venheation of the statements made in the application is not made in accordance with the provisions of O VI, R 15, the Court is bound to reject the applicanto under R 5 infra 1 But where the applicant did not verify the contents of the petition at the foot of the petition, but did so by a separate affidavit in which the statements contained in the several paragraphs in the application were said to be true it was held that the affidavit might be treated as part of the application 2 The schedule of property need not, however, be signed and verified by the applicant and in any case, the omission to do so will not, as has been seen in Note 1 above, entail the rejection of the application

- 3 Cause of action See Notes to R 5
- 4 Death of applicant -Sec O 22, R 1, Note 10

R. 3. [S. 404] Notwithstanding anything contained in these Rules, the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court, in which who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person.

(1877-S 404: 1859-S, 301.)

Synopsis

Presentation to Court Note No
Presentation by applicant in person 2
Purdanathin woman Stationary Station See Note, to R 7 in/ra
Limitation See Note, to R 7 in/ra

but indvertently — Amendment should be illowed] (1928) 1938 Pat 25 (29)

9 (1929) 1929 Mad 528 (829) 53 Mad 48 Note 2 1 (1912) 16 Ind Cas 83 (80) · 6 L B R 117 2 (1923) 1923 Lah 684 (684) ( L L R 117 to

(1932) 1932, Put 308 (209)
7a (1931) 1931 Loin 47 (50) Application in time
- Verification and Signature after

hmitstian

## 1 Presentation to Court

The insistence in the Rule is on the words 'in person and not on the words to the Court as meaning to the judge lumself 1 Therefore where the application is presented to the Sheristadar of the Court or to an officer of the Court who places it before the judge and the petitioner appears before the judge, the presentation will be valid 3

2 Presentation by applicant in person

This Rule as mandatory as regards the requirement as to the presentation in person, and a Court is bound to reject under R 5 an application for leave to sue as a pauper, if it is not presented by the applicant in person, except in cases where he is exempted from appearing in Court 1 Where one only out of several applicants presents the application in person, the Court should reject the application as against those persons who have not joined in presenting it in person 2 Where, however the law by reason of the fact that personal appearance in Courts is impossible either by reason of the party being a company or an infant, or a lunatic allows an appearance by somebody else, an appearance by such person would be sufficient compliance with the law a

The provisions of this Rule as regards presentation in person do not apply to a case where a plaint, returned by one Court is presented to another Court or where a plantiff is allowed to continue his suit as a pauper 5 or where the application for leave to sue as a puper is returned for amendment and the amended application is presented by the applicant's pleader 6

### 3 Purdanashin woman

A woman who is exempted under S 132 from personal appearance in Court e e a Purdanashin lady is entitled to present an application for leave to sue as a pruper through an authorised agent 1

4 Authorised agent

The term authorised agent does not mean the same thing as the expression recognised agent in O 3 R 2 aute 1 A pleader may be a duly authorised agent within the meaning of this Rule 2 But he must be snecially authorised to present an application under this Order and must fulfil the other conditions detailed in this Rule 3

the contrary not followed

Order 33 Rule 3-Note 1

1 (1974) 1974 Mad 901 (907) 48 Wal 785 2 (1974) 1974 Mad 901 (902) 48 Wad 785

8 (1921) 1921 Nag 106 (107) 17 Nag L R 22

#### Note 2

- 1 (186° 6") 4 Fom H C R 91 (91) 2 (1887) 10 Mad 103 (194)
- (1909) 4 Ind Cas 777 (780) 12 Oudh Cas 391
- 381
  3 (1) 181 1918 Mad 862 (303) 41 Mad 674
  (1 10) 1899 1 un Re No 19 page 114
  1 resentation of appeal in forma
  2 a spers b manager appointed un
  let \$(t \lambda \lambda 0 1855 is proper
- 4 (1931) 13-1 111 418 (419)

[But see (1903) 1933 Mid W > 197

(1931)

# 111

Note 3

1 (1902) 21 All 172 (178) A case of pauper appeal

(1899) 1899 Pun Rc No 19 page 114 Katri woman is exempt from personal ap-

резтапсе (1979) 1329 Pit 27 (29) 7 Pit 875

Note 4

Ordinary

- 5 Presentation of pauper appeals See Notes to O 44 R 1
- 6 Limitation Sec Notes to R 7 infia
- R. 4. [S 406] (1) Where the application is in proper form and duly presented the Court may, if it thinks in examine the applicant, or his agent when the applicant is allowed to appear by agent, regarding the nieuts of the claim and the projects of the

If presented by agent Court may order applicant to be examined by com mission

aj plicant

I.

(2) Where the application is presented by an agent the Court may, if it thinks fit order that the applicant be examined by a commission in the manner in which the examination of an absent writies may be taken

[1577-5 4(6, 1559-55 302 304]

Sanopsis

Scope of the Rule

Note No. 1 Right to cross examine applicant

1 Scope of the Rule

This Rule empowers the Court to examine the applicant when the application is duly presented no only with reference to the question of his patherism, but ilso with reference to the meetis of the claim in order to ascertian whether the allegations in the petition do or do not show a cause of action. An enquiry inder this Rule should be made by the judge himself.

As to whether persons other than the applicant can be examined on the

merits see Notes to Rr 5 and 7 infra

2 Right to cross examine applicant

Where the applicant who seeks permission to sue as a pupper is examined under this Rule, the opposite pirty has a right to cross examine him on the merits of the claim in order to test the statements he makes in his application.

R. 5. [Ss 405, 407] The Court shall be O jet an application for permission to suc as a paymen —

- (a) where it is not framed and presented in the manner presented by Rules 2 and 3, or
  - (b) where the applicant is not a pauper, or
- (c) where he has, within two months next before the presentation of the application, disposed of any property fraudu-

Order 33 Rule 4-Note 1

" (186° C5) I Bom II C R 10° (103) And not by Shastri of the Court

Note 2

i. lently of in order to be able to apply for permission to suc as a pauper, or

(d) where his allegations do not show a cause of action, or

(e) where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter

(1877—Ss. 405, 407; 1859—Ss. 302, 304, Cf. O 7, R 11 1

### Local Amendment

ATTAMADAD

d under clau e (d) merely on barred by any law"

or the following and the applicant, on being required by the Court to make any amendment within a time to be fixed by the Court fails to do so

### Sunovsia

	Note No	1	Note No
Legislative changes	1	Clause (e)	6
Applicability of the Rule	2	Appeal	7
Clause (a)	3	Letters Patent Appeal	8
Clause (b)		Revision	9
Clause (d)	5	Doctrine of Lis Pendens	• 10

### Other Topics

Rule to le strictly construed See Note 2 Shall reject See Note 2 Pt (1)

1 Legislative changes

The clause when his illegitions do not show a cause of action' has been substituted for the clause 'that his allegations do not show a right to see in such Court which occurred in the old section

2 Applicability of the Rule

The Rule provides that an application for permission to sue as a pauper shall be rejected in the events enumerated in the Rule 1 It is restrictive of the right which every languant has to seek the aid of a Court of Justice. and should therefore be interpreted strictly 2

As in the case of an order rejecting a plaint under O 7, R 11, an order of rejection of an application under this Rule must be made on prelimipary grounds, before notice is issued, and before an enquiry is held into the applicant's pauperism 3

3 Clause (a) See Note 1 to R 2 and Note 2 to R 3, supra

Where the application for leave to sue in forma pauperis is framed in the manner prescribed by Rule 2, but is defective in some particulars with regard to the substance of the plaint, it is not obligatory on the Court to reject the application 1 In proper cases the Court has power to allow an application to be amended so as to make it conform to the law 2

Order 33 Rule 5-Note 2

1 (1914) 1914 L lt 86 (43) 9 L P R 93 {1,972} 1 157 M1 487 (183) Cause of action not disclose 1 — Application was re-

2 (189 ) fetel (1879) Let Mahmood J (1933) 1933 Rung 110 (112) 11 Rung 414 3 (1896) 20 Bom 86 (91) Per Ranade, J Note 3

1 (1903) 1933 Rang 410 (412) 11 Rang 414 Dissenting from 1979 Rang 125 [But see (1929) 1929 Ring 128 (129)

7 Rang \$591 2 (1914) 1914 Mad 256 (258)

## 4 Clause (b)

1

The question of the applicant's pauperism has to be decided with reference to the definition given in R 1 The Court in this respect is bound to proceed on the valuation given in the plaint and cannot go into an investigation of the question whether the suit has been overvalued. Nor can it so into the merits of the case when dealing with the question of properism of the applicant a

Where the applicant is found to be a pauper it is not necessary for the Court to Live a funding on the other matters enumerated in the Rule unless it finds that the amplication has to be rejected for any of the other reasons mentioned therein 3

### 5 Clause (d)

The words used in clause (c) of S 407 of the old Code were right The expression was however held not to be limited to questions of jury diction alone but to include a good and subsisting cause of action capable of enforcement in Court, and calling for an answer, and not barred by the law of Limitation or any other law 1 The present clause (d) gives effect to this view by substituting the words cause of action for the words right to sue so that the Court has got the power to reject an application for permission to sue in forma pauperis where the claim is prima facio barred by limitation 2 or is unlawful 3 or is immoral or opposed to public policy 4 But in considering the question whether the applicant has a cause of action or not the Court has to look only into the allegations made by the applicant. This does not mean that the Court should confine itself to the allegations in the petition It is open to the Court to consider not only the allegations contained in the plaint but also the facts appearing in the examina

ndicata]

[See also (1999) 1979 All 674 (C74) 1 3 (1976) 1926 Lah 642 (613)

Note 5 (1698) 20 All 293 (301) (1889) 13 Born 196 (198)

1 (1895) 7 Alt Col (GC4) (F I')

1 (197t) 61 In | C15 801 (89t) (Pat)

(1891) 1891 Pun Re No 81 Where a Court finds that an applicant who ap thes to sue in form paupers is unable to pay the Court fees upon his cium it should allow him to sue s a prujer for the whole imount claimed and it is illegal on the p rt of the Court to confine the permission to part of the claim be cause it inds that he may succeed

Note 4

only as to that pirt (1912) 16 Ind Cas 612 (614) (Mad)

2 (188 \*) 4 Mrd 323 (324) (1895) 2 Cil W N 474 (4"8 479) (1904) 8 Cil W N "0 ( 9)

(See (1931) 1931 \H 823 (323) The fact that issue as to possession of property will be decided in suit is to reason for not deciding it in procee ling for dispuniering But such deci ion will not operate as res

(1313) 18 Ind C is 491 (491) (I ih) (1904) 2" Vlad 3: (39) (1903) 11 Oudh Cas G (CS) 2 (1885) 7 All GG1 (GG4) (1919) 1919 Lah 4 (5) 134 (1974) 1934 Rang 111 (112)

(1894) 1894 Lun Re No 130 (1920) 1920 Wed 122 (123)

(1914) 1915 Mrd 395 (199) [See lowever (1337) 1932 \11 543

(546) Que tion of limitation toul! projectly be determined after the [laint is admitted]

3 (1917) 191" L B 18 (19) Suit for r covery of amount wou it a lottery

4 (1899) 13 Bom 1ºf (180)

(ISSJ) 13 I om 190 (131) Warringe Irokago contracts

non of the applicant 5 Beyond this, however, the Court cannot go 6 In fact, even in an inquiry under R 7 the Court can confine itself to the evidence of the plaintiff and refuse to go 10to other evidence 7 Consequently, complicated questions of limitation,8 or of res judicala,9 or of local jurisdiction94 cannot be gone into for deciding the application. Nor can the Court refuse the application on the ground that, on the merits, the laugation is very likely to end in failure to The Court should exercise great caution in considering the question of cause of action masmuch as the applicant is often without the advantage of the aid of Counsel ii Further the opposite party will have the opportunity of uiging these very objections under R 712

## 6 Clause (e)

The object of the provisions of this Order is to help bona fide litigants Where, therefore, a litigation is not bona fide, and the plaintiff has been set up by another for the purpose of evading the Court-fee, the Court will not allow him to sue as a pauper i

The Clause will apply only if the agreement has reference to the subjectmatter of the suit and is of a champertous character.2 Further, the agreement

5 (1919) 1919 Cal 385 (386) 46 Cal 651 (1934) 1934 Rang 214 (216) (1919) 1919 Cal 155 (105) (1911) 11 Ind Cas o5 (57) (Cal)

(1909) 4 Ind Cvs 975 (976) (Lah)

(15-2) 4 Mrd 323 (924) (1928) 1938 Sind 118 (119) 22 Sind L R

(1899) 20 111 299 (301)

(1J32) 1932 Lont 584 (585) 6 (1929) 1929 Rang 209 (200)

(1934) 1934 Ring 214 (216) this other evidence oril or documentity evanuat be considered

(1934) 1934 Lah 231 (232) Court should not embark upon considerations of doubtful questions of law or fact in order to see whether allegations

show a cause of action (1929) 1929 All 624 (624) (Do ) (See also (1933) 1933 Pat 284 (285) Plant held not to disclose a causo

of action 1 (1932) 1932 Rang 107 (112 113) 10 Rang 357 (FB) Evidence relating tomerits not admissible 1929 Rung 273, over

ruled 7 See Notes to Rule 7, infra

9 (1918) 1918 VI 1d CO (G1) 41 Mad 620 (1926) 1376 Mrd 195 (185)

(1919) 1919 1114 218 (219) (1923) 1929 Lah 495 (495) (1910) 8 Ind Cas 475 (476) (1910) 1 U B R

J (1975) 1925 All 275 (2°C) [1 ut sec (1870) 14 Suth W R 281 (282) ]

1. (1 131) 1334 Lih 231 (232) 10 11 + 01 13 10 111 755 (757) 52 111 927 1 1 1 1 1 1 Lal 124 (121)

12 110/ Clud Cis 703 (703) (AII) (15 (2) 1835 VII W \ 215 (219) (1300) 10 411 467 (472)

(1925) 1925 Cul 990 (990) (1904) 8 Cal W N 70 (73) (1898) 2 Cal W N 474 (478, 479)

(1924) 1924 Lah 609 (660) (1885) 1885 Pun Re No 25, pige 45

(1919) 1919 Mad 218 (219)

12 (1900) 27 Mad 37 (40)

(1904) 27 Mad 120 (121) (See also (1905) 4 Mad L Tim 302 (303)] (1916) 1916 Mad 1017 (1018)

1 (1919) 1919 Pat 58 (59)

(1927) 1927 Pat 352 (352) (1907) 30 Mud 547 (545) Where on the

date of the institution of a suit in forma jauperes the plaintiff has allowed third parties to obtain an

date of the presentation of the apreal the appellate Court cuinot grant leave to appeal in forma pau-

2 (1917) 1917 All 156 (186)

(1931) 1931 Cil 740 (740) Mortgige subsequent to application under O 33 not for each but executed under pressure for previous loans does not must be one between the pruper and a third party. Thus, where a company has gone into liquidation and the liquidator sues in forma pauperis to recover a debt due to the company, the fact that the liquidator is paid a percentage of the collections will not bring the application under this clause 3 The agreement contemplated by this Clause is one which is subsisting and effective of the time of the application.34

It is however not necessary that the "interest should be a vested and completed interest. Thus, an agreement with pleader appearing in the pauper suit, that he is to recover his fee out of the fruits of the decree that may be obtained in that soil by the plaintiff is within the prohibition of the Clause 4 But a mere agreement to pay the fees when the decree is obtained without any condition by which the pleader could recover the fees from the decrital amount, will not full under the Clause 5

### 7 Appeal

An order reacting an application for permission to sue in forma pauperis is not appealable is it is nother a decree nor an order coming within any of the Clauses of O 43 R 11

### 8 Letters Patent Appeal

An order of a Single Judge of the High Court, sitting on the Original Side, allowing or refusing to allow a plaintiff to sue in former pauperis is a "judgment within the meaning of the Letters Patent and is appealable as such 1

9 Revision See Note 26 to S 115 and also the undermentioned cases 1

10 Doctrine of Lis Pendens See Notes to R 8, infra come within this Pule

(1934) 1934 Rang 214 (215) Person advance ing money to another out of pity -No agreement giving him interest in subject matter-Expectation that he would be repaid on suit being successful - Unless repayment is secured on sulject matter, under standing is not illegal 3 (1918) 1918 Mad 362 (364) 41 Mad 624 34 (1935) 1935 Oudb 20 (21) 1t not subsisting

it does not stind in the way of ip plication being allowed 4 (1985) 9 Bom 371 (372)

[See also (1892 1896) Upp Bar R

272 ] (1932) 1932 Rang 69 (69) 5 (1926) 1926 Lah 642 (643)

1 (1885) 7 All GGI (GG8) (1899) 21 All 133 (136) (FB) (1930) 1930 Rang 259 (259)

(1910) 8 Ind Cas 475 (476) (1910) 1 Upp Bur R 28

(1865) 3 Suth W R Misc 20 (20) (1931) 1931 Rang 129 (130) 9 Rang SG

Note 8 1 (1931) 1931 Born 166 (166 167)

(1925) 1925 Mad 167 (169) 48 Mad 700 (1930) 1930 Rang 259 (260, 262) Note 9

1 (1927) 1927 Lah 56 (56) (1933) 1933 All 295 (296) 55 All 216 Order

and is revisable (1335) 1955 Oudh 20 (21)

(1933) 1933 Pat 284 (285) Court, in decid ing pamperism not confining to planut, acts with malerial irregularity

(1934) 1934 Rang 214 (216) (1835) 1835 Pun Re No 21 Revision lies

when Court embarks upon an enquire by examining other wilnesses where at has no power to do (18-9) 1858 All W N 150 (151) When the

leave to refused on the ground that the petitioner has a weak case on the ments

(1893) 13 411 W N 218 (219) (Do ) (1910) 6 Ind Cas 703 (703) (411) (Do ) (1913) 1915 Vrd 652 (653) (Do ) (1917) 1917 All 355 (355) (Do )

(1898) 20 111 293 (302) But no revision hes when the Court has not acted with maternil irregularity or illegality

(1919) 1919 Lab 4 (5) 1919 Pun Re No 184. (Do )

Notice of day for receiving evidence of applicants pau

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R 6. [S 408] Where the Court sees no reason to reject the application on any of the grounds stated in Rule 5, it shall fix a day (of which at least ten days' eleur notice shall be given to the opposite

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perism party and the Government pleader) for receiving such evidence as the applicant may adduce in proof of his panperism, and for hearing any evidence which may be adduced in dispreef thereof

[1877—8 408; 1859—8 305]

Sunopsis

Note No 1 | Evidence of paupersim See R 7, infra

1 Notice

Notice

The provision directing notice is imperative and therefore an order made without notice to the Government pleader or to the opposite party is one made without jurisdiction and is open to revision 2

As to the form of notice under this Rule, see App. H, Form No. 12

### 2 Evidence of pauperism —See R 7, infra

R 7 [S 409] (1) On the day so fixed or as soon thereafter as may be convoment, the Court shall Procedure at hear oxamine the witnesses (if any) produced by ing either party, and may examine the applicant or his agent, and shall make a memorandum of the substance of

their evidence (2) The Court shall also hear any argument which tho parties may desire to offer on the question whether, on the face of

the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prolubitions specified in Rule 5

(3) The Court shall then either allow or refuse to allow the applicant to sue as a pauper

[1877-S 409:1859-S 306]

(1867) 7 Suth W R 496 [487] No revision hes from an order granting leave

(1910) 6 Ind Cas S31 (832) 32 All 623 (Do ) (1931) 1931 Rang 129 (131) 9 Rang 86 Or ler refusing leave to sue in forma

pauperus is subject to revision (1932) 1932 Born 581 (588) Revision hes where provisions of this Order are (1933) 1933 Sind 92 (93 84) 26 Sind L R 491 Revision lies against order refusing levre [See also (1934) 1934 Lah 231 (232) Order granting leave is a case with m the meaning of S 115] Order 33 Rule 6-Note 1

1 (1927) 1937 Cal 464 (401) (1914) 1914 Cal 537 (537) 2 (1927) 1927 Cal 464 (464)

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## Sunovsis 1

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Note No Scope of the inquiry under this Rule Sub R (2) See Note 1 ante Review of Order under this Rule See Note 1 to R 15 infra 3 Limitation when the application is Limitation when application is refused 5 Limitation when application is converted into a plaint on payment of Court fee

Limitation where plaintiff is dispau

Death of applicant-Legal representa tive if can continue proceedings See Note 10 to O 22 R 1 and Note 11 to

Order rejecting application whether appealable

Appeal from decree-Whether propriety of Order allowing suit in forma pau peris can be questioned 10 Dismissal of application for default

See R 15 sufra

Other Topics

Evidence-Whether hould be confined to pupers in clone See Note 1 Pt (2) Examination of pauper-Who can conduct

See R 4 Note 9 The Court shall hear argument ' Sco Note 1 Pt 6b

1 Scope of the inquiry under this Rule

- Two kinds of examinations are contemplated by this Order --
  - (1) An examination of the applicant under R 4, ante, and
  - (2) An examination under this Rule 1

It is important to remember the following distinction between the two kinds of examinations -

- (1) An examination under R 4 takes place before issuing notice to the Government pleader and to the opposite party, while the examination under this Rule takes place after such notice. There is thus no cross-examination of the applicant under the former
- (2) The examination under R 4 is only of the applicant and none else, while the examination under this Rule may be not only of the applicant but also of his witnesses
- (3) The examination under R 4 may be in respect of the applicant's nauncrism as well as the merits of the case, while the examination under this Rule is confined to the question of the applicant's pauperism 2 It has accordingly been held that a Court has no power to allow the examination of witnesses on questions other than the pauperism of the applicant such as

Order 33 Rule 7-Note 1 1 (1912) 15 Ind Cas 184 (184) (Mad) The Court is bound to enquire into plaintiff s pruperism unless petition is rejected under R 5

(1927) 1927 Rang 7º (73)

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written statement [See (1933) 1933 All 779 (780) Appli cation to sue as pauper-Court must first see whether cause of action is disclosed and then determine whe ther applicant is really pauper-Order allowing praver conditional on furnishing security for court fee is not proper].

questions as to the existence of a cause of action3 or as to the title of the applicant to institute the suit4 or as to limitation5 or as to res judicadas and decide the application on such evidence it is however, not clear as to whether when the applicant is examined under this Rule as to his pauperism he can be cross examined as to matters relating to the cause of action or limitation as

It is only the examination of witnesses on questions other than the pauperism of the applicant that a produbted by this Rule The Court is not precluded from hearing arguments on the question whether the applicant is or is not subject to any of the produbtions specified in R 5 & But even arguments are confined to the matters specified in R 5 and the Court has no jurisdiction to reject the applicant on other grounds than those specified? Thus the Court canno reject the application on the ground that other co heirs who are not paupers are seeking to es abilish their rights through the applicant who is admittedly a pauper 8 Nor can it reject the application on the construction of documents filed by parties 9 or on any complicated questions of law such as limitation respirated etc 10

Even if the other party does not ofter any arguments as provided under Sub Rule (2) the Court is not precluded from considering suo motu if the application is subject to the prohibitions under R 5 u This Rule in so far is it relutes to the manner of taking evidence does not apply to proceedings under the N W F P Regulation (VII of 1901 S 46 Cl 2) and the Ondh Courts Act (IV of 1925) (S 16 Cl 2)

- 2 Sub R (2) -See Note 1 ante
- 3 Review of order under this Rule -See Note 1 to R 14 infra
- 4 Limitation when the application is granted

Where an application to sue in forma paupers is granted the suit is deemed to be instituted on the date of the presentation of the application and not on the date when the applicant is allowed to sue as a pauper Therefore where an application to sue in forma paupers was made before the amendment of the Court Fecs Act (Madras Act 1922) but was registered as a suit after

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3 (18 9) 14 Suth W R 2-1 (282)
(1598) 2 Cil W N 474 (4"8) [See com
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(1892) 4 Vad 323 (324)
(1925) 1925 Pat 30 (31) 8 Pat 275
8 (1910) 8 Ind Cas 4"4 (475) (1910) 1 Upp
But R 20
9 (1901) 8 Cal W N "0 ("3)
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19 Wid 107 which took a contrary New overciled to the New York of the New York (New York) 1 14 Suth W. R. 251 (292) 10 Rang 857 (151) 12 14 14 14 15 Rang 107 (109) 10 Rang 857 (151) 15 M d L. Jor. 212 (295 296) (195) 2 Call W. N. 4 1 (4 8) (195) 4 15 Call W. N. 6 (73)

1 (1862) 1862 Marsh 174 (1864) 4 Bom H C A C 39 (40) (1916) 1916 Mad 695 (195) (1882) 4 All 37 (39)

(See also (1801) 9 Moo Ind App 66 (J1 95) (t C)) the amendment, the amount of Court-fees to be entered in the decree should be calculated on the basis of the old Court-Fees Act 2

As to appeals in forma pauperts, see O 44, infra

### 5 Limitation when application is refused

Where the application to sue in forma paupers is rejected the proceedings come to an end and if the upple int thereafter brings a regular suit on pryment of the Court-fees prescribed the suit will be deemed to be instituted only on the date when the Court fees in paid and not on the date in price at tion of the rejected application. As to whether at the time of refusing the application the Court can grant time for the prisment of the Court-fees on the plaint and whether if the Court-fees are paid within the mes of granted the sint would be deemed to be instituted on the date of the presentation of the application. See Note 10 to \$149 supra and the cases enter the late of the presentation of the application.

Is to appeals in forma pauperis see O 44 R 1 Note 7 infra

### 6 Limitation when application is converted into a plaint on pay ment of Court fee

Where during the neudency of in application to sue as a painter the appling pairs the court-fee an espect of the plant and thereupon the plant is registered as a sint does the institution of the suit due back to the dut of presentation of the application? Their Leidships of the Privy Council in Skinner V. Order observed.

The jettion is filed and proceedings are then to inquire into the properties with kind charled by virious orders of the Court until a very considerable period of time has clayed. Then prinding that majors the librarily laying the amount of strupt-fees into Court admits let is no longer desions to use as a judger, and gives my so much of the priver of his position is asks to be allowed -odo use but no more there then unthing in the lat which is represented in such a state of thing, the position of plaint if while let ejected allogs they and the plaintiff is compelled to commence de more in the private of the latter of the plaint is not assistant of the plaintiff of the latter of t

with it original date on the file of the Court . In their the nit must be deemed to be instituted when the application was filed

Though Skunner v Orde was decided under the Code of 1859, the principle has been followed in cases arising under the later Codes, and it has been held that where the application is bound fide, the suit will be deemed to be instituted on the date of the application to sue in forma pauperis and not on the date when the Court-fees are paid. But if the application is mala fule and it is found that the applicant was even at the time of the application, possessed of means to pay the Court-fees the suit will be deemed to be

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2 (19) 1 (J) Mr. 1 159 (15)
                                                            (P.C.) Reversing (1870) 1 311 220
                  Note 5
                                                   2 (1901) 25 Cat 427 (430)
1 (1695) 17 MI J (J N)
                                                     (190a) 25 Mad 493 (49a)
  (1998) 10 I om 509 (510
                                                     (1.316) 1916 N (d 6~, (6~,)
  (1807) 24 Cal 859 (431)
                                                     (1925) 192 - Mad 793 (793)
2 (1907) 9 I om I R 204 (205 207) Time can
         not le grantel after the petition 1
                                                     (1922) 1322 \ \u00edg 100 (ICt) | 18 \ \u00edg 10 R 4t
         distris ed
                                                     (1917) 1 117 Ondh 32, (325)
  (13 ") 1933 Mal 893 (555) I suger applies
                                                     (1923) 1973 Ring 256 (257) 1 Ring 190
                                                     (1901) 4 Ondh C15 2.0 (251)
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1 (15-0) 2 Ml 211 (250 251) Clad App 12 C P C 295 & 296 instituted only on the date on which Court fees are paid and not on the date when the application was presented a

## 7 Limitation where plaintiff is dispaupered

payment of Court fees and no question of limitation arises 1

8 Death of applicant—Legal representative if can continue pro

A plaintiff dispaupered under R 9 is entitled to continue the suit on

8 Death of applicant—Legal representative if can continue proceedings—See Note 10 to O 22 R 1 and Note 11 to R 1 above

9 Order rejecting application whether appealable

No appeal lies from an order rejecting an application to sue in formal pauperis whether under R 5 or under R 7 but in proper cases it may be open to revision by the High Court 8 to cases where the application is granted see also the undermentioned cases 2 (See Note 26 to S 115) The final order on such an application of a Judge sitting on the Original Side of the High Court is however, a judgment under Cl 15 of the Letters Patent and is therefore appealable as such 3

10 Appeal from decree—Whether propriety of order allowing suit in forma pauperis can be questioned

In an appeal from the decree it is not open to the appellate Court to entertain the plea that the planniff should not have been allowed to sue as a pauper as the matter is one affecting the institution of the suit, and not one affecting the decision:

11 Dismissal of application for default -See R 15 infra

R. 8. [S 410] Where the application is granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted in

the ordinary manner, except that the plaintiff shall not be hable to pay any court-fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader or other proceeding connected with the suit

[1877—S 410, 1859—S 308]

...

Note 7

1 (1895) 17 All 5°6 (5°9) Note 9

Note 9 1 (1875) 1 All 746 (747) (F B)

2 (1895) 7 AH 4 (4 U (1893) 18 A 1 657 672) (1 B) (1917) 191 A 1 (18 (1830) 5 Cal 80 (310 511) (18 5) 21 Sath W R 62 (62)

(18 5) 21 Sath W R 67 (62) (1930) 1930 Lah 785 (786)

93 (1933) 1933 All 200 (206) 50 All 216

(1934) 1934 Lah 231 (231) [See (1934) 1934 Lah 295 (\*95) Ap

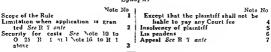
phreation to sue as pumper granted— Only party affected is Grown—High Court can interfere but would be slow to move at the instance of delendant!

3 (1925) 1925 Mad 16" (168) 19 Mad 700 [See however (1927) 1925 VII 446 (416) 48 VII 493 ]

Note 10

1 (1901) 93 111 264 (365)





Other Topics

I occedings prior to thing and numbering is Stamp duty and penalty-Not governed by a sout See Note 1 I ts (i) to (i) this Rulo See Note 4 Pt (i)

## 1 Scope of the Rule

The application to sue as a pauper cannot be deemed to be a plaint till leave to sue is granted and therefore, the Court his no jurisdiction to order the return of the plaint under the provisions of 0 7 R 10, for presentation to the proper Court <sup>1</sup> See also Note 8 to 0 7 R 10 Until the leave is granted there is no suit in evisience and therefore the Court cannot direct an attachment of properties before judgment <sup>3</sup> See also Note 5 to 0 38 R 5

Where a plaint is filed with insufficient Court-fee and the plaintiff tening unable to pay the additional Court fee applies to continue the suit in forma pauperis it has been held that the Court his to ascertain if the plaint discloses a cause of action and then to direct an inquiry into the pauperism of the applicant. If he is found to be a pauper he should be allowed to continue the suit as a pauper as the procedure under Rr. 2 and 8 is impossible under such circumstances.

Where an application for leave to sue as a pauper is granted and thereby becomes converted into a suit the valualist given by the applicant becomes a valualist for the purpose of the suit unless it is distinctly confined to the pauper application alone 5

- 2 Limitation when application is granted See R 7 ante
- 3 Security for costs —See Note 10 to O 25 R 1 and Note 16 to R 1 above

# 4 Except that the plaintiff shall not be hable to pay any Court

The exemption does not extend to the hability to pay stamp duty or penalty in respect of a document which owing to defect in stamp is in admissible in evidence:

5 Insolvency of plaintiff

Where the plaintiff permitted to sue as a pauper is subsequently ad judged an insolvent the Official Receiver is entitled to continue the suit 1

6 Lis pendens

The doctrine of lis pendens will apply to suits instituted in forma

7 Appeal -See R 7 ante Order 33 Rule 8-Note 1

Note 4 1 (1868) 10 Suth W R 357 (358)

1 (1868) 10 Suta W R 357 (8: Note 5 1 (1918) 1918 All 177 (177)

[See also (1975) 1975 Va 1 791 (791)]

1 (190 ) 30 111 95 (100)

R. 9. [S 414] The Court may, on the application of the defendant, or of the Government ploader, of which seren days' clear notice in writing has been given to the plaintiff order the plaintiff to be disputpered. Dispaupering

(a) if he is guilty of verations of improper conduct in the comse of the suit.

(b) if it appears that his means are such that he ought not

to continue to sue as a pruper. or (c) if he has ontored into any agreement with reference to

the subject matter of the suit under which any other person has obtained an interest in such subject-matter [1877-S 414 cf R 5, sum a ]

Sinonsis

Note No Scope of the Rule Vexatious or improper conduct Ought not to continue to sue as a pauper Agreement with reference to the

Death of plaintiff after institution of 2 the suit Sec O on R 1 Note 10 Appeal in forms pauperis Sec O 44 R Limitation where plaintiff is dis

Other Topics

3

Appeal See R 5 Note " 1t (1) R -Suit disposed of-Rile inniplicable Note 9 Pt (1) \oto 1 Pt (1)

1 Scope of the Rule

subject matter

This rule applies to cases where the suit is pending and therefore the plaintiff cannot be disprupered after the suit or appeal has been disposed of on a settlement between the parties 1 An order granting leave to sue as a pauper does not operate as res indicata. It can be re opened under this rule on any of the grounds mentioned therein 2

Vexatious or improper conduct

A fraudulent concealment of property will amount to venations or improper conduct but a mere omission to state in the list of assets a life insurance policy worth about Rs 245 where the Court fee to be paid on the plaint was over hs 500 was held not to be a sufficient ground to dispruper the plantaff under this Rule 1 Intentional delay in prosecuting proceedings such as failure to bring the legal representatives of a deceased defendant on the recerd within a reasonal le time may amount to revatious or improper conduct wathin the meaning of this rule "

Ought not to continue to sue as a pauper The plantiff cannot be disprupered under this rule on the ground that te was in recent of an interim allowance during the suit barely sufficient for

Order 33 R 9 Note 1 t (1574 18 B a # 1 (40 ) (1574) 1 | VIII

his maintenance,1 or that he had a rich relation,2 or that he appeared by an imment counsel 3 Where it is proved that the applicant has received a sum of money sufficient to pay the Court-fee after the date of the application he ceases to be a purper and the fact that the money was paid to a creditor will not prevent the Court from holding that he is no longer a pauper 4

4 Agreement with reference to the subject matter '-See also Note 6 to R 5 above

This clause is intended to prevent the prosecution of a suit where the plaintist has entered into a champertons agreement with another for the prosecution of the largation and also to prevent a party continuing his suit as a pauper even after a third party, has acquired an interest in the subject-matter, and therefore an interest in paying Court-fees to Government 2 Thus an agreement by the plaintiff with his advocate promising to pay him a large sum of money in the event of his success was held to amount to such an agreement as is contemplated by Cl. (c) of this rule 2 But this clause does not apply to cases where the parties have settled their differences in order to put an end to lineation 4.

- 5. Death of plaintiff after institution of the suit -Sic O 22, R 1,
  Note 10 above
- 6 Appeal in forma pauperis See O 44, infia
- 7 Limitation where plaintiff is dispaupered -See R 7, ante

R. 10. [S 411] Where the plaintiff succeeds in the suit, the October there paper Court shall calculate the amount of Court-feers which would have been paid by the plaintiff if he had not been permitted to sue as a pauper; such amount shall be recoverable by the Government from any party ordered by the decree to pay the same, and shall be a first charge on the subject-matter of the suit

[1877—S 411; 1859—S 309.]

Scope of the Rule Note No

Amount of court fees to be a first Etherge Etherge 12 Crown entitled to precedence in res

Sopposis

Note No

Pect of Court fees 4

Recovery of Court fees by Government 4

Recovery of Court fees by Government 5

In precious fees by Government 5

Appeal realisation of Court fees 7

Other Tomes

Pupper succeeding only in 1 irt See Note 1, Pt (t)

Note 3	Note 4
1 (1924) 1924 Pat 27 (23, 29) 2 I at 579 2 (1924) 1924 Pat 27 (28, 23) 2 Pat 879 3 (1924) 1924 Pat 27 (39) 2 Pat 879 (Pat 50 (1915) 1914 I h 77 (77)	1 {1591} 16 Bom 461 {467} 2 <b>(1913)</b> 1 Ind Cas 596 (537) 7 Sind L R 52 3 <b>(1927)</b> 1927 Rang 283 (284)

<sup>[</sup>But see (1915) 1915 Lih 77 (77)] 5 (1921) 1921 Ring 283 (27) 1 (1921) 1921 Mad 97 (99) 4 (1991) 18 Bom 464 (467)

R. 9. [8 414] The Comt may, on the application of the detendant, or of the Government pleader, of which seven days' clear notice in writing has been given to the plaintiff order the plaintiff to be dispaused—

(a) if he is guilty of verations or improper conduct in the course of the suit.

(b) if it appears that his means are such that he ought not to continue to sue as a papper, or

(c) if he has entered into any agreement with reference to the subject-matter of the suit under which any other person has obtained an interest in such subject-matter

[1977—S 414 cf R 5 supra]

#### SINOPES

Scape of the Rule

Vexitious or improper conduct

Ought not to continue to sue as pauper

Agreement with reference to the subject matter

Solve

Death of plaintiff after institution of the suit Sec 0 ° 3 R 1 Note 10

Appeal in forma paupers Sec 0 44

Appeal in forma paupers Sec

## Other Tomes

Appeal See R 5 Note 7 1t (1) R 7 Sut disposel of—Rule 1120ple ble See Note 9 It (1) Note 1 Pt (1)

## 1 Scope of the Rule

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## 2 Vexatious or improper conduct

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3 Ought not to continue to sue as a pauper

The plantiff cannot be disprupered under this rule on the ground that he was in receipt of an interim allowance during the suit barely sufficient for

Order 33 R 9—Note 1 1 (1991) 18 Rom 461 (46 ) (1931) 19 1 1113 9 (74)

O.:

his maintenance, to or that he had a rich relation, a or that he appeared by an emment counsel a Where it is proved that the applicant has received a sum of money sufficient to pay the Court-fee after the date of the application he ceases to be a paiper and the fact that the money was paid to a creditor will not prevent the Court from holding that he is no longer a paiper 4

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- 5. Death of plaintiff after institution of the suit -Sec O 22 R 1, Note 10 above
- 6 Appeal in forma pauperis Sec O 41, infra
- 7. Limitation where plaintiff is dispaupered -See R 7, ante
- R. 10. [S. 411] Where the plaintiff succeeds in the suit, the O 3 court shall calculate the amount of Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper; such amount shall be recoverable by the Government from any party ordered by the decree to pay the same, and shall be a first charge on the subject-matter of the suit.

[1877—S. 411; 1859—S. 309.]

Synopus

Scope of the Rule
Amount of court fees to be a first charge
Effect of the first charge
Effect of the first charge
Effect of the first charge
Appeal

Synopus

Pect of Court fees by Government from party ordered to pay the same forward of the proceedings of the process of Appeal

Appeal

To appeal

T

Other Topics

Note 4

Pauper succeeding only in part See Note 1, Pt (1)

Note 3

1 (1924) 1924 Put 27 (28, 29) 2 Put 873 1 (1834) 15 Bom 464 (467) 2 (1924) 1924 Put 27 (28, 29) 2 Put 879 2 (1918) 21 Ind Cus 536 (537) 7 Sind L R 52

3 (1921) 1921 Pat 27 (30) 2 Pit 879 [But see (1915) 1915 Luh 77 (77)] 3 (1927) 1927 Ring 283 (251)

4 (1921) 1921 Vad 97 (95) 1. (1994) 18 Bom 464 (467)

1 Scope of the Rule

This rule and the next are intended to secure to the Government its rights to Court-fees, the payment of which is temporarily suspended when the plaintiff is permitted to sue in forma pauperis 1 This rule deals with the case of a pauper plaintiff who succeeds in the suit and R 11 deals with the case of a pauper plaintiff who fails in the suit. No provision has been made in the Code for the case of a plaintiff succeeding in part and failing in part. In the absence of any such provision, presumably the Court is intended to deal with the case by combining the provisions of the two rules and by appropriating the Court-fees payable between the plaintiff and the defendant in proportion to the extent of success of each party la The High Courts of Allahabad 2 Madras3 and Patna4 have held that it as not open to the Court to direct the defendant to pay Court-fees exceeding the amount which would be payable on that portion of the plantiff's claim on which the plantiff succeeds. The High Court of Calcuttas has on the other hand held that this rule leaves the discretion entirely with the Court to direct which of the parties should pay the Court fees due to the Government and that the Court should not be fettered by any hard and fast rule but must only be guided by the equities of the case

As has been seen already this rule is applicable only where the plaintiff succeeds in the suit Where, in a pauper suit, the amount decreed to the plaintiff fell short of the amount payable by him as costs to the defendant he was held not to have succeeded within the meaning of this rule because so far as the plaintiff was concerned the decree was in the result not a success in view of O 21 R 19 of the Code 6

This rule is applicable also to Chaitered High Courts in the exercise of their Original Civil Jurisdiction?

## 2 Amount of Court fees to be a first charge

The Court-fee payable to the Government under this rule is a first charge on the subject matter of the suit 1 "The Crown has a right to receive

Order 33 Rule 10-Note 1

not inconsistent with O 83 Rr 10 and 11 C P Code

1 [See however the observations in (1930)

1a

proportion to their success cannot be altered by the same Court so as

780

[See however (19%) 1925 Mad 786

(787) Paupor appeal allowed on a point not touching merits-Court

Note 2 1 (1675 77) 1 Bom 7 (9)

(1934) 1934 All 438 (499) Purchaser of decree from pauper plaintiff takes it subject to the charge for Court fees -The charge is only to the extent of the Court fees and Government pleader a fee is not a charge on the

subject matter of suit (1875 78) 1 All 596 (598) (1907) 23 All 537 (510) (F B)

(1894) 18 Bom 23; (240) Probate proceed ing in forma pauperis-Joint charge will be on property covered by pro-

(190°) 25 Mad 733 (735) But first charge may be lost by waiser or consent

certain fees at the institution of every suit, it temporarily forgoes its right. ( in the case of pauper plaintiffs, and places means in their hands to proceed to judgment against their defendants. Without the forbearance of the Government to insist on its ordinary rule the suit in such a case, could not have been brought or the money realised. It is therefore, reasonable that the Crown, in consideration of its giving up its right to those fees, should have for their defrayal, the first claim on the proceeds of the pauper suit' 2

The rule creates two distinct and separate rights exercisable at the option of the Crown, 192 -

- (1) A right in rem against the property recovered in the suit, and
- A right in personam against the party ordered by the decree to pay the Court-fee

In the event of the Crown not succeeding in realising the amount by pursuing the personal remedy it has a right to recover the same from the subject-matter of the suit 3 The charge is enforceable in execution by attachment and sale of the properties covered by the charge and not by a separate suit 4 See R 13, infra

The Court fee payable to the Government is to be calculated as on the date of the presentation of the application for leave to sue in forma pauperis Where the Court-Fees Act was amended after the institution of the suit and before the decree, the calculation of Court-fees has to be made in accordance with the law at the time of the institution 5

## 3 Effect of the first charge

The effect of the first charge is that a sale in execution of the same prevails as against a subsequent sale. Thus where a property was sold in 1896 for the Court-fees due to the Government under a decree of 1893 and it was again sold in 1899 in ovecumen of a money decree obtained by a third person in 1894 on a debt anterior to 1893 the former purchase was held to prevail over the latter 1 Similarly the claim of the Government against any amounts due to the plaintiff under the decree will prevail against any cross-claim or claims under cross-decrees against the plaintiff in favour of the defendant, provided the defendant has not taken out execution for the balance under O 21. Rr 18 or 19 In the case cited below A sued B in forma pauperis 10 recover a property of the value of Rs 60,000 and obtained a decree for a sum of Rs 1,500 He was ordered to ray a sum of Rs 1,200 to the Government as Court-fees. In an application by the Government to recover the amount of the Court-fees from the decree amount of Rs 1,500 due from B to A B contended that a sum of Rs 1,000 was due to him from A as costs of the suit and that a sum of Rs 800 was also due from him under another cross-decree against him making a total sum of Rs 1,800 and B claimed to be entitled to set-off against this total sum the above amount of Rs 1,500 due to A It was held that under the circumstances the Government was entitled to recover the amount of Court-fee from the decretal amount of

<sup>9 (1875) 1</sup> Bom 7 (9 10) 3 (1919) 1919 Pat 99 (101) 4 Pat L Jone 166

<sup>1 (1596)</sup> 

<sup>(1919) 1919</sup> Pat 99 (101) 4 Pat L Jour 166 5 (1926) 1976 Vad 474 (475) (1933) 1933 Sind 354 (351) 27 S L R 210

<sup>1 (1902) 23</sup> Mad 783 (73) 9 (1997) 9 111 64 (67)

A in the hinds of B in preference to the cross-claims of B. It would be otherwise if in the above case B had before the application by the Government was made actually applied to execute his decree against 1 for the balance after making the set-off  $^3$ 

## 4 Crown entitled to precedence in respect of Court fees

It is a principle recognised by the laws of all countries that claims of the State are entitled to precedence over other claims. The amount of Countries due to the Crown is therefore entitled to precedence over the claims of other creditors of a pauper decree-holder. This rule is only an enabling one inducating the manner in which the Crown may realise the debt it does not preclude the Crown or its representatives from urging its pierogative rights of precedence in any other manner. So when a successful pauper plaintiff attached and sold for costs due to her certain property other than the property in suit belonging to the judgment debtor and the sale proceeds were paid into Court and both the plaintiff and the Government solicitor applied for payment out of the said sum it was held that the Government solicitor was entitled to be paid out in preference to the plaintiff and that it was not obligatory on the Government to altach the fund in Court before getting navment?

But though in respect of the Court fees the Government is entitled to precedence among ordinary creditors it cannot claim precedence over lieu holders. It is only when claims of the Crown and claims of common persons come into competition that the Crown is preferred. It is a matter of common justice and common honesty that the Crown has no more right than a common person to serve A's property, and apply it in or towards the discharge of a debt due from B. Accordingly, it was held that the Government could not attach and sell a defendant sproperty, for Court fees so as to destroy the rights of a previous mortgagee of the defendant.

#### 5 Recovery of Court fees by Government from party ordered to pay the same

The party ordered by the Court under this rule to pay the amount of Court fee due to the Government is the person who is liable to pay the same to the Government. The Government can proceed against that person personally or against his properties as the case may be. 1

## 6 Mode of realisation of Court fees

An order under this rule for the recovery of the Court-fees due to the Government is equivalent to a decree in its favour and may be executed by the Government at its option, either by enforcing the charge on the subject-matter of the suit, or by proceeding in execution against the person or

3 (1972) 1977 Nat 19, (176) Note 4

1 (1869) Pom H C (O t.) 23 (25)

(190.) 99 All 537 (510) (I 1) Overruln., [1879) 2 All 130 [See al o (1926) 1926 Cal 859 (860)

Maintenance decreed in pauper suit

(1893) 7 Ma1 434 (435)] 0 (1912) 15 1 1 434 (436) (PC) (180) 31 MI 223 charge]
Note 5
1 [See (1881) 8 Bom 577 (182]]
Note 6
1 (1901) % \11 346 (348)

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perty of the party ordered to pay the Court-fee 2 No separate suit has O the recovery of the same 3 See R 13 below. The fact that the property, subject-matter of the suit, has ceased to be in the possession of the party, cted to pay the costs and has come into the possession of the successful v does not affect the right of the Government to enforce the charge 4 en a decree is attached in execution of another decree the proper course. ealising the fruits of the latter decree is not to sell the former decree ched as aforesaid but to execute the attached decree itself at the instance the attaching decree holder or otherwise, as provided in O 21, R 53 s principle applies to the Government as well, and the fact of the ernment possessing a first charge on the subject-matter of the suit under rule will not entitle the Government to sell the decree vissed in favour he pruper planniff 5 The proper method of recovering Court-fee from a per planniff who has obtained a decree for future maintenance is by the ointiment of a receiver to collect the maintenance amount and pay the ernment the Court-fee due by the plaintiff 6

In proper cases, the decree holder may be allowed to take out execution institute judgment-debtor for the Court for due to Government also, in 1 he has already paid the fee to the Government or ou the Court taking identiprecaution to liave the Court-fee amount paid over to the Government.

A sale for Court-fee wrongly believed to be duck or of the property at third person in occurant of an order for the Court-fee due to the eriment? is a nullity

An application by the Government for recovery of the amount of the irt fee is subject to the Law of Limitation and must be made within three rs from the date of the decree <sup>10</sup>

## Appeal

There was a difference of opinion inder the old Code as to whether Covernment, in proceedings under the Chapter corresponding to this er was a parts to the suit within the meaning of S 47 R 13 now

(1919) 1919 Pri 9J (101) 4 Pri L Jour 166 (1936) 18 All 419 (441) (1919) 1919 Pri 99 (101) 4 Jul L Jour 166 (183) 18 All 419 (421) (1934) 1919 Pri 9J (101) 4 Jul L Jour Loc

(350) 13 All 419 (421 422) [See (1893) 20 C.1 111 (115)] [1926] 1J2f Mad 565 (56) 49 Mad 564

A portion of each "ustatuent of uture minitenance may be reserved for the decree holder to live up on Sec 43-9 (1252) 1975 F G 136 (136) 47 411 59-5 5 Ind upp 252 (F G) herea for future manuferance not received in the second of the second o

[But sec (1933) 1933 Pom 850 (351 352) 57 Bom 507]

(133) 1935 Sind 21 (27) Suit in format pauperis for maintenance lecreed and right to future maintenance madecharge on immoverable property —Sale of such projects in execution proceedings cannot be attracted to consentuate for Languages.

(19.3) 19.20 MI JOS (2001) Case where the decree holder was under the decree found to pre-Court fee to Covern ment and entitle 1 to recoup 1 n real from the judgment del tor

8 (1893) 15 11 321 (376)

9 (1901) 26 All 346 (357) 10 (1883) 7 Lom 510 (514 557 555) (1874) 97 Suth W R 512 (512) (F I )

(1952) 4 M14 155 (156) (1962) 4 M14 155 (156) (1962) 11 Suth W R 67 (654)

#### Note '

1 [Sec Note 10 to S 47, ante] [Sec also (1898) 1895 1 om Print Judgl 406] A in the hands of B in preference to the cross claims of B it would be otherwise if in the above case B had, before the application by the Government was made actually applied to execute his decree against A for the balance after making the set-off 3

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# 6 Mode of realisation of Court fees An order under this rule for the recovery of the Court-fees due to the

Government is comincient to a decree in its favour and may be executed by the Government at its option either by enforcing the charge on the subject-matter of the suit, or by proceeding in execution against the person or thosal 1922 Maria 19 (1935) 1934 1537 (1930) (1 1) Operating.

8 (1997) 1927 Nat 12, (126) Note 4

(1879) 2 All 136 [See also (1926) 1927 Cil 859 (8(0) Uniterance decreed in proper surwith churse on defendant a proper tics—Government selling said proper tics, for Court fees—Government a right is subject to municanace

(1543) 7 Mal 431 (130) 5 (1312) 15 (1312) 15 (1312) 15 (1312) 16 (1312) 17 (180) 31 Ml 223

charge]
Note 5
1 {See (1891) 8 Hom 577 (782)]
Note 6
1 (1901) 26 \lambda 186 (818)

property of the party ordered to pay the Court-fee? No separate state has O for the recovery of the same? See R 13 below The freit that the property the subject matter of the sum has come into the possession of the party directed to pay the costs and has come into the possession of the successful party does not affect the right of the Government to inforce the charge? When a decree is stateded in excut ion of another decree the proper course in realising the fraits of the lutter decree is not to sell the former decree introduced as aforesaid but to eve u.e. the attached decree itself at the instance of the attached applies to the Government as well and the fact of the Government possessing, a first charge on the subject matter of the suit under this rule will not enable the Government to sell the decree pissed in favour of the pruper plantiff. The proper method of recovering Court-fee from a nature plantiff who has obtained a decree for fu new maintenance, is by the

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7 Appeal

There was a difference of opinion under the old Code as to whether the Covernment, in proceedings under the Chapter corresponding to this order was a party to the suit within the meaning of S 47 1 R 13 now

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7 (1919) 1919 1 1 2 9 (101) 1 1 at L Jour 16° (1897) 18 41 11 J (4.1) (1919) 1919 1 at 99 (101) 11 at J Jour 16° (1897) 18 41 18 19 (11) 1 (1919) 1919 1 at 97 (101) 1 t at L Jour 16° (1899) 18 41 419 (2) 4 2 9 (1899) 18 0 (4.11) 11 (118) 1 (1919) 1 (1979) 12° N 40 50 (4°) 49 Wal 5° (1979) 12° N 40 50 (4°) 1 at Mal 5° (4°) 49 Wal 5° (4
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Government the Cour -fee due by the plantaff 6

and right to future maintenance

" (19 3) 1329 Mi 303 (201) A case where the decree holler way in her the decree found to pay Contribe to Govern ment and entailed to recomp himself from the jilligment deltor

8 (1693) 15 W1 924 (376) 9 (1901) 96 W1 316 (352) 10 (1893) 7 I on 516 (543 552) (1874) 22 Suth W R 512 (512) (1 F) (1874) 34 W1 155 (15)

#### Note 7

(68)]

1 [S c Note 10 to S 47 f ite] [See also (1894) 1893 Bont Print Judgt 406]

[See 1 wever (1509) t1 Suth W I 67

ittrebrile under 5-60 C 1 C. But receiver may be appointed and por tion of collection may be juil to crelitors of runitonance holder Sec 5-60 Note 22]

[But sec [1933] 1933 Hom 250 (351 329 de 160 507]

<sup>(19</sup> J) 1935 Sind 21 (29) Suit in forma paugeris for maintenance decreed

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0, provides that the Government in such cases is a party within S 47 An order on application by the Government for payment of the Court-fee under this order, will therefore now be an order under S 47 and as such will be appealable as a decree 2

R. 11. [S 412] Where the plaintiff fails in the suit or is dispaupered, or where the suit is Procedure where withdrawn or dismissed,pauper fails

(a) because the summons for the defendant to appear and answer has not been served upon him in consequence of the failure of the plaintiff to pay the Court-fee or postal charges (if any) chargeable for such service, or

(b) because the plaintiff does not appear when the suit is

called on for hearing,

the Court shall order the plaintiff, or any person added as a coplaintiff to the suit, to pay the Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper.

[1877--S 412]

Synopsis

Note No Note No Legislative changes Costs of successful defendant Score of the Rule Where the suit is withdrawn or dis The Court shall order the plaintiff to pay the Court fees See Noto 2 mussed above

Other Topics

I milure of Court to provide for Court fees-Remedy See Note 2

Legislative changes

1 The corresponding section in the old Code contained a penal clause to the effect that if it was found that the suit is resatious or frivolous the pauper plaintiff was liable to a fine not exceeding Rs 100 or imprisonment for a term which may extend to a month or both The said clause has been omitted in the present rule

2 The word "withdrawn ' has been newly added See Note 3, below

2 Scope of the Rule

The provisions of this rule are mandatory and the Court when it passes a decree in the suit must provide in that decree for payment by the plaintiff of the Court-fee due to the Government 1 As to the remedy of the Government in case the Court omits to make an order as to Court-fee, see Rr 12 and 13 below and the notes thereto

3 Where the suit is withdrawn or dismissed

The old Code did not contain the words "when the suit is withdrawn" and there was a conflict of decisions as to whether the words 'if the plaintiff fails in the sunt included also cases where the suit was withdrawn 1 The in-

Note 3

<sup>2 (1</sup>J11) 35 Lom 118 (150) Order 33 Rule 11-Note 2 1 (1891) 13 411 32 (379)

<sup>1 (1891) 18</sup> Dom 461 (467) (No) (1890) 16 Bom 77 (78 79) (No)

are hickory of the words where the sut is a thdrawn has now set the conflict at rest

It has been held by the High Courts of Bombay and Madras3 that can where a such is dispussed on grounds other than those specified in Cls. (a) n 1 (b) of this rule the pluntiff must be deemed to have fuled in the suit ed that the Court is bound to make an order for the court of the Court es ly him to the Government

Where a plaint in forma suspens is returned for presentation to the by Court the planuff cappor be said to have failed in the sun and therefore no order for payment of Court fee can be made under this jule 4 Simirly where an application to sue as a pauper is rejected because the applicant is a minor and unrepresented and no enquiry is made as to pauperism an ler under this rule for prement of the Court fees from the estate of the n or applicant is not legal 5

#### 4 Costs

It i helds sen in 5 35 antel that a Court can under certain cir n theres order a next friend or a guardian of a minor to pay the costs of un per on the though he is not a part; to the suit Can this Court in a Launer suit order the next friend or the guardian to pay the Court fees due to vernment? It has been held that it can do so under the combined operation f S 35 and thus Rule Though the Court fee may not be costs but only revenue so far as the Government is concerned it is costs meurical by tho rty paying it and S 35 is wide enough to cover such a case 2

## 5 Costs of successful defendant

This rule makes a provision for the payment of Court fees due to the Covernment and does not deal with the power of the Court to order costs of a defendant who has succeeded in a suit in forma pauperis. But it does not follow that in the case of a pauper suit the Court cannot order the plaintiff to lay the costs of the successful defendant. Orders as to costs as between the i irties to the suit are governed by S 35 as much in suits by paupers as in other suits 1

6 The Court shall order the plaintiff to pay the Court fees - See Note 2 above

Covernne t apply for pa Cort fees e t of

R. 12. [New ] The Government shall have O the right at any time to apply to the Court to male an order for the payment of Court-fees under Rule 10 or Rule 11

(1905) 29 Bom 107 (10 ) (Xes) (1907) 31 Fom 10 (La) (F E) (1cs) (1908) 1908 Pun Re No 101 1age 485 (Yes) (1911) 12 Ind Cas 29 (30) 35 Rom 413

Under the ne v Code [Put see (1890) 1. Born 77 ( 8 79) Under the old Code-Overruled in (1907) 31 1 om 10 (F B)]

3 (1997) 91 Mid 113 (114) Reference nde Court Pees Act S 5

(1894) 4 Mad L Jo 98 (99) 4 (1891 1887) 6 Born 590 (597)

5 (1899) 13 Bom 234 (936)

1 [See Note 19 S 35 a te] [See also (1876) % Sut1 W R 816 2 (1931) 1931 Mrd 749 (250 %) 43 Mal 716

Note 5

1 (1891) 8 Bom 5 \* (5 9) (F P)

12 Scope of the Rule

Sunonus Note No

Note No

SCH.

1 Scope of the Rule

This rule is new and entitles the Government to apply to the Court at any time to make an order under R 10 or R 111 In the undermentioned case<sup>2</sup> it was held that the present rule being a rule of procedure had a retrospective effect and applied to cases of dismissil of suits before the new Code came into force

2 Appeal

13.

14

An order passed on an application by the Government under this rule for payment of Court-fee is an order under S 47 and is therefore appealable 1 See Note 7 to R 10 anic

R. 13. [New ] All matters arising between the Government and any party to the suit under Rule 10, Rule 11 Government to be or Rule 12 shall be decreed to be questions arising deemed a party between the parties to the suit within the meaning

of Section 47.

Synopsis Scope and object of the Rule

1 Scope and object of the Rule

This rule is new It sets at rest the conflicting rulings of the several High Courts under the old Code as to whether the Government is to be deemed a party to the pauper application and suit (See Note 7 to R 10) Ouestions arising under Rr 10 to 12 between the Government and any of the nattics are now questions to be determined under S 47 and therefore this rule operates as a bar to the institution of an independent suit whether by the Crown or any other party with reference to such matters 1

R. 14. [New.] Where an order is made under Rule 10. Rule 11 or Rule 12, the Court shall for thuith cause Copy of decree in le a copy of the decree to be forunded to the cent to Collector Collector.

Synopsis

Vote \c

Scope of the Rule

Scope of the Rule

All that the Court should do under this rule is to send to the Collector a copy of the decree which it has passed and which contains an order that the

106) 6 Bom L R 1122] Order 33, Rule 12-Note I 2 (1911) 12 Ind Cas 29 (90) 55 Bom 448 The cases under the old Code in the ab Note 2

rate they under the old code in the sence of such a provision were conflicting tee (1573) 2 Cil L Rep 4F1 (462) flow runnent could not apply (1581) 13 15 m 77 (2014) (18 H) 15 Hom 77 (79) (Can) (Se n nies (1905) 23 Isom 102 (103

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Note No

plant shall pay a certain sum to Government. What the Collector does of the receipt of the copy is no concern of the Court and the Court cannot Druard the elected to him with a direction to collect the sum parable by planenii 1

Refusal to allow applicant to sue as

pauper to bar sub sequent application

Scope of the Rule

of like nature

R. 15. [8 413] An order refusing to allow the applicant ( to sue as a panper shall be a bar to any subsequent amheation of the like nature by him in respect of the same right to sne; but the applicant shall be at liberty to institute a suit in the undinger manner in respect of such right, pro-

vided that he linst pays the easts (it any) incurred by the Government and by the opposite party in opposing his application for leave to sue as a panper.

11877-8 413 : 1859-8 310.1

#### Local Amendments

RANGOON B twee 1 th w rel 1 super and the word shall occurring in the 2nd line in critical

> oul ray then a the ground stated in Cl (a) of Bule 5 \* Synorus

Note No 'Right to sue ' Bar to subsequent application Costs incurred Dismissal of an application for default

Other Topics Proper appeal See Note 1 Pt (4).

Scope of the Rule

The Rule provides that an order refusing an application to sue in forma pauperis shall operate as a bar to a similar subsequent application. It does not, however, har a subsequent suit provided the costs of the Government and of the opposite party are paid 1 Nor does the refusal of the purper application har an application for a review of that order 2 As to whether the Court can after the refusal of the application, allow the pauper applicant to pay the requisite Court-fee within a time to be fixed by it and validate the plaint, see Note 10 to \$ 149 and the case cited below 3

The provisions of this rule apply also to applications for leave to appeal as a pauper 4

- Order 33 Rule 14-Note 1 1 (1030) 1930 Iting 312 (313) 8 Ring 231 Order 33 Rule 15-Note 1
- 1 (1895) 17 111 526 (529)
  - (1893) 21 All 353 (560 301) O 2 R 2 Is no bar
  - (1836) 20 Bom 504 (510) (1897) 24 Cal 899 (890)
  - (1917) 1917 (11 355 (353) (1932) 1932 \11 812 (314)
- 2 (1890) 4 Bons 414 (415) (1870) 11 Suth W R 22 (22 21)

- (18G) 70) 5 Leng L R App 29 (30) (1898) 20 All #10 (#11) No Court fee is
  - purable on an application for review
- 3 (1912) 14 Ind Cus 297 (2)8) (Cul) Following (1897) 21 Cul 889
- 4 (1898) 22 Bom 849 (859) Firm C J, dis

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# Synopsis lote lo | 1 | Appeal

Note No

1 Scope of the Rule

This rule is new and cuttles the Government to apply to the Court at any time to make an order under R 10 or R 11. In the undermentioned case? It was held that the present rule being a rule of procedure had a retrospective effect and applied to cases of dismissal of suits before the new Code came into force.

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of Section 17

Synopsis

Scope and object of the Rule 1

## 1 Scope and object of the Rule

This rule is new It sets at rest the conflicting rulings of the several light Courts under the old Code as to whether the Government is to be deemed a party to the pumper application and suit (See Note 7 to R 10) Questions arring under Rr 10 to 12 between the Government and any of the parties are now questions to be determined under S 47 and therefore this rule operates as a bar to the institution of an independent suit whether by the Crown or any other party with reference to such matters.

R. 14. [New ] Where an order is made under Rule 10. Rule 11 or Rule 12, the Court shall forthuith cause a copy of the decree to be forwarded to the Collector.

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Scope of the Rule

## 1 Scope of the Rule

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Order 33 Rule 12—Note 1

The is supler the oil Code in the above of 1 h a provision were conflicting to (1578) 2 t.il I, Rep. 161 (1672)
Covernment could not apply
(18 1111) 1300 77 (19 14 14)

(16.11) 15 Dom 77 (7.1) (Can) (See also (1904) 23 Isom 102 (103 100) G Bont L R 1122] 2 (1911) 12 Ind Cas 29 (90) 55 Bom 115 Note 2

1 (1911) 12 Ind C1 20 (30) 85 I on 41 Order 33 Rule 13 - Note 1

1 (1919) 1919 Int 7) (101) 1 Pat L Jone

I amust, shall pay a certain sum to Government. What the Collector does ( ofter the receipt of the copy is no concern of the Court and the Court cannot forward the decree to him with a direction to collect the sum parable by 1 Tuntiff 2

R. 15. [8 413] An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in

applicant to sue as pauper to bar sub sequent application of like nature

respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, pro-

yided that he first pays the costs (if any) menited by the Govern ment and by the opposite party in opposing his application for leave to sue as a pauper.

11877-5 413: 1859-5 3101

## Local Amendments

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If the n tl word panger at I the word shall occurring in the 2 1 hr in crt the Otherwiethan on the ground statel in Clfis of Rule 5 Sunorsis

Note No Scope of the Rule Right to sue Bar to subsequent application Costs incurred Dismissal of an application for default

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1 Scope of the Rule

The Rule provides that an order refusing an application to sue in forma pauperis shall operate as a bar to a similar subsequent application. It does not, however, but a subsequent suit provided the costs of the Government and of the opposite party are paid 1 Not does the refusal of the pauper application bar an application for a review of that order 2 As to whether the Court can after the refusal of the application allow the pauper applicant to pay the requisite Court-fee within a time to be fixed by it and validate the plaint see Note 10 to S 149 and the case cited below 3

The provisions of this rule apply also to applications for leave to appeal as a pauper 4

Order 33 Rule 14-Note 1

<sup>1 (1930) 1930</sup> Rang 31' (313) 8 Rang 24 Order 33 Rule 15-Note 1 1 (1695) 17 111 576 (\*28)

<sup>(180</sup>J) 21 VII 3 9 ( CO SCI) O 2 R 2 Is no bar

<sup>(1636) 20</sup> I on: 504 (510) (1897) 21 Cul 849 (490)

<sup>(1917) 1917</sup> All 955 (855) (1932) 1337 All 319 (314)

<sup>. (1680) 4</sup> Box 1 414 (115) (1870) 11 Sath W R 92 (22

<sup>(1879 &#</sup>x27;0) J Feng L R \pi 2J (30) (1879) 20 \lambda 11 410 (411) \rangle o Court fee 15 pay able on an application for review like the plaint

<sup>3 (1917) 14</sup> Ind Cas 297 (298) (Cal) Following (1897) 24 C 11 85J

2 Bar to subsequent application

The rule specifically provides that an order "re/nsing" the pauper application will operate as a bit to a subsequent application of the like nature in respect of the same right to sue R 7, anie, empowers the Court under the circumstances mentioned therein, either to allow or refuse to allow an application to sue as a pauper. There is a conflict of opinion as to whether an order of rejection of an application under R 5 of this Order is an order of refusal, within the meaning of this rule. In Alul Chandra Sen v. Pearly Mohun, 1 at was observed by the High Court of Calcutta that there is no distinction between an order of rejection under R 5 and an order of refusal under R 7 and both kinds of orders alike bar a subsequent application under this rule.

The order in that case was however, one passed alter evidence and, therefore presumably one passed under R 7° The High Courts of Allahabad Bombay Lahore Madras and Rangoon and the Chief Court of Oudh's have on the other hand, held that the bar under this rule does not extend to an order of rejection passed under R 5. It is submitted that the latter view is correct. The Colcutt High Court has, however, in a recent case bus dissented from the decision in Alul Chandra Sen v Peary Mohum mentioned above and has followed the view of the other High Courts.

An order returning the application for presentation to the proper Court does not amount to an order of refusal within the meaning of this rule 8

The bar under this rule being one which affects the jurisdiction of the Court to enterrain a fresh application, the Court is bound to take notice of it although it is raised at a late stage in subsequent proceedings 9

3 Dismissal of an application for default

According to the decision in the undermentioned casel of the High Court of Calcutta a dismissal of an application for default of appearance operates as a bar to the entertainment of a fresh application under this rule, But according to the other High Courts' such a dismissal does not amount to an order of refusal within the meaning of this rule and a second application is not barred. The High Court of Calcutta also, has, in a recent cases' followed the view of these High Courts dissenting from the earlier decision of its own Court.

In Ranchod Marar v Bezanµ3 at was held by the H gh Court of Bombay that an order rejecting the application as the applicant did not vish to proceed with the same amounted to an order of refusal within the meaning of the corres-

#### Note 2

<sup>151]</sup> 

<sup>3 (1845) 7</sup> All 661 (664) (F B) 4 (1896) 20 Bom 86 (94 95)

<sup>9 (1896) 20</sup> Born 85 (95) Note 3



(3) Under the Transfer of Property Act there was no provision for the passing of a final decree where payment was made in accordance with the preliminary decree. This omission has been recified in this Order.

In suns relating to mortgages, Courts should be guided by the provisens et O 34 and not by the English practice <sup>2</sup> The High Court on its o ignal s de is also governed by these provisions <sup>3</sup>

This order apples not only to mortgages of *immoteable property* but also to mortgages of *chattels*<sup>4</sup> and to charges <sup>5</sup> see R 15 below. The provisions of this order have no application to suns under S 12 of the Redemption of Mortgages Act. Pumplo Act 2 of 1913 <sup>6</sup>

## 2 Transfer of Property Act S 85

This Rule corresponds to S 85 of the Transfer of Property Act with the following material alternations —

- (1) The words all persons having an interest either in the mortgage security or in the right of redemption have been substituted for the words. All persons having an interest in the property
- compri d in a m rigage
  2 The words provided that the plantiff has notice of such interest
  - which occurred it the end of S 85 have been omitted

    3) In explanation has been added

The omission of the proviso to S 85 in the present Rule shows that person may be a necessary party to a mortgage suit though the planning may not be aware of that person's interest in the mortgaged property. Cases 1 der S 85 of the Fransfer of Property Act bearing on the question of notice

1 c only of academic luterest now <sup>2</sup>

The other effects of the changes introduced by the Rule have been di cussed in their proper places in the commentary on this Rule

## 3 Scope and object of the Rule

The object of the present Rule as to joinder of parties in mortgage sutts is to avoid multiplicity of suits. The Rule applies only to suits relating to mortgages (i. e. suits for sale, foreclosure or redemption) and to suits to inforce charges but not to suits for ejectiment. The Rule does not prohibit the joining of any party but merely lays down that all persons interested in the in relace security or in the right of redemption should be made parties.

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2 (1976) 1.0 6 Unib. 11.3 (11.3)
2 (1.10) "1 Cal JOT (210)
3 (1.10) "1 Cal JOT (210)
4 (2.10) (2.10) (1.11) 4.2 Cal 4.55
[See also Note 20 to 13.2 (1972) 1.932
Cit. JJ (1.33) 3.9 Cal 1.6 G Robe as to exist apply able to in itages of the central principles of the central princip
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C (1933) 1J33 Lah 17J (18t) 14 I th 2t8 Note 2 1 (1J10) 7 Ind Cas J02 (J04) 33 All 71

<sup>2 (1005) 12</sup> C<sub>1</sub>1 W N 911 (913) (1,07) 6 Cal L Jour 12 ( °2) (15.7 8) 3 Cal L Jour 12 (13 14) (190) 3 lud Cas 50 (571) 5 Nag L R 117 (1310) 1315 Cal 72 ( 70)

C, P C 297 & 298

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Explanation.—A puisite mortgages may sue for foreclosure or for sale without making the prior mortgages a party to the suit, and a prior mortgages need not be joined in a suit to redeem a subscauent nor ladge.

Sunanti

[See O 1, Rr 1, 3, 9, 10; and O 31 R 1]

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\ote '	10	Note	10
it relating to mortgages	1	plinition	10
ensfer of Property Act S 85	35 2 3	(c) Mahomedan c leus	11
ubject to the provisions of this	- 1	(f) Joint Hindu family	12
de	4	(j) Assigned of mortgage	13
ersons having an interest		(h) Received in insolvency	14
her in the mortgage security in the right of redemption	5	(i) Lessee	15
rties to a suit for foreclosure	•	(1) Landlord	16
e or redemption	6	(k) Kanomdar	17

VII Parties to appeals

XI Revision

VIII Effect of non joinder

Joinder of parties

tiff and a defendant

- VI Parties to a suit for foreclosure sale or redemption 6
  (a) Trustees executors or uluminstrators 7
  - (b) Benamidar (c) Sub mortga\_ce
    - (d) Prior mortgrace Ly
      - Other Concs

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9

Decree not affecting interests of genous not impleaded Sec. Note 13 1t (8) and (12) to (32) Interest under custom in the See Note 19

It. (2) an 1 (3)

Notice now immaterial. See Note 2 i uisno mortgigee s rights and duties See Note 19

IX A person cannot be both a plain

Note 19

Bu il Ctaimants of deceased morigages a
estate See Note o Pts (17) to (18)
See also Note 6 1 N (4)

Suits confined to part of hypothera Sc Note 6 Pts (18) to (90 a) Suit for contribution Sce Note P N (21)

1 Suits relating to mortgages

This order is new It incorporates with certain alterations So 85 90 92 94, 96, 97 and 99 of the Transfer of Property Act of 1882 which dealt with the procedure governing suits relating to mortgages. The chief objects with which this Order was exacted were—

- (1) To set at rest the conflict of decisions under the Transfer of Property Act 1882 as to whether an application for an order absolute after a prehiminary decree for sile was an application in execution or was one in the suit itself for a further decree (It is now made clear that the application is for a further decree)
- (2) To put an end to the conflict of decisions is to the applicability of Art 178 (now Art 181) of the limition of the applications for orders absolute in mortgage suits. (It is now established that Art 181 applies to an application for a final decree)

Order 34 Rule t - Note 1

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(3) Under the Transfer of Property Act there was no provision for the passing of a final decree where payment was made in accordance with the preliminary decree. This omission has been recufied in this Order.

It suits relating to mortgages Courts should be guided by the provicia of O 34 and not by the English practice. The High Court on its o ignal side is also governed by these provingers?

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## 2 Transfer of Property Act S 85

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(1) The words all persons having an interest either in the mortgage scenario or in the right of redemption have been substituted for the words. All persons having an interest in the property

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The omission of the provise to S 85 in the present Rule shows that person may be a necessare party to a mortgage suit though the planniff may not be aware of that person's interest in the mortgaged property. Cases a der S 85 of the Fransfer of Property Act bearing on the question of notice is only of academic interest now.

The other effects of the changes introduced by the Rule have been discussed in their proper places in the commentary on this Rule

3 Scope and object of the Rule

The object of the present Rule as to joinder of parties in mortgage units is to avoid multiplicity of suits. The Rule applies only to suits relating to mortgages (i. e., suits for sale, foreclosure or redemption) and to suits to efforce charges but not to suits for ejectment. The Rule does not prohibit the joining of any party but merely lays down that all persons interested in the morti-age security or in the right of redemption should be made parties.

(t9ta) 1915 Cal 432 (433) 3 (19t4) 1914 P C 136 (13 ) 36 411 383 41 Ind App 216 (t' C) 1 1932 (t899) 2t All 195n (15J9) 21 All 193 (194) ule as to costs applicable to mortgage of (1893) 1899 111 W N 34 (34) chattels 1 Note 3 (Lut see (1933) 1333 Bom 51 (54, 50)] 1 (1591) 13 All 432 (159) (F B) (1837) 19 111 373 (381) (1305) 1 Nag L R 117 (120) ( (1933) 1.33 Lah 179 (161) 14 Lah 218 (1901) 28 Cal 517 (530) Note 2 1 (1910) 7 Ind Cas 902 (304) 33 AH 71

> 2 (1909) 1 Ind Cas 500 ( 2 232 3 (1920) 1920 Nag 24 25

C. P. C. 297 A 298

(1004) 12 Cil W \ 9t1 (9t3)

(1.07) 6 Cal L. Jour 119 ( 22) (1677 16) 3 Cal I Jo r 12 (13 14) (1909) 3 It d Cas 370 (5"1) 5 Nag L R 117

(1913) 1915 Cal (43 ( 20)

#### 4 'Subject to the provisions of this Code

This expression has been substituted for the words. Subject to the provisions of the Code of Civil Procedure S 437 (now O 31 R 1) which occurred in the Transfer of Property Act S 85 Hence the present rule is subject not only to O 31 R 1 but also to other provisions of the Code as for instance O 1 R 91 or O 30 (Suits by or against firms )2

## S Persons having an interest either in the mortgage security or in the right of redemption

Under S 85 of the Transfer of Property Act the plaintiff in a suit relating to a mortgage was bound to implead all persons having an interest in the "Property comprised in the mortgage This gave rise to a conflict of decisions According to one view the words Property comprised in the mortgage referred to the interest, as distinguished from the physical property which the mortgagor was competent to transfer by way of mortgage at the date of the transaction 1 In other words, no person according to this view, who had no interest either in the mortgage security or in the right of redemption could be made a party. The High Court of Allahabad on the other hand, held that the word property meant the physical property mortgaged and that it was therefore necessary to implead all persons claiming interest in the property though they had no interest in the mortgage security or in the right of redemption 2 The present rule has adopted the former view and the Allahabad view is now no longer law

All the High Courts were however agreed, even in cases coming under S 85 of the Transfer of Property Act that a person claiming adversely to the mortgagor and the mortgagee t e a person claiming a paramount title was not a necessary or a proper party to a suit relating to a mortgage 3 The same principle has been held to apply under the present rule also 4 Thus a person impleaded as the legal representative of a deceased mortgagor cannot have a paramount title to the property which he sets up adversely to the mortgagor determined in the suit 5 A person who in a redemption suit claims

Note 4 1 (t924) 1924 All 107 (108) (1933) 1933 Cal 325 (328) 6 [See also (1932) 1932 [See also Note 19 P 2 (1911) 12 Ind C1s 6'9 (630) (411) Note 5

cannot be added as a party under O 1 R 10 (1932) 1332 Notes 180 33 Pun L R 240 (211)

lerson entitled to redee n but set long up paramount title in binself

5 (19%) 1926 Rang 208 (20J) 4 Rang 214 (1930) 19.0 Lah 1068 (1069) (1971) 1921 Cal 313 (313)

(1927) 19 , S nd 265 (266 267) (19.6) 1326 Mad 741 (716) (1918) 1913 \11 61 (84) 40 \11 584 (1918) 1318 Cul 537 (578) (1916) 1916 P C 18 (1J) 43 Ind App 187

(1J31) 1J31 1 at 64 (68) 10 1 at 234 (19.7) 132" Oudh 607 (603) (192") 1327 Mad 301 (301)

38 VII 468 (P C) (1911) 1911 111 -( 67) (19t4) 1J1; Oudh 18; (18a)

(1909) 31 311 11 (13)

(1327) 1927 Mid 345 (346) (1321) 1321 Mid 701 (\*04) Investigation of mortgagor , title to 1 and is not

the right of redemption in opposition to the plain'aff cannot be said to be claiming a title paramount to that of the mortgager and the mortgager and may be a proper party to the suit 6 The High Court of Madras seems to draw a distinction between a stat for redemption and a suit for the enforcement of a mortgage and is inclined to hold that persons claiming the property adversely to the mortgagor and mortgagee can be joined as parties to a suit for redemp But the judgments in these cases do not show why the general rule as to the exclusion of questions relating to paramount or adverse title from morthage suits should not apply to suits for redemption. On the other hand, it has been held by the Patna High Courts that even in suits for redemption persons asserting a paramount title to the mortgaged property should not be joined as parties. Where a person asserting a paramount title to the property has been erroneously made a party to a suit relating to a mortgage he should be discharged from the sun 9 But an objection on the ground of the joinder of such a person is not one affecting jurisdiction but is only an irregularity in the matter of the 1 inder of parties and can be cured under S 99 of the Code 10 Where therefore a party allows the suit to go on and the Court adjudicates on his claim to paramount title he will be bound by the decision and cannot subsequends contend that the question was not within the purview of the sun ii Mercover the rule as to the exclusion of paramount title is not an inflexible one and in proper cases persons asserting a paramount title to the property ca be conveniently made parties to a mortgage suit and their claims can be idjudicated upon in such suit 1 Thus, where the person claiming paramount or adverse title is in possession of the mortgaged property and is likely to resist the claim of the plaintiff if the latter succeeds in the suit, it may be convenient to ten him as a party so as to avoid a multiplicity of suits 13 Similarly where

| See also (1932) 1932 Cal 12 (1a) 58 Cal 12 (22) ] | (1916) 1316 Oudh 25 (97) 96 Ind Cas 61 (65) | 14 O. 6. 58 | Morteage and against

the manager of Hinde sons can the manager of Hinde joint 1 S amphaled—Sons can contend that the northage does not build the furnity a tate

6 (1910) 8 Ind Ca 2 5 (2.4) (Lah) (1868) 3 Agra H C R 144 (145) (1924) 1924 Pat 34 (201) 2 1 at 805

7 (1316) 1318 Mad 70 (703) [See also (1910) 8 Ind Cas 55 (586) (Mad) ]

8 (1927) 1927 Pat 45 (45) 9 (1924) 1J24 Oudh 1J (23)

I

(192c) 1926 Cal 11J2 (11J2 1193) (1914) 1914 Cal 143 (145) 19 Ind Crs 686 (688) 41 Cal 69

10 (1928) 1929 Nag 306 (307) (1925) 1J25 Cal 973 (J76 978) (1918) 1918 Mad 705 (705) (1918) 1918 Orab 19 (73)

11 (1924) 1924 Oudh 19 (23) (1934) 1934 Oudh 50 (54) 9 Luck 291 (1921) 1921 Nag 67 (68) 17 Nag L R 176 (1929) 1929 Pat 678 (679) 9 Pat 589 (1924) 1324 Mad 193 (196) (1318) 1918 Cai 933 (937) 44 Cai 425 (1916) 1916 Cai 173 (173)

> [See also (1926) 1920 Cal 1192 (1192 1193) Plaintif impleading person claiming paramount title—He can not sub equently claim at late stage that such person should be discharged?

12 (1918) 1918 Înt 356 (363) (1335) 1935 Nag 63 (68) (1914) 1914 Mad 332 (333) (1911) 11 Ind Cas 826 (526) (Cal)

(1907) 5 Cal L Jour 90 (104)

(1917) 1917 Oudh 159 (190) Suit on mort gage — Persons alleging that they are owners of property and easen tants of the subsequent mortgage, the mortgages in which, was im pleaded by the plaintiff are proper

parties (1931) 1931 Nag 20 (.3) 26 Nag L R 359 (1904) 8 Cal W N 365 (368)

(1910) 7 Ind Cis 921 (922) (Cal) Defendant mortgagor s legal representative can set up his own title to the property

13 (1974) 1924 Pat 613 (615) 3 Pat 244 (1935) 1935 Nag 63 (68) it is alleged that the person claiming paramount title is only a benamidar for the mortgagor, he can be joined as a party to the sunt and the question can be decided therein 16 So also in the case of mortgage of joint family property by the manager of joint Hindu family the other members of the family, who are joined as defendants to a suit on the mortgage can question the validity of the mortgage is

Where a person is desmassed from a suit on a mortgage on the ground of his claiming a paramount file to the property, he cannot subsequently sue for redemption 16

The question whether a person other than one classing a paramount title, may be made a party to a suit relating to a mortgage and whether the questions raised by him can be gone into in such suit will depend upon the applicability of the provisions of Orders 1 and 2 thereto. As has been seen in Note 30 to O 1, R 10 ante, questions raised purely as between the plaintiffs or between the defendants uter se and in which the opposite side is not concerned, are not questions involved in the suit and need not be gone into in the suit. Thus in a suit on a mortgage in favour of a deceased person a person claiming the estate of the deceased mortgagee in opposition to the plaintiff is not a necessary party to the suit 17 Similarly where the plaintiff mortgagee dies and some of his legal representatives are brought on the record, a person who claums also to be another legal representative cannot be added as parts on that ground only and allowed to raise questions purely between lumself and the mal claimants wifer se 18 It has also been held similarly that question of the relative hability of each of several co-mortgagors cannot be gone into in a mortgage suit 19

6 Parties to a suit for foreclosure, sale or redemption

As has been seen in Note 5 anle, all persons hiving an interest in the mortgage security or in the right of redemption should be made parties to any suit relating to the mortgage. The microst should be one subsisting at the time of the suit. Thus the owner of a contingent interest he that of a Hindu

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the time of the sunt. Thus the owner of a contingent interest like that of a Huid

(See vice (1910) 8 Ind Cas 883 (887) 18

(1828) 1929 1939 194 2 (4 2)

11 (1928) 1929 1939 Cal 973 976)
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15 (1916) 1916 Oudh 25 (26) (1916) 1916 Oudh 25 (26) (1928) 1928 Vald 764 (764) (1928) 1928 Vald 190 (200) (Sumisrly (1921) 1924 P C 118 (119) (P C) Mortexpe by Hindu widow—

(P C) Mortgage by Hindu widow-Surt on mortgage—Reversioner joined as pirty—Reversioner can question linding nature of mortgage aguinst him ] [See also (1930) 1930 Aug 82 (90)

but on mortgage — Sabsequent mortgage pomed — He sen dispute the binding nature of the mortgage against him on the ground that it was not made with his concent which was requisite under the law, he being mulguar of the tind!

1 (1850) 12 Cat 414 (121, 422) 12 Ind App 17 (10 C) 43 (0.13) 14 (Nog 120 (121) 13 Nog L R (2) 1 (10 8) 1328 Mal 954 (953) (See also (1931) 1931 Nag 161 (165)
17 Nag LH 312 Subsequent purchater—Impleaded — Disclaimer by
him of any interest — To be dicharged immediately without rusing is-uo-letween defendants safer

Note 6 1 (1888) 13 Bom 51 (53) (1932) 16 fom 599 (602) Cessition of in

(1913)

rescuting the mortgiger in the suit-Mortgig enotinees are party unter the can show he has been regulated [See also (1871) 8 from 14.00.6.1]

(19) Dec el morte ger bring milet li transfere l to an ther reve a ner as not a necessary party to the suit 2 Similarly a transferee pending a Sun 1 the mortage is not a necessary party to the suit 3

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The hears and assignees of the mortgagee's interest

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of redenpaon ---All persons mentioned in S 91 of the Fransfer of Property Act 5 Thus the mortgagor,52 all co-mortgagors,6 purchasers of

the county of redemption,7 subsequent mortgagees,8 and other the morigage liproperty -- His legal

representatives are n t becce art Tarti . Sub equent pur baser-Disclauning all interest to be hischarged at

2 (1305) 30 All 4 (7 (435)

a (1327) 1327 Na. att (200) Le ce of mort

Sin F (15.09) 21 41 149 (151)

(165J) 15-J VII W N JL (J2) (1376) 1976 Jour 142 (4) 35 I C 213 (Oudh) (1321) 1321 Cal 801 (803) Prior mortgageo

is in no way bound or affected by the sib equent one inbrance create ? sendente lite

4 (1913) 1319 P C 24 (20) 46 In 1 tip 272 47 Cal 175 (P 'C)

(1333) 1933 Cal G21 (C22) GO Cal 777 All mortgagous or heirs of mortgagues must be | nike to suit - Set sairy 1 arty joined after limit attom-W hole

suit fiels (1302) 24 311 22 , (224)

(1881) 9 All 68 (73) (F B) Sole mortgages dying-Several heirs lett- til must

be joine l (1913) 20 In l Cas 321 (320) (Cal)

(1314) 1314 Cal 789 (761)

(1914) 1914 All "25 (225) (1J16) 1J16 Pat 411 (414) Suit by one co heir of a mortgiace - All other co

heirs should be joined as partles (13.6) 1926 Cal 416 (417) Heirs of co mort gages are is custary parties to the

(1327) 1327 Mad 773 (775) Kurichit dee I executed by stake holder of chit fund transactions Quaero whether ill the subscribers to the fund were

necessary parties to the suit (Sce also (1932) 1932 Cal 34 (30, 36) Some heirs of mortgagee sning -Others consenting - Decree for lor mer correct ]

(1J33) 1933 Lah 17J (1S1) 14 Lah 218 Smit ly mortgagees to set asido order ol Collector for redemption on payment of a specific I sum - Under S 12 of Punjab Redemption of Mortgages Act 11 of 1913-Death of one of the

entirety 5 (1.123) 1933 N (g 311 (313)

(1.112) 17 Ind Cas 433 (132) (Cal) (1920) 1.120 Nig 247 (248) (1926) 1926 MI 46 (47) 45 MI 171 (1901) 23 MI 467 (469)

5a (1692) 15 Mad 54 (56)

(14Js) 23 Bom 287 (2J1) (1931) 1931 Oudh 410 (410 411) 6 (1897) 11 Lom 495 (428

(1802 1901) Upp Bur It Vol II, 586 (1874) 21 Suth W R 423 (428) (1895) 7 All J 6 (378)

(1895) 3 L U R 15 (17) (1095) 9 Bom 128 (131) (15-6) 10 Born 618 (655 GJb)

(1903) ... Mad 461 (462) (1913) 18 Ind Cas 141 (182) (L B) (1926) 1926 All 46 (47) 49 All 171

(tJ29) 1929 Alt 814 (814) (1923) 1923 Bom 451 (453)

(1832) 16 Bom 486 (491) Auction purchaser

in execution of money docres (1897) 19 All 941 (942) (1871) 14 Moo Ind top 144 (147) (FC) (1920) 1920 Nag 247 (245) Transferen of

mortgaged property in breach of co venant igainst alienation is a neces

is entitled to be made party to

hary Party (1930) 1930 Mad 1017 (1020) Purchaser from Government of mortgaged pro perty attached under Cr PC, S 68.

mortgage suit and has the right to rodeam 8 (1908) 1303 Puu Rs No 64 1 age 309

(1316) 1916 Lah 213 (219) 1916 Pun Ra No 80

(1892) 15 Mad 487 (489) (1894) 21 Cal 116 (120) (1886) 10 Bom 88 (91)

(1890) 12 All 537 (589) (1881) 8 Bom 108 (173) it is alleged that the person elaiming paramount title is only a benamidar for the mortgagor, he can be joined as a party to the suit and the question can be decided therein 14 So also in the case of mortgage of joint family property by the manager of toint Hundu family the other members of the family who are nomed as defendants to a suit on the mortgage can question the validity of the mortgage is

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## 6 Parties to a suit for foreclosure, sale or redemption

As has been seen in Note 5 ante all persons having an interest in the mortgage security or in the right of redemption should be made parties to any suit relating to the mortgage. The interest should be one subsisting at the time of the suit 1 Thus the owner of a contingent interest like that of a Hindu

(See also (1910) 8 Ind Cas 885 (886)

(Mad) 1 14 (1978) 1928 Mad 2 (4 5) (1925) 1920 Cal 9"3 (976)

15 (1916) 1916 Oudh 25 (96) (1928) 1928 Mad 764 (169) (1928) 1928 Mad 199 (200)

(Similarly (1921) 1921 P C 118 (119) (P C) Mortgage by Hindu widow-Suit on mortgage-Reversioner joined as party-Reversioner can question binding nature of mortgage aguinst

[See also (1900) 1930 Nag 89 (90) buit on mortgage - Subsequent mortgages joined - He can dispute the binding nature of the mortgage against him on the ground that it was not made with his consent which was requisite under the law

which was requisite black the land I be being imiguan of the land I le (18 C) 12 Cat 414 (421 422) 12 Ind App 11916, 1916 Nag 120 (121) 13 Nag L R 69 1 (129) 1928 Nal 5 8 (979)

18 (1924) 1977 Mad 10,1 (10,2) [See also (1933) 1933 Cal 324 (328) ]

19 (192") 1927 Pat 117 (120)
(1923) 1923 Pat 199 (201)

[See also (1931) 1931 Nag 161 (165)

27 Nag L R 312 Subsequent pur chaser-Impleaded - Disclaimer by thin of any interest — To be dis charged immediately without rus ing issue between defendants inter

Note 6

1 (1838) 13 Bom of (o3) (1897) 16 Lom 599 (602) Cossation of in

terest die to partition (1915) 1915 Mad 1203 (1203) A ct on sale of mortgagor s r ghts - 1 urcha er joined as lints and effectively re liesenting the morigagor in the nit-Mortgigor not i ecca ary party unless le can shov he has been rejidiced [See also (18 1) 8 Bom HCOC 1

(19) Dece ed mortgagor laving completely tran ferred to another

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Security.

- The heirs and issignees of the mortgagee's interest Co mortgagees 4
- The t flowing are necessary parties as being interested in the county of redempaon -
  - (1 All persons menuoned in S 91 of the Transfer of Property Act 3 Thus the mortgagor 52 all co-mortgagors, 5 purchasers of the equity of redemption,7 subsequent mortgagees,8 and other
    - the mortangel property 1114 legal representatives in a t nece ary
  - arti transfer with a restriction of New 1 R 112 bul cju it jur hiser-Dischoning all sutere To be lischarged in

nce

2 (1305 A) (114)\* (435) 3 (1347) 134\* No. 33 (293) 1 c cc of most

(1530) 21 41 143 (151)

(185J) 15 J 111 W > JI (02) (1126) 13 to Jour 142 (4) 93 I C 213 (Ou lb) (1321) 1321 Cal 801 (803) Prior mortgiges

in in no way bound or iffected by the sib ique it encimbrance created rendente lite 4 (1919) 1919 P C 24 (26) 46 Int App 272 47 Cal 175 (P C)

(1313) 1393 Cal 671 (672) GO Cal 777 All mortgages or heirs of mortgagees must is patter to suit - \cearty joined litter limit stron-Whole aust Inla

(1302) 21 411 226 (225) (1837) 9 All 68 (73) (F B) Sile mortgagee dying-Soveral hours left- all must

1012) 20 In 1 Cas 32) (320) (Cal)

(1914) 1314 Cal 768 (761)

(1914) 1914 411 225 (225) (1317) 1316 Lat 411 (414) Suit by one co herr of a mortgagee - All other co

- hours should be joined as parties (13\_6) 19\_6 Cal 416 (417) Heirs of co mert gagee ato notessary justies to the
- (1J27) 1J27 Mad "73 (775) Kurichit dcod executed by stake bolder of chat fund transactions Quaere whether all the subscribers to the fund were necessity parties to the suit [See also (1972) 1932 Cal 31 (35 36)

Some hers of mortgages suing -Others consenting - Decree for for mer correct 1

(1JJ3) 1J33 Lah 17J (1SI) 14 Lah 218 Suit by mortgagees to set assde order of Collector for redemption on payment of a specific I sum - Under S 12 of l'unith Redemption of Vortgages Act II of 1913-Death of one of the Hantiffs and failure to implead his L R. - I ach holds s well defined and divisible share- O of R 1 not applicable and suit does not abatem

entirets 5 (1 123) 1923 N ig 811 (318) (1312) 17 Ind Cas 432 (482) (Cal)

(1920) 1J20 Nig 247 (246)

(1926) 1926 M1 46 (47) 45 M1 171 (1926) 1926 M1 46 (47) 45 M1 171 (1901) 23 M1 467 (409) 54 (1827) 15 M1 65 (456) (1835) 23 Hom 287 (201) (1931) 1931 Oudh 410 (410 411) 6 (1957) 11 Fom 425 (428)

(1507 1-9a) Upp Bur R Vol II 586 (1574) 21 Suth W R 423 (428) (1585) 7 All 146 (378)

(1595) 7 L B R 15 (17) (1-85) 9 Bom 128 (191) (1366) 10 Bom 618 (650 656) (1903) 26 Mad 461 (462)

(1913) 18 In 1 Cus 191 (182) (L B) (1926) 1926 All 16 (17) 48 All 171

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in execution of money decree

(1930) 1930 Mad 1017 (1020) Purchaser from Government of mortgaged pro perty attachel under Gr PC S 68. is entitled to be made party to mortgage suit and has the right to

redeoin 8 (1999) 1J03 Pan Re \o 64 | 1 tge 309 (1316) 1916 Lah 219 (213) 1916 Pun Re

No 86 (1892) 15 Mad 497 (469) (1894) 21 Cal 116 (120) (1886) 10 Dom 88 (91) (1890) 12 All 537 (539) (1884) 8 Bom 168 (173)

persons interested in the equity of redemption 9 and in the proper taking of accounts, 10 are all necessary parties

(2) Prior to the amendment of the Transfer of Property Act by Act XX of 1929, there was a conflict of decisions as to whether an attaching creditor (who was one of the persons mentioned in S 91 of that Act) was a necessary party to the mortgage suit in The amended S 91 does not inention an attaching creditor as one of the persons entitled to redeem a mortgage and he is therefore no longer a necessary party to a mortgage suit

The following are not necessary parties to a suit relating to a mortgage ---

- (a) A prior mortgagee See the explanation
- (b) A person merely in possession of the mortgaged property 12
- (c) A person whose name is merely entered in the village papers as having some title to the plots in question, but who is in no way connected with the mortgage <sup>13</sup>
- (d) A person who has a right to be maintained out of the income of the mortgaged property when such right is not made a charge on the property <sup>14</sup>
- (e) A person having merely an incheate title to the property 15
- (f) A receiver appointed in a partition suit previous to the mortgage suit <sup>16</sup>

9 (1927) 1027 Bom 474 (477) 51 Bom 771 Hens to intestate Parsi who intermeddle with his estate are his legal repro sentitives and proper parties to suit on mortgage executed by the de ceased Parsi Bourke Cas 319 Suit for foreclosure—Per

Bourke Cas 319 Suit for foreclosure—Per sonal representatives of the mort gagor are necessary parties (1892) 15 Mad 487 (489)

(1920) 1926 Mag 496 (497) Person interested — The test is whether the party will be projudiced by foreclosure or sale 10 (1974) 6 N W P H C R 208 (210)

(1889) 15 Cal 35 (38) 11 (1912) 17 Ind Cas 432 (433) (Cal) He is a necessary party

(1933) 1933 Nag 333 (334) (Do) (1923) 1923 Nag 311 (313) (Do) (1928) 1928 Nag 97 (98) 23 Nag L R 164 (Do) (1914) 1914 Mad 439 (439) 15 Ind Cas 384 security being furnished — Attach ing decire holder ceases to be a necessary party ] 12 (1921) 1921 Nag 191 (193) (1921) 1921 Nag 67 (0s) 17 Nag L. R. 176

(1931) 1931 Cal To3 (166 770) 58 Cal 538

bution gets right to redeem and is a necessary party - But after pur

chase in Court sale himself ceases

to be a necessary party [See also (1932) 1932 Cal 661 (663)

59 Cal 827 Attachment rused on

(1921) 1921 Nag G7 (6s) 17 Nag L R 176

Frespriser not a necessiry purty

[See also (1932) 1932 Nag 144 (147,
148) 28 Nag L R 60 Redomption—

Tresprisers in possession — Decree
aguinst — Not binding on real heirs
of deceased mortgagor 1

13 (1925) 1925 All 593 (593) 14 (1900) 22 All 191 (199) 27 Ind App 51 (PC)

(1931) 1931 Rang 108 (109) [Do] (1920) 1920 Mad 126 (128) 48 Mad 696 (Do) (192) 1920 All 861 (861) (Do) (1921) 1921 Mad 30 (34) 44 Mad 232 (Do) 19 Sind L R 268 Mortgages s pro perty under management of minager under Sind Encumbered Estates Act—Suit for redemption—Manager not a necessary party because the claim for redemption is not a claim

- the other co-owner is not a necessary party thereto 17 (h) Where a number of persons own the county of redemption in
- distinct shares and the mortgagee, in his suit on the mortgage, exempts one or more of such shares, and claims only a decree for a proportionate part of the mortgage debt, the owners of the exempled shares are not necessary parties 18. The same rule applies where the mortgagee has released from the mortgage any portions of the property 19
- (i) Where a mortgagee has through negligence, allowed strangers to trespass upon, and acquire parts of the mortgaged property. such persons are not necessary parties to a suit for redemption 20 The general rule is that a mortgage is indivisible and hence suits cannot be brought for the redemption or enforcement

of a mortgage part by part 201 As to the parties to suits, other than suits for redemption, foreclosure or sale by or against mortgagors or mortgagees, see the undermentioned cases -1

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43) 85 All 441 ]
(169a) 1698 All W N 120 (120)
17 (1905) 22 C11 746 (748)
19 (1905) 2 Cal L Jour 202 (216)
                                                                          [Compare (1913) 19 Ind Cas 423 (423)
   (1,05) 31 Mad 333 (336)
                                                                         (Cal) Released part being property
   (1908) 30 Cal 755 (757)
                                                                         which mortgagor was not entitled
                                                                         to mortgage - Mortgagee can claim
            [See (1931) 1931 Nag 44 (45) 27 Nag
L R 4 If mortgages claims the
                                                                         the whole debt from the rest of the
            whole dobt from the rest, the ex-
                                                                         property ]
[Compare also (1909) 1 Ind Cas 264
            empted sharer in the equity of re
           demption would be a necessary
                                                                         (277) (Cal) ]
   party ]
(1906) 28 All 174 (177)
(1905) 1905 All W N 156 (156) Portions al
                                                                 (1891) 18 Cal S20 (321) Where whole pro-
                                                                         perty 14 included, mortgages is not
bound to apportion mortgage debt
[See also (1903) 25 All 79 (82) 1902
            ready redeemed by paying propor-
tionate amount - Owners of such
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portions are not necessary parties See also (1913) 19 Ind Cas 614 (614) 35 All 247 ] (1903) 1 Ind Cas 80 (81) (Mad)

19 (1905) 20 Cal 755 (757) (1905) 1905 All W N 156 (150) Where one item has been already redeemed its owner is not necessary party to suit as to other items. See also the following cases holding that where a mortgagee has lost his rights against the owner of a portion of the property or has released such portion from his mortgage he cannot throw the whole burden on the rest of the

for any debt actingt the mort-

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....
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(But see (1913) 20 Ind Cas 41 (42,

All W N 203 Mortgageo's right to

201 (1875 78) 1 All 297 (300)

(408) (P C) Purchaser of portion of equity of redemption in a portion of mortgaged premises entitled to redeem that portion on payment of proportionate amount ]
(1918) 1918 Mad 1142 (1144) Suit by one

co owner for redemption of whole mortgago — Court can in suitable case pass decree for both reliefs viz. for partition and redemption of plaintiff's share.

21 (1870) 2 N W P H C R 72 (73) Suit for

## 7 Trustees executors or administrators

The rule is made "subject to the other provisions of the Code." This would include O 31, R 1 under which the trustee, executor or administrator in whom the property is vested can effectively represent the persons beneficially interested. The latter need not therefore be joined as parties to a suit relating to the mortgage. But the Court has a discretion to join the beneficiaries in a proper case, as for example when, in the case of an executor, the state has been fully administered, or in the case of a trustee or an executor, his interest is adverse to that of the beneficiaries in the case of joint-trustees however all of them should be impleaded in any suit relating to the mortgage.

## 8 Benamidar

It is now well settled that a benamidar can sue or be sued in his own name and that the rule applies to mortgage suits also! The real owner is not a necessary party to such a suit. The contrary view, held in the undermentioned cases, is not good law. There is, however, no impropriety in adding the real owner as a party in proper cases, and the real owner as a party in proper cases.

possession by mortgagee against third party who demis mortgage s title—Mortgagor is a necessary party (1808 GJ) 5 Bom H C (O C) 76 (Si, 82) Suit by puisno mortgageo against first mortgagee who has been paid tho

amount due to him to recover the

mortgaged piemises—Nortgagor is a ne ceruit lutt (18°4) 22 5 utl WR 639 (533) Suit by mortgages for pos ossion — Subse quent mortgages and purchasers who opposed him in obtaining pos

sess on are proper parties (1870) 25 Suth W R JJ (40) Mortgages a suit for khas possession of undefined area of the mortgaged land co

mortgages and necessary parties 1912) 11 Ind Las 37 (88) 36 Bom G24 Sunt by puisne mortgaged to establish his inortgage and to set saide the order passed against him in claim proceedings in suit brought by proinortgage—Mortgager is necessary party to puisne mortgages a suit

(1888) 15 Cal 35 (38) Suit to determine the rights of the puisine and prior mort gagees inter so mortgagor is necesary party

(1901) 5 Cal W A 493 (425) Mortgagee pur chasing a nortion of the pre effects

not necessary parts
(1931) 1031 PC 229 (2931) [P C) Suit for
recents by some mortgagers against
assignee decree holder purchaser—
Other co mortgagers praviously held
entitled jointly to accounts not im
pleaded—Suit bid for non joinder
(1902) Cast Note?

1 (1902) Cul W V 488 (489) Forclosure de ereo against executor binds bene ficuries though not parties to the

(1931) 1931 Bom 583 (587)

2 (1884) 10 Cal 713 (718) Executor finding at difficult to sue debtor-Legates may sue

may sue (1927) 1927 Born 49 (50) 51 Born 16 3 (1866) L R 3 Eq 363 (374), Cleg v Roulan I

4 (1889) 13 Mad 107 (206 207)

5 (1908) 34 Mad 408 (414) (1912) 13 Ind Cas 234 (284) (Mad )

(1903) 26 Mad 649 (658) (F B) Note 8

1 (1896) 18 All 69 (74) (1933) 1983 Mad 685 (686) A transferor from the herrs of a bonamidar mort

gagor can maintain a suit for re

(1899) 21 All 380 (582) (1906) 28 All 44 (46)

(1906) 28 All 44 (46) (1638) 22 Bom 672 (678) (1637) 24 Cal 614 (615)

(1892) 15 Mad 267 (263) Presumption is that benamidar instituted suit with the authority of real owner and lat

(1900) 13 C P L R 33 (37)

(1918) 1918 P C 140 (143) 46 Cal 566 46

Ind 1pp 1 (P C) (1924) 1924 Pit 458 (4.9) 3 Pat 81

(1924) 1924 Pat 458 (4.9) 3 Pat 81 (1897) 24 Cal 34 (36)

(1896) 22 Born 820 (823) (1925) 1925 Cd 973 (978 979)

(1908) 30 All 30 (92) (1910) 7 Ind Cas 16v (170) (Cal) 2 (1889) 16 Cal 364 (366)

(1898) 25 Cal 98 (93) (1903) 30 Cal 265 (272)

(1907) 30 Mad 245 (246) 3 (1929) 1929 Mad 268 (260)

## 9 Sub mortgagee

Ι

Where a mortgagee creates a mortgage of his rights in favour of another he is said to create a sub-mortgage. The sub-mortgagee is entitled to bring to sale the interest of the sub mortgagor in the mortgage 1 and the original mortgagor is not a necessary party to such a suit 2. Where the morigagor is also made a party to the suil, the sub mortgagee may sue for sale or foreclosure of the mortgaged property itself in cases and in the circumstances which would have entitled the sub mortgagor on the date of the sub-mortgage to clum that rehef, for the purpose of working out his rights against the suli-mortgagor3 The mortgagor is not a necessary party to a suit for redemption by the sub-mortgagor against his sub-mortgagee,4 though there is no impropriety in making him a party thereto 5. In a suit for redemption by the mortgagor against his mortgagee, the sub mortgaged as being interested in the mortgage security (is a necessary party) 6 But where the mortgagor, not having notice of the sub-mortgage, fails to implead him in such suit and pays off the mortgage amount to the mortgagee, the sub-mortgagee cannot, after that redemption, bring the right mortgaged to him to sale 7 The reason is that he has only a terminable microst in the mortgago-right of ms sub mortgagor and when that right has been legally terminated his security so far is gone

#### 10 Prior mortgagees-Explanation

Under S 85 of the Transfer of Property Act it was held in some cases that a prior mortgages was a necessary party to a suit to enforce or redeen a puisne mortgage. These cases have been superseded by the ovplanation

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Note 9
1 (1907) 29 VII 3-5 (300) (F B)
(1911) 9 Ind Ca+ 76 (765) (Lom)
(1921) 1921 Lah 2-3 (2-4)
(1903) 5 VII LJ 402 (403)
(1908) 27 VII 472 (477 478)
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Court which hold that he could get only a money decree against the sub mortgagor is no

Jonger good law
(1836) 18 All 113 (114)
(1901) 21 Yul W N 153 (154)
(1903) 25 Yul 46 (47)
(1903) 27 All 384 (370)
(1903) 27 Yul 314 (519)

2 (1999) 4 Ind Cas 433 (434) (C.1) (1910) 5 Ind Cas 654 (655) (Cal) It is how ever open to him to impleed original

mortgigoi (1911) 9 Ind Cas 76, (765) (Bom) (1921) 1921 Lah 2,3 (754) 3 (1908) 5 Ill LJ 402 (404) (1909) 2 Ind Cus 6to (646) (Cal) (1897) 20 Yad 3, (3e 3.) (1904) 25 All 611 (217)

(1904) 26 All 611 (617) (1913) 18 Ind Cas 389 (390) (Oudh) (1905) 27 All 472 (477, 478) Sub-moriga;

(1903) 27 All 472 (477, 478) Sub-mortgages can redeem (under Transfer of Property Act S 91) prior mortgage (See also (1900) 1300 Pun Re Ao 31, page 107 Sub-mortgages as entitled to retain posse sion until amount

(1891) 15 Born 632 (633 694) Form of de

(1896) 20 Bom 54J (503) (1922) 1922 Bom 550 (301) 16 Bom 993 (1927) 1327 Wad 703 (701)

See (1910) 5 Ind C vs 151 (152 153)
37 Gal 23) 37 Ind App 19 (P C)
Sub mortgage by deposit of title
deeds not impleaded—Not bound
by decree or sale)

7 (1932) 1333 Vad 115 (11") 00 Mad 320 (1321) 1921 Mad 3"4 (376) Note 10

1 (1904) 14 Mad L Jour 467 (468) (1897) 13 All 513 (545) (1895) 22 Cal 33 (39) (1906) 30 Bom 155 (167) (1898) 22 Bom 701 ( 07) (1898) 20 All 110 (114 115)

(1891) 13 All 432 (465) (F B) (1900) 22 All 212 (214) (1891) 13 All 581 (255) Projects cann

(1891) 13 All 581 (252) Property cannot be

1, to the present rule under which a prior mortgagee or his transferee is not a necessary party to a suit relating to a puispe mortgage 2 But there is no prohibition against joining a prior mortgagee in such a suit,3 and the equities of a particular case may even demand that he should be so made a party 4

Where a decree for sale is passed on foot of a puisne mortgage, without making the prior mortgagee a party to the suit the rights of the prior mortgagee are in no way affected and the sale under the decree can only be subject to the prior mortgage 5 Even if the prior mortgagee is made a party to the puisne mortgagee's suit he is not bound to assert his prior right, if no relief is claimed against him and the priority of his right is not in any way impugned and the decree in the suit cannot affect his rights b But where he is impleaded and his prior right impugned or sought to be postponed in any way, he is bound to assert his right under the prior mortgage. Otherwise his right will be barred by constructive res judicala? When a prior mortgagee who has also purchased the equity of redemption and is in possession of the mortgaged property is made a defendant to a suit upon the puisne mortgage the decree may direct the puisne mortgagee to redeem the prior mortgage before bringing the property to sale 8

A holds a first and a third mortgage on a property B the holder of the second, i e, the intermediate mortgage impleads A as a defendant to the suit on the ground that he is a third mortgagee A is not bound to set up his prior mortgage masmuch as the prior mortgage is not impugned 9 But

(1893) 21 All 272 (273) Fullure to acknow ledge prior lien of a defendant not

fatal to suit (1901) 1901 All W N 68 (68) Suit by subse quent mortgage for sale-Prior mort gage ignored-Offer to redeem if prior mortgage found valid Suit maintainable (See however (1907) 29 All 205 (206) Sale subject to prior charge

for maintenance allowed! 2 (1926) 1926 Nag 135 (136)

(1916) 1316 Pat 113 (114) 2 Put L Jour

(1912) 13 Ind Cas 182 (182) (1912) 1 Mad

W N 41

(1909) 36 Cul 193 (210) (1920) 1920 Pat 630 (631)

(1898) 1 Oudh Cas 105 (111 112)

(1909) 1 Ind Cas 139 (139) (Cal)

(1897) 1 Cal W N 453 (454) (1914) 1914 Born 268 (26J) 21 Ind Cas 39 (41) 38 Bom 24 Non joinder of

prior mortgages in suit by puisne mortgages does not affect latter a

Subsequent mortgagee-1'ny ing prior mortgagee-Suit by intermediate mortgagee-Subsequent mortgagee cannot insist on prior mortgage be ing pa d-Property can be sold sub ject to prior mortgage] [See (1933) 1933 Mad 595 (596) Prior mortgages impleading second mortgagee and obtaining decree-Property purchased by private sale and satisfaction of decree entered-Subsequent suit by second mortgages impleading prior mortgages-- Decree directing sale of property subject to his hen-Property purchased in execution-Second mortgages pur

(But see (1929) 1929 All 296 (298)

chaser is entitled to possession] 9 (1926) 1926 All 449 (449) 48 All 554 (1909) 9 Cal L Jour 78 (81)

(13 1) 1931 All 76 (79) (1926) 1926 All 449 (449) 48 All 554 he is not precluded from setting up the prior mortgage and if he so acts it up it should be adjudicated upon by the Court 92 Where A's claim to the priority rests not on a prior mortgage in his favour but on the fact of his being subrogated to the rights of a prior mortgagee by payment, he must assert the right to such priority on pain of being precluded by res judicata from putting it forward in a subsequent sunt 10 The reason is that in such a case he fills only one role, 112, that of pusne mortgagee and must put forward all the defences open to him Where a person holds two mortgages on the same property, he can, by force of the explanation to the rule, sue on the later mortgage subject to his rights under the earlier mortgage 11 though according to the High Court of Allahabad he must expressly reserve his rights under the prior mortgage in The High Court of Bomhay has, however, held that ho cannot sue on the subsequent mortgage alone unless, perhaps, he reserves his rights on the first mortgage up But according to the general trend of decisions he cannot sue on his earlier mortgage only and afterwards sue to enforce the second mortgage 12 But a contrary view has also been taken in the undermentioned cases which proceed upon the ground that masmuch as the two mortgages constitute different causes of action, there is nothing to prevent their being sued on separately without regard to the question whether the mortgage sued on it is an earlier or a later one

It was held by the High Court of Patna in the underment oned caseis that a mortgagee can bring the properly to sale subject to a prior mortgage in his own favour, at any rate, when he was not able to sue on the first mortgage But the consensus of opinion seems to be that though the mortgagee may be allowed to sue separately on the mortgages and obtain decrees, he cannot be allowed to bring the property to sale twice or under one of his mortgages subiect to the other,15 the reason heing that it would not be equitable to the mort-

[Contra -(1915) 1915 Cul 373 (374) (1903 04) 8 Cal W N 385 Puisne mortgagee being a necessary party must, when impleaded set up his prior as well as subsequent mort gages]
9a (1911) 9 Ind Cas 643 (643) (Mad)

10 (1916) 1916 Cal 809 (808) (1912) 14 Ind Cas 496 (504) 39 Cal 527 30 Ind App 68 (P C) (1909) 3 Ind Cas 686 (688) (Cal)

Τ.

(1931) 1931 Pat 33 (38) 9 Pat 816 [But compare (1927) 1927 Nag 38 (39) Decision by Court on question

(But see (1931) 1931 All 549 (549)

53 All 631 He is not bound to declare his prior mortgage] 11b (1915) 1915 Bom 54 (55) 39 Bom 138 30 sale over same property by same person—Separate foreclosure decrees

can be passed (1920) 1920 Mad 1026 (1029) Suit on second mortgage without reservation of rights under first mortgage-Decree - Subsequent suit on first mortgage-Maintainable as an in dependent cause of action so long as

properties not sold away and mortgage rights not extinguished (1920) 1920 L B 160 (100) 10 L B R 260 Smit on later mortgage-bub equent

suit on earlier one-Independent cause of action

14 (1916) 1916 Pat 113 (114) 2 Pat L Jour

15 (1921) 1921 Cal 321 (326) (1921) 1921 Pat 77 (80) 2 Pat 874 Property already sold under prior de cree cannot be allowed to be sold under later decree

(1595) 20 411 022 (324 325) (1909) 3 1nd Cas 175 (176) (Cal) Property cannot be sold under second decree subject to the first.

(1902) 25 Mad 108 (113, 114) (1901) 24 All 179 (184)

gagor to allow the mortgagee to do so, as a fair price cannot be obtained for the property at such a sale. The conflict has now practically been set at rest, in cases of mortgages coming into existence after the 1st April 1930, by the enactment of the new S 67-A of the Transfer of Property Act by which a mortgagee holding two or more mortgages shall, in the absence of a contract to the contrary be bound to sue on all the mortgages. See also \oto 40 to S 11 ante.

#### 11 Mahomedan co heirs

Where a Mahomedan mortgagor or mortgagee dies leaving a number of heirs the ordinary rule is that all the heirs should be made parties to a suit relating to the mortgage 1 But the failure to join some of the heirs is not fatal to the sust and the decree passed will bind all the heirs 2 It was so held by their Lordships of the Privy Council in Khairaimal v. Daim 3 The reason is, is has been already seen in Note 63-B to S 11 and Note 5 to S 52. aute, that the representatives actually brought on the record must, in the absence of fraud or collusion be deemed to be litigating in the common interest of themselves and of all the other heirs within the meaning of Expl VI of S 11 of the Code Where however pending the suit objection is raised as to the non joinder of some of the heirs but the plaintiff refuses to make them parties the decree can bind only the right title and interest of the persons actually on the record 4 In view of the Privy Council decision referred to above the views expressed in the undermentioned cases 5 that a decree against only some of the legal representances of a deceased Mahomedan mortgagor is not banding on the other representatives or that there is some difference in principle between Mahomedan co-heirs and the members of a joint Hindu family in this respect cannot be accepted as correct especially as those cases do not advert to the Privy Council decision

## 12 Joint Hindu family

(1,04) 26 411 14 (17 18)

There is a conflict of decisions as to whether, in a suit by or against the manager of a joint H-ndu family to enforce or redeem a mortgage, the other members of the family are necessary parties in the sense that their interests will not be bound if they are not individually joined as parties On the one hand, it has been held by the High Courts of Madras and Patina and in several cases of the other High Courts that in such a case the manager

(1930) 1930 Mad 63 (71)

(1920) 1920 Mrd 814 (814) hather-Mana

ger not precluded from suing in his

own name merely because he pur

ports to execute the document also

Note 11

<sup>1 (1887) 11</sup> Lom 425 (428) (1870) 14 Suth W R 21 (216) [See also (1932) 1932 Cal 34 (35)] 2 (1J15) 1915 Bom 272 (277) 39 Bom 729 3 (1JO4) 82 Cal 936 (818) 32 Ind App 23 (P C) [See also the observations in (1925) 1925 411 479 (480) 17 411 466] 1 (1J19) 1919 Bom 135 (137) 43 Bom 575 1 (1J23) 1323 Bom 411 (412) 43 Bom 712 1 H5) 19 7 Lah 903 (205) 1 11) 131.) Lom 135 (137) 17 Dom 575 Note 12 5 N 3 388 (393) 15 8) 1 Mad 222 (225) 18 J) Mad 207 (08) (i 1\_) 10 Ind Cus 874 (878 873) 35 Mad

effectively represents the other members of the family and that the latter cannot impugn the proceedings as not binding on them merely on the ground of their not having been individually made parties to the suit. But in many other decisions, it has been held that the other co-parceners are necessary parties to the suit and that their interests cannot in any way be affected by the result of the suit. In this connection, the following decisions of the Privi Council should be referred to 5 In Arshan Prasad v Har Narain 6 it was held that the manager of a joint Hindu family business effectively represents the family in all littlation by or against the family in connection with the joint family hasiness In Sheo Shankar v Juddoo Lunnar" the Privy Council observed as follows ---

There s cans to be no doubt upon the Indian decisions (from which their Tordships te no reason t 1, nt; that there are not asion, including foreclosure suits when the managers of joint lim lu finishes so effectively represent all other members of the family that the family as a whol I bound

In Ganpat Lat v Bindleasin Prasad a minor co-parecuer sued for a declaration that his right to redeem a mortgage was unaffected by a sale under a decree passed against the manager without impleading him (the minor) as a party. Their Lerdships rejected that claim holding that, after the purchase under his decree the mortgagee was in the position of a purchaser and that unless the sale and the decree were nttacked in a properly constituted suit his possession could not be disturbed. In Lingan Gonda v. Basan Ganda 9 the Privy Council held that S 11 Expl VI was applicable to a joint Hindu family. In view of the foregoing decisions of the Prny Council the Madras and Patna view must be accepted as correct See also Note 61 to S 11 ante Even granting that the son is a necessary party to a suit against the father, where he is impleaded as a legal representative of his father he cannot object to the decree in the executing Court on the ground of the plaintift's failure to implead him 92 Nor does the plantiff mortgagee lose his right to sue the son separately by his failure to join him in the suit against the father 96

On the question whether in a suit by or against the manager of a joint

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Hindu family the manager should be expressly and specifically stated as sung
                                                         (1906) 30 Bons 477 (486)
                                                         (1 103) 80 111 256 (257)
                                                         (1907) 27 Alt 311 (315 317)
                                                         (1098) 24 411 211 (213)
   (1913) 18 Ind ( 19818 (852) 9 Nag I R 1
                                                         (1635) 17 111 537 (568)
                                                         (1593) 15 All To (93) (F B)
                                                       5 (1911) J Jud Cas 739 (741) 33 411 272 38
                                                         Ind 1pp 45 (P'C)
(1914) 1914 P 5 137 (197) 96 411 383 41
                                                         In 1 12 P 21C (P C)
(10 0) 1920 1 C 1 (2 3) 47 Cat 921 47
                                                         Ind tpp 91 (P C)
(1927) 1327 1 C of (G of) 51 Bcm 450 54
                                                                In 1 11 0 122 (P C)
                                                       ( (1911) 9 In L 15 7"3 (741) 83 All 272 88
                                                       In 1 1p 4 (P C)

(1914) 1314 P C 130 (197) SG 111 SS3 41
                                              11
                                                       8 (1970) 19_0 P C 1 (2, 3)
                                                                                       47 Cat 924 47
                                                       1nd ter 91 (PC)
9 (1927) 11.7 PC 6( 6 57) of Pom to 54
                                                      Ind App 122 (P C)
91 (1-97) 21 All 3-6 ( 57 359)
   (1.)011 29 Cal 517 (.311)
                                                      26 (1-22) 21 111 201 (-07)
   (1900) 27 Cal 721 (75u)
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or as being sued in his representative capacity as manager, there is a conflict of decisions some cases holding that such express mention is not necessary, 10 and others holding that it is 11 The better view, it is submitted, is that the question whether a manager suce er is sued in a representative character is a question of fact in each case and his specific description as manager is not essential

Although it may not be legally necessary to implead the other coparceners in a suit by or against a manager, yet, they would be proper parties to such a suit 12 Further the right of the other co parceners to object, not on the ground of their non-joinder but on the ground of the debt being not binding on them, or as heing tainted with illegality or immorality, is not affected by proceedings to which they have not been parties 13 But in a suit on a mortgage of joint family property where the manager is not made a party all the others are necessary parties 14 Similarly, where the father is impleaded but he does not, or cannot, act in a representative character, the other members should be joined if their interests are sought to be affected 15

To a suit to enforce the mortgage of the share of one co parcener alone, the other co parceners are not necessary parties.18 Similarly, where the mortgage is not a joint family transaction but one entered into by a member of the family in his individual capacity, the others are not necessary parties 17

Where the parties are not governed by Hindu Law, and the son, under the Customary Law is entitled only to a reversionary interest for the protec tion of which he has the right to interfere to prevent unnecessary alienations of the property the son s interest is not sufficient to entitle him to be made a party to a suit on the most rage 18

13 Assignee of mortgage

In a suit for redemption of a mortgage against the assignce thereof, the original mortgagee is not a necessary party! But in a suit to enforce the mortgage brought by the assignce of the merigage, the original mortgages is a necessary party where the mortgagor denies receipt of consideration2

## 14 Receiver in insolvence

Where the mortgagor becomes insolvent after the date of the mortgage, the mortgagee bringing a suit on his mortgage is bound to implead the Official Receiver

10 (1930) 1930 Pat 293 (297) (1923) 1923 All 284 (284)

(1912) 15 Ind Cas 126 (129) 34 All 549

(1921) 1921 Pat 377 (378) 6 Pat L Jour 610 11 (1916) 1916 Bom 278 (279) 40 Bom 248 (1916) 1916 Pat 310 (311) 1 Pat L Jour 468 (1916) 1916 Born 278 (279) 40 Born 248

12 (1903) 25 All 162 (164) (1931) 1931 Bom 408 (409) 33 Bom L R 608

(1902) 24 All 459 (4G0)

13 (1303) 25 411 214 (223) (1910) 34 Bom 354 (357)

(1916) 1916 Cal 279 (282) 42 Cal 1068

(1912) 17 Ind Cas 734 (735) (All) Father

in jail-Vinor son not represented -- Son not bound (1917) 1917 Mad 761 (763) Once the par ties have become divided in interest the father cannot sue on behalf of

(See also (1988) 1933 Nag 44 (46) 29 Nag L R 77]

16 (1913) 21 Ind Crs G8J (G90) (Lom) 17 (1902) 1902 Pun Re No 15 page 53 (1904) 1 All L J 307 (au8) Mortgage of pro

entitled to sue without joining

other co parceners [Sec slso (1889) 13 Bom 51 (53) Davided members of the family not

necessary parties]
18 (1919) 1919 Lah 40 (40) 1919 Pun Re No 125

1 (1926) 1326 Sand 145 (147) 2 (1910) 7 Ind Cas 69 (69) (111)

or Assignee as a party thereto <sup>1</sup> The undermentioned cases to the contrary <sup>2</sup> are O no longer law in view of the decision of the Privy Council in Kala Chand v Jacannath referred to hove See also O 23, B 10, ante

#### 15 Lessee.

I

A lessee who has been inducted on tho land by the mortgager or by the mortgage and whose interest will be affected by the result of the suit is a recessary party to a suit relating to the mortgage. But a person having merely a raised interest in the land is not entitled to redeem a mortgage or to be joined as a party to a suit on the mortgage.

#### 16 Landlord.

Although the general rule is that a person cluming a paramount title is not a necessary party to a suit on the mortgage, yet, in some cases, it may be convenient to join the landlord of the mortgager as a party thereto. (See Noto 5, supra) Where the landlord is in possession of the mortgaged property not by virtue of a supreme title but by virtue of a title improperly and collusively obtained from the tenant under a decree for ejectment, ho is a necessary party to the suit on the mortgage.

#### 17 Kanomdar.

In an appeal by sub tenants against a decree for redemption of a Kanom, obtained by a jenmi, the Kanomdar is a necessary party 1 Whore a melcharathdar along with the jenmi obtains a decree for the redemption of a Kanom, and the Kanomdar appeals against the decree, claiming compensation for improvements, the jenmi is a necessary party to the appeal 2

18 Parties to appeal -The provisions of this Rule apply also to appeals 1

#### Note 14 1 (1327) 1927 P C 108 (109) 51 1nd App 190 51 Cal 593 (P C) Reversing 1325 Cal

765 (786) (1935) 1935 Laii 316 (318) (1992) 25 Mad 406 (422)

2 (1927) 1,927 Mad 609 (010) Decided before the decision in 1927 I C 108 (1930) 1930 Lah 791 (792) Which simply follows 1925 Cal 785 which was re

follows 1925 Cal 785 which was re versed to the Privy Copnell 3 (1927) 1927 P.C. 108 (109) 54 Ind App 190 54 Cal JOS (P.C.)

Note 15 1 (1924) 1926 Hom 522 (523) Lessees under mortgagee

(1919) 1J19 Pat 325 (326) Lease granted by mortgagee

(1907) 29 All 679 (682) Lessee under per

Permanent lessee (1927) 1927 Lat 411 (411, 412) Moharandar (But see (1883) 9 Cal 643 (644) Holder of Mourasi Mokuran patta granted by mortgagor not entitled to redeem and not necessary party ] 2 (1901) 5 Cal W N 83 (85)

Note 16 1 (1929) 1929 Pat 222 (227) 8 Pat 489 Suit

a mortgage of a non transferable occupancy holding the landlord is a proper but not a necessary party (1909) 1939 Nag 89 (90) Suit on prior mort

his consent 2 (1912) 16 1nd Cas 703 (705) (Cal)

Note 17
1 (1902) 25 Mad 568 (571)
2 (1911) 9 Ind Cas 940 (940) (Mad).

2 (1911) 9 Ind Cas 940 (940) (Ma Note 18

1 (1897) 7 Mad L Jour 206 (207) (1899) 9 Mad L Jour 49 (50) (190a) 2 Cal L Jour 202 (216) (1916) 1916 Mad 828 (829)

[But see (1927) 1927 Cal 479 (480) Redemption suit dismissed — One only of the mortgagors appealing— Others are not necessary parties]. 19 Effect of non joinder

Under S 85 of the Transfer of Property Act, 1882, it was held that the word "must' in that Section was importance in character, and that, consequently the future to join a person indicasted in the most gued property as a party to the suit was a defect fatal to the suit. But the Court was, however, held to have power under S 32 of the old Code (now O 1, R 10) to add the necessary parties. As his been seen in Note 4, ande, O 34, R 1 makes it now clear that its provisionace "subject to the other provisions of the Code including O 1, R 9, and hence, the non-joinder of my person as a party to the suit is not a fat il defect, a decree can be passed so far as regards the puties actually on the sense that, in his absence, unless the person countred is a necessary party in the sense that, in his absence.

Note 19
1 (1901) 1901 All W N 22 (22) Decree bolder cannot bring projects to sale subject to pulsue Moltgigee's light of ic

demption (1892) 19 Cal 401 (411) (1898) 22 Bom 701 (707) (1902) 26 Bom 433 (430)

(1905) 27 All 517 (525) (1996) 18 All 107 (112) (1891) 13 All 442 (465 477) (1894) 16 All 478 (489) (I B)

(1994) 10 411 418 (483) (1 15) (1996) 29 Mad 84 (86) Lount was doubted

2 (1892) 19 Cal 401 (411) (1880) 11 Cal 45 (51) (1886) 8 Lom 328 (386) (1903) 27 Bom 157 (161) (1904) 24 All 75 (78)

(1903) 27 Bom 157 (161) (1904) 21 AN 75 (78) (1901) 5 Cal W N 83 (84) Review granted

for the jurge o of J ming omitted person (1871) 8 Bom H C R (O C) JG (101) Court

may add A necessity puty even after a preliminary decree (1895) 18 Mad 33 (38) Intendment not to

be allowed if by so doing defendant is likely to be precluded from plead

(1900)

(1905) 1905 AH W N 35 (36) Pracet for amendment not to be refused even though a previous opportunity had been given and the case wis nearing

tion by one hear of mortgagos-Non

(1927) 1927 111 459 (459)

(1924) 1924 All 928 (923) (1924) 1924 All 928 (923) (1924) 1924 All 107 (104)

(1919) 1919 Bom 13, (136) 43 bom 575 (1913) 21 Ind C 14 271 (272) 35 All 484

passed for sale of property of other

mortgige suit purchaser of portion of mortgiged proporty is made a party defendant after prescribed period of limitation suit as against him is builed by limitation.

(1J09) 3 Ind Cas 2J1 (203) (Cal) Decree is binding on parties thereto [See also (1908) 12 Cal W A 911

(313, 914)]. (193°) 1932 Cal 31 (30 30) Some heirs of decased mortgagee sung—Others consenting—Decree for former correct

(1933) 19 j3 Cal 92 (328) 86 Cal W A 1133 (1141 1143) One of the purchasers of the equity of redemption impleaded dying jending saut—til L Re-except one substituted after notice and without objection—Non-pounder not fatil of

meterni
[1933] 1033 Lul 179 (182) Sut by mort
gages to set avaide order of Collector
for redemption under S 12 of the
Pumph Redemption of MortrigeArc III of 1113]—Beath of one and
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no rehef could be given at all even is regards the parties actually on the record. If the party on the record effectually represents others not joined the decree will bind the interests of the latter also. The Court has also ample powers under O 1, R 10 to idd, in proper cases, my parties it considers necessary for the disposal of the suit. In this connection reference may also be made to S 99 of the Code which has also down that a uniquender (which includes non joinder) is not, in itself, a ground for reversing or viving a decree?

But, although, the non-joinder of persons who ought to have been joined as parties under this Rulo is not fatal to the suit, the result of this eninct, in any usy, affect the rights of such persons. Simple, is this proposition is its application to the complicated facts arising in mortgage suits has been the subject of a great diversity of judicial opinion. In order to appreciate the various views properly, it is necessary to remember the following important principles—

(1) Where an owner C mortgages his property to 4 by way of a simple mortgage, the mortgages gets nothing more than a right to obtain from the Court an order that the property be sold for the recovery

of the debt The mortgager rotains, in himself, (a) a right to redeem the mortgage, and

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4 (1927) 1927 All 230 (230)
                                                            (1887) 9 All 125 (125)
                                                            (1588) 10 All 520 (528)
(1897) 19 All 570 (381)
(1901) 23 All 25 (31)
(1903) 25 All 440 (453) (FB)
  (1988) 1963 Cal G21 (G22) GO Cal 777
  (1918) 1918 Pat 154 (154 155) Withdrawal
          of suit against a necessary party-
          Suit should be dismissed
  (1916) 1916 Mad 825 (-29)
                                                            (1906) 23 All 279 (280)
(1906) 1906 All W N 28on (286n)
  (1914) 1914 All 109 (111) In redemption
                                                            (1901) I All L J 207 (208)
          suit all the mortgagees or their re-
          presentatives are necessary jurties
                                                            (1891) 18 Cal 164 (179) 17 Ind App 261
          [See also (1934) 1934 1'4sh 38 (46)
                                                                  (P C)
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Suit for sile of mortgage projecty— Mortgaged property wholly transfered by mortgagor—Transferee made prity after limitation—Suit must be whelly dismissed ] (See (1900) 36 Bom 1.06 (161) Neces

sary parties defendants are those without whom no decree at all can be rendered

5 (1325) 1925 Cal 94 (95) (1927) 1927 Mad 1071 (1042)

T.

tion sale under O 21 R 90 because

(PC) Right to question priority etc.

(1894) 21 Cal 76 (79) 26 Ind App 165 (P C) (1916) 37 Cal 209 (200) 37 Ind App 19

not affected

(1900) 4 Cal W N 607 (509) (1684) 1884 All W N 136 (186) (1897) 26 Mad 82 (83)

non joinder S 99 cannot be invoked

1

1006 Mortgage by father and som—In partition suit mother allotted a share —Suit by mortgagee without im pleading her—Her right of redemption not lost]

(1934) 1934 Pat 648 (650) 13 Pat 364 Sub led-

(PC)
id by

(1912) 13 Ind Cas 874 (575 8"6) 1 Upp Bur R92 Unimplended person is entitled to declaration that his rights are not affected by decree

(1912) 14 Iud Cas 496 (204) 39 Cal 527. 89 Ind App 68 (P C) (1912) 14 Ind Cas 299 (300) 89 Cal 925

C. P. C 299 & 300

- (b) a right to the physical possession and enjoyment of the mort-aged property<sup>9</sup>
- (2) Where the mortage is a usafluctury one 4 will get a light to be in possession of the property until his debt is discharged, und C will retain only the right to redeem
- (3) Where C the mortgagor, sells has interest in the property to D, then, if the mortgago is a simple one D gets Cs rights, viz, the right to redeem and the night to possession of the mortgaged property, if the mortgage is a usufructurry one he will get only the right to redeem the mortgage.
- (4) Where C after creating a meetgage in favour of A, creates a further mortgage in favour of B then, if the mortgage is a simple one, B will get

(a) a right to redeem the prior mortgage and

- (h) a right to obtain from the Court an order that the property be sold subject to the prior mortgage, for the recovery of his debt
- O will retain the right to redeem both the mortgages plus the right to possession
- If Bs mortgage is a usufructuary one, he will be entitled to a right to redeem the prior mortgage and a right to the possession of the property and C will be entitled only to a right to redeem both the mortgages
- (5) Where C makes several mortgages successively in <u>favour of different</u> persons the later mortgagee is entitled to redeem the earlier ones cannot redeem the later onos, according to the maxim. Redeem up and foreclose down. 11

We now proceed to consider the various classes of cases illustrating the application of the above principles —

(i) C executes a simple mortgage in favour of A and then sells his intorests in the mortgaged property to D A files a suit on his mortgage, grainst C without impleading D, and, in execution of the decree obtained therein, purchases the property himself. Being obstructed by D in the possession proceedings, A said D for possession if the suit maintainable? No 12 The reason is that D not having been made a party in A s suit on the mortgage, is not affected in any way by the decree and execution proceedings in such suit, and his right to possession cannot be disturbed. On the same principle, if D is dispossessed by A in execution, he cun, in a suit perty Act
12 (1897) 19 All 511 (512) (F B).

(1923) 1922 Cal 374 (277) 49 Cal 1018 (1929) 1929 Cal 2.3 (295) Sant was also barred by function in this case (1931) 1931 Mad 572 (575) (1927) 1927 Lat 411 (411 412) (1927) 1927 Lat 411 (411 412) (1921) 1921 LB 10 (102) (1926) 1920 Ray 183 (184) 4 Rang 90 (1920) 1925 Nay 193 (1930) Lessee use made

[But see (1886) 8 411 324 (329) Ob solete law]
9 (1918) 1918 Sind 26 (27) 12 Sind L R 1
10 (1918) 1918 Sind 26 12 Sind L R 1
11 See S 94 of the Amended Transfer of Pro

parts (1923) 1929 Nag 246 (250) 25 Nag L R 19 (1923) 1923 Nag 273 (274) 19 Nag L R 18 by him against 1, recover back possession unconditionally  $^{13}$ . There is no difference in principle in this respect even if D is a purchaser of Cs interest in execution of a money decree against him, instead of in a private trunsfer  $^{14}$ . The remedy of I in such cases would be to file a fiesh suit on his mortgage against D. He cannot, however, bring a fresh suit where his claim on the original mort,  $J_{\infty}$  is barred by limitation  $^{16}$ .

- It was, however, held in the undermentioned cises, that the result of not implicating D or other person entitled to be in possession would be to make the decree so obtained intefficial only against the right of redemption vested in such persons so that A would be entitled to possession against them subject to their right of redemption. It is submitted that this issue is not correct. D has not only not a right of redemption but a right to the possession of the property as well. A decree to which he was not a party cannot affect him over my respect of the latter right.
- (11) The principles above stated in Class (1) will equally apply to cases where D, instead of being a purchiser of C s interest, is a usufine tury mortgaged in possession.
- (iii) C executes simple mortgages first in two ur of 1 and then in favour of B B suce on his mortgage without impleading A and, in execution of the decree obtained therein, purchases the property in Court auction and enters into possession. Thereafter, A suce on his mortgage without impleading B and purchases the same property in execution of his decree. It will be seen that, at the time of the suit by 1 the right to redeem and the right to possession of

Transfer by way of lease (1925) 1925 Sind 193 (195) 17 Sind L R 281 Vendee of equits of redemption

> [See also [192] 4 Mad H3 (216) Puisno mortgagee in possession— Prior mortgagee who had obtained money decree pirchising the property in oxecution deprising juisne mortgagee of his possession—Latter can sue prior martgage, for jaces

(1972) 1932 Cal 561 (562) 15 (1931) 1931 Mad 542 (542) (1930) 1935 Mad 542 (542) (1930) 1935 Mad 500 (502) (1937) 1927 Pat 411 (411 412) (1923) 1923 Nag 273 (274) 19 Na, L R 18 Tansforce a lessee

•

(1901) 5 Cul W N 423 (425 429) (1931) 1931 Lah 419 (438) 16 (1949) 1922 Lom 334 (83a) (1885) 12 Cul 614 (620) (1931) 1931 Vad 542 (549)

(1025) 1023 Rang 183 (100) 6 Rang 297 17 (1901) 26 411 461 (467) (1932) 1932 111 366 (355) (1832) 16 Bom 483 (401)

(1917) 16 Ind Cas 457 (450) (Cat) (1927) 1927 Cal 239 (250) Where it was hell that disposessed purchaser can only redeem and council sue for posses sion

(1916) 1916 Cal 771 (771) (Do) (1921) 1921 Cal 157 (169) (Do) (1924) 1J24 Pat 472 (453) 3 Pat 114 [See (1895) 21 Vad 64 (66) Where

defendant was willing to redeem]
(1908) 6 Cal L Jour 612 (616)

(1692) 17 Wed 17 (18) Pursue mortgage in possession (1691) 13 MI 315 (31J) Subsequent usufrue

1691) 13 All 315 (313) Subsequent usufrue tuary mortgages in possession

(1806) 10 Bom 24 (220) (Do)
(1902) 7 Cal W N 11 (19 20) Case of pulsae
mortgages who had parchased in
execution of his do ree
(1901) 23 411 (3)

16 (1911) 9 Ind Cas 513 (515) (Mad) Overruling (1903) 76 Mad 537 (1997) 1857 411 W N 125 (125) A cannot sue

(1924) 1924 Mad 650 (655) 47 Mad 5.1 (1923) 1923 M1 232 (232)

the property being already vested in B cannot be affected by A's suit to which he was not a party. It follows that 4 cannot maintain a suit for possession against B19 or a suit for possession subject to a redemption by B 20 He can, however bring a fresh suit for sale on his mortgage against B provided of course that, on the date of such suit the claim on the mortgage is not barred by limitation 91

(11) C executed simple mort ages first in favour of 4 and then in favour 4 obtains a decree upon his mortgage without impleading B and in execution thereof purchases the property himself and ob tains possession B thereafter files a suit on his mortgage pur chases the same property in execution of his decree and then sucs A for possession Does the suit he? No "2 The reason is that at the time of B s suit on the mortgage the right to redeem and the right to possession having both already vested in A the latter cannot be affected by anything done in B s suit B has, hewever, two remedies open to him, 112, (a) to redeem 123 and (b) to sue A for sale on the subsequent mortgage subject to the prior mert gage " If B adepts the former remedy and redeems A the latter, in his tuin, as owner of the equity of redemption can redeem B25 Beth these rights can, however, be adjusted on equitable grounds in the same suit 26 If B adopts the latter remedy, A can,

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t recove los e sion from puisne
ts if uctury mortgagee
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(1694) 21 Cal 116 (120) (1010) 1916 Oudh [4(10) 18 Ondh Cas 347 (1910) 1915 L L 49 (50 51) 8 L B R 206 I usne mortgagee ent tled to sne for

) to

Decree must be for possession sub ject to redemption by B-Submitted

2, 33

(1926) 1926 411 480 (483 489) Remedy on

20

agun on his mortgage if within

23 (1923) 1923 Nag 225 (226) (1924) 1924 Nag 198 (199) B has the first right to redeem and not A to redeem

(1901) 23 Boin 153 (162) 4 was held enti iled to redeem B first

(See also (1935) 1933 Bom 25 (2u) Prior simple mortgagee in 105ses sion under sale in enforcement of his mortgage-Subsequent mortgagee not made jarty-Litter can tedeem and obtain transfer of security but cannot get possession-His remedy is to sue for sale if not burred ]

24 (1903) 30 Cul 599 (604 605) (F B) (1917) 1917 Pat 214 (217) But purchaser cannot dispossess & without redeem ing him

(1920) 19.0 Mad 650 (651) (1924) 1924 Pat 484 (486) 3 Pat 435 (1920) 1920 hag 251 (253) 16 Nag L R 215

(1912) 14 Ind Cas 496 (504) 39 Cal 527 39 Ind App 68 (P C)
95 (1927) 1922 All 135 (137) 44 All 462 Prior

mortgageo who has foreclosed his mortgie without impleading puisne mortgagee can deposit under Trans fer of I roperty Act S 53 and sue for redemption [See however (1932) 1932 Pat 270

(272) 11 Pat 415 ] 26 (1922) 1922 411 185 (194) 44 All 469 Prior

ts mm leaded in B s suit A s remeds is to avail of Rules 12 and 13 of this Orler or to redeem B If not the only other remedy of A is to sne in clusty clum that B should redeem the prior mortgage rights O vested in him before disturbing his possession 7 In other words I can set up his prior mortage as a shield a unst the claim of L. This right of I is a weapon of defence and not of attack " and em be set up notwithstunding the claim on the mortgage itself

- is brited by Innitation 30 (i) timber a mortaine in favour of 1. Thereafter in execution of a money degree a nust t the most reged property is attached and and is purchased by D. Pending the attachment 4 purchases by 1 m ite sile the property from 6 in satisfiction of the most aire and enters into possession. In a suit by D against 4 for recovery of presession can 4 set up his mortgage as a shield as a defence to the suit ? No 31 The reason is that the private purchase of I pending attrehment is void against all claims of D all in, under the attachment and does not convey the equity of redemption to 4 The prior moitgage can be used as a shield only for the purpose of protecting a possession to uluch the person etting it up has become laufully entitled and since in the case above referred to 4 had no valid title to such possession as against D he cannot use his pile mortgage as a shield in D s suit to re cover nossession
  - (ti) C executes simple mort ages first in favour of 4 and then in favour I sues C on his mortgage without impleading B B also institutes a parallel suit on his own mortgage without implead ing ! I purchases, pending B's suit, the mortgaged property in execution of his decree and thereafter B purchases the same proporty in execution of his decree If the doctains of his pendens upplies to the ease then Is purchase cannot take effect as against is and therefore B will be entitled to possession as against A is remedy will then be to file a fresh suit for sale against B3 Lurther on the analogy of the principle stated in Class (v) above, I not being entitled to possession cannot hold up his pilor mort age as a shield against Bs suit for possession The undermen

mortgagee was allowed to redeem having regard to e justice (1922) 1927 Nag bJ (31 J ) (1 B) A was iven a decree for posses ion subject to B s right of redemition [See also (1931) 1331 Pit 431 (435 4.6) I mor mortgage suing without impleading subsequent mort ages of portion and becoming purel aser in Court auction—Second suit against subsequent mortangen for possession -becond mo tginee alloyed to re deem that portion alone]

T

27 (1931) 1931 All 406 (481) 28 (1922) 1922 P C 11 (13) 48 1nd App 46. 43 All 469 (PC)

(1933) 1933 411 412 (413) (1881 82) 6 Lom 11 (13) (1922) 1J22 All 104 (105) 44 All 415 (1683) 1883 AH W N 133 (193) (1904) 31 Cal 737 (443)

(131\_) 14 Ind Cas 537 (539) (Lah)

(1922) 1922 Mad 249 (25J) (1331) 1331 Rang 100 (106 107) J Rang 1

(13°3) 1323 Rang 107 (106) (But see (1917) 1917 Wid 51 (753) 40 Wad 77 Dis ented from in 64 Wad L Jone N R C 25 and also contrary to 1922 P C 11 } (1982) 1332 I to 2 O (371) 11 I at #15

99 (1931) 1931 All 416 (481) (F B)

465 ation See n in

31 (1929) 1923 P C 258 ( 59) (P L) [But sec (1976) 1920 \ag 21 (93 94) Transferce les pendens held entitled to set up prior mortgage as shield ] 32 (1907) 31 Born 112 (118) (1930) 1930 Mad 570 (571 572) [See also foot note 36 infra]

tioned cases however, while holding that the doctrine of list pendens applies to such cases, have nevertheless come to the con clusion that A cao get a decree for possession subject to redemption by B 33 The High Court of Allahabad has in a recent Full Bench case 34 held that the doctrine of his pendens applies to such cases but has in a somewhat cootrary manner come to conclusions which can only follow on the hasis that the doctrino does not apply Thus it has formulated the following conclusions -

If A sues B as plaintiff for possession, then

(1) if he was the earlier purchaser (a e purchaser pending Bs suit) in point of time he can redcom B and recover possession even though his (As) mortgage is harred by time.

(2) if he is the later purchases (a c, if Bs purchase is pending As suit)

then his suit even for redemption cannot be decreed

If B suce A as plaintiff for possession then

(1) if B is the earlier purchaser in point of time he must redecin 1 and A cronot compel B to submit to redemption by him

(2) if B is the later purchaser in point of time he must first redeem A but A will have the right to redeem B next, and retain possession

The High Courts of Madras and Calcutta have held that the doctrine of his pendens does not apply to legal proceedings to coforce mort gages and that therefore a sale au pursuance of a mortgage decree the mortgage having been executed before the institution of the suit is not affected by the doctrino of his pendens. According to this view the first purchaser will be entitled to possession as against the later purchaser a result which is practically the same as that of the Full Beoch case of the Allahabad High Court re ferred to above

In the principles discussed in the several classes of cases discussed abovo. there is no distinction between the case of a mortgage purchaser and a stranger purchaser as can he seed from an examination of the cases above referred to 37 When the puisne mortgagee who has not been impleaded in a suit on the prior mortgage seeks to redeem a prior mortgago it was held before the Transfer of Property Act was passed that he should pay the amount due under the prior nortogge without any reference to the decree that was passed in the prior mort gage 38 But S 89 of the said Act provided that when once a final decree was passed on a mortgage the mortgage security and the right to redcem were both extinguished, with the result that thereafter the rights of the parties fell to be e decree 39 Eveo subsequent to the Transfer of Pro

> (1933) 1933 (-1 181 (182) (1850) 5 Cal 263 (268) 37 (1928) 1928 Rung 18J (190) 6 Rang 297

36 (1905) 32 Cal S91 (904)

(1922) 1922 Bom 234 (335) Assignee from decree bolder purchaser 35 (1891) 18 Cal 1G4 (180) 17 Ind hp 201

(1 C) 39 (1920) 1920 P C 79 42 All 364 47 Ind App 71 (P C)

(1900) 22 All 391 (397 3JS) [See also (1918) 1918 P ( 34 (35) 40 All 407 45 Ind App 130 (P C)]

nd L R 64 (But see (1926) 1926 11 480 (486) Lis vendens does not apply Prior mortgagee cannot compel unimplea ded luisne mortgages to redeem

91 (LJ31) 1931 All 406 (481 482) (F B) 35 (1933) 1933 Mad 583 (584 '90 594) 36 Mad

perty 1ct the earlier view is adopted in many cases 40 In O 34 R a which has taken the place of S 59 of that Act the words as to the mortgage security being extinguished have been omitted. The result now is the same as was held by the decisions prior to the Pransfer of Property Act namely that the puisne mort gagee seeking to redeem the prior mortgagee should pay the amount due under the prior mortgage and not merely the amount due under the decree thereon 41 He is not however bound to pay for any imp orements made by the purchaser 42 Where a puisne mortgagee is impleaded in a suit to enforce a prior mortgage and a decree for sale or foreclosure is passed on the mortgage the effect is to extin guish his security if he does not everer o his right of redemption or his security is not expressly saved 43 It was held in the undermentioned cases 44 that the puisne mortgagee is not entitled in such a case to insist that the mortgager should redeem his mortifule als his cause of action being altogether different from that of the prior mortgagee. Similarly it was held if the puisne mortgagee pays off the prior mortage he cannot and a for an order absolute for the amounts of both the mortgages 45 B t the said case re of doubtful authority now since express pro vision is made in Rr. 2 and 4 for the idudication of the rights of subsequent mort gagees who are joined a parties to vant on the paior moitgage. See also Forms Nos 9 10 and 11 of 11p D These legislative changes only sive effect to an old practice as can be seen from the cale mentioned below 40 See also the under

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40 (160 ) 19 All J. (Jul)
                                                                            (1922) 1922 Mad 807 ( 08)
                                                                            (1923) 1922 Lah 90 (907)
(1916) 1916 Pat 61 (50) 1 Pat L Jour 761
(1915) 1919 All 29 (290) I uisno mort
gages at ghts are not affected when
    (1903) 25 All 359 ( 34 95 )
(130 ) 24 All 185 (15 )
    (1597) 16 Bom 456 (491)
   (1,06) 33 Cal JJO (J9J)
(1594) 21 Mad G4 (67 64)
(1903) 26 Mad 484 (455)
                                                                                      only a money decree is obtained on
                                                                           the 1 rior mortgage
(1932) 1J32 Cal 1º6 (1º9) 59 Cal 117
    (1905) 31 Mad 424 (483)
(1905) 31 Mad 425 (423)
(1908) 31 Mad 228 (259 260)
(100) 5 Cal L Jour 315 (319 8 0)
(1904) 1 All L J 007
                                                                                      Rights of puisne mortgages indica
                                                                                      ted-Redemption or remedy against
                                                                                      urplus sale proceeds-Remedy for
41 (1922) 1922 Cal 23 (% 27) 49 Cal 6 6
    (1J26) 19°6 Nag 214 (214 215) 21 Nag L R
                                                                                      mortcage before sale or for sale of
            165
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(1,32) 1932 Pat 2 0 (271) 11 Pat 485 (1933) 1933 Lah 75 (6) But credit should to given for prof ts recovered by

> 43 vor 11a nut ve 11 469 JI C) "

(1912) 17 Ind Ca OJ1 (292) (Mad) (1916) 1916 Lah 219 (220) 1916 Pun Re

(1916) 1916 All 2 3 (27 )

(1914) 1914 Bom 268 (263) 38 Lom 94 (1914) 1914 All 42 (42) 36 All 123

(1311) 9 Ind Cus 670 (o 1) 33 111 3 0 Not entitled to redeem by simply paying the price for which the projecty was soll—Must 124 the full amount luo

soli—105: 14 the total amount suo (1032) 1932 1 at 2 0 0° 2° 11 Pat 415 (Do) 42 (1032) 1032 1 11 Ot (100 ) 44 III 419 (1003) 31 Mad 422 (4° 0) (1677) 20 Mad 120 (143) 13 (1904) 7 Oudh Cas 2433 (246) (1006) 1000 111 W Y 112 (113)

mentioned cases 47

properties not included in prior mortgage only by separate suit of

nwo sid

41 (1904) 1 Cal L Jour 31 (86) 45 (1904) 26 All 504 (506)

46 (1694) 24 Cal 190 (197)

47 (1920) 13 O Nag 1 (6 (1 C) 16 Nag L R 180 Lesses not joined in suit on mort gage—Mortgagor foreclosed—Lesso redeeming mortgage - Vortgager's redeem losseo

(19 ) 1977 Mad 304 (309 310) Legal re Presentative of discussed larry not bronght on record proceedings do not bind him

(1310) 5 Ind Cas 339 (840) (Mad) Legal ro presentatives of deceased befendant

not brought on record of all cation for sale-Sale set aside

(19 5) 1325 Int 37 (08) 3 Lat 818 Defen dant of posing the unpleadment of any person is estopped from object mg to the proceedings on the ground of failure to make him a party

(1330) 1930 M d 35 (533) 53 Mad 581

20 A person cannot be both a plaintiff and a defendant

Suppose A and B are the first mortgagees and 1 and C are the puisne mortgagees of a property In a suit by A and B for forcelosure of their mortgage, C alone can be joined as defendant as a puisne mortgagee because A cannot be both plaintiff and defendant in the same suit. The same person cannot be both plaintiff and defendant in a suit even in different capacities 2

### 21 Joinder of parties

A misjoinder of plaintiffs in a mortgage suit, some of whom are not entitled to any relief, is a mere defect of form and is not fatal to the suit 1 This Rule does not prohibit the joinder of any person2 whom it is proper to add under the provisions of O 1 Rr 1 and 3 Where, after the commencement of the trial of a suit, an application is made to the Court for adding persons alleged to be interested in the subject matter of the suit the matter is in the discretion of the Court, it may, in a proper case decline under O I. R 10 to add the parties sought to be impleaded 3 As to the effect of joining new parties after the period of limitation, see Limitation Act S 22, and the undermentioned cases

## 22 Revision

It has been held by the High Court of Patna that S 115 does not apply to the case of a mere refusal to add a person as a plaintiff in a mortgage suit but that. if the result amounts to a denial of a fair trial, the High Court can interfere under S 107 of the Government of India Act 1 An order discharging necessary parties from the suit is open to revision 3

- R. 2. [Neu, Act IV of 1882, S 86] (1) In a suit for fore-Preliminary degree closure, if the plaintiff succeeds, the Court shall pass a preliminary decreein foreclosure suit
- (a) ordering that an account be taken6 of what was due to the plaintiff at the date of such decree for-
  - (i) principal7 and interests on the mortgage,
  - (ii) the costs of suit11, if any, awaided to him, and

Charge decree- Non party cannot intervene in the execution of the decree and resist execution -His

Note 20 1 (1902) 24 AH 179 (183 184) 2 (1901) 25 Eom 606 (612) Note 21

1 (1975) 1925 Nag 366 (368) 2 (1920) 1920 Nag 217 (248)

3 (1924) 1924 Oudh 33 (33 34) 26 Oudh Cis establish priority - Court should 317 Party sought to be impleaded decide according to equity 1 wing after preliminary decree-Alllica regard to the real position of the

tion for joinder refused (1905) 1905 All W N 35 (36) In this case at was held that the Court ought to

have granted the upplication for the addition of part es

4 (1914) 1914 Nvg TJ (80) 10 Nvg L R 173 (1934) 1934 Pesh 38 (40) Mortgagor trans ferring whole property before suit by mortgage-Transferee impleaded after limitation-Suit must ful Note 22

demitton or remede against surplus fore sale or for sale of properties t included in prior mortgage, only

1 (1926) 1926 Pat 207 (°08) 4 Pat 723 2 (1931) 1931 Oudh 410 (410 411)

sale proceeds-Remedy for sale in see of satisfaction of prior mortgage

(1903) 50 Cal 142 (151 152) Party to suit

aside by appropriate proceedings (1932) 1932 Cal 126 (129) -9 Cal 117 Rights

omitted in execution proceedings-

Sale is not nullity but may be set

of put ne mortgagee indicated-Re

pirties

by a parate suit of his own

- (ni) other costs, changes and expenses properly menued O by him up to that date in respect of his mortgage security, together with interest thereon, or
- (b) declaring the amount so due at that date; and
- (e) directing-

T

- (i) that, if the defendant pays into Court 16 the amount so found or declared due on or before such date as the Court may fix within six months 17 from the date on which the Court contains and countersigns the account taken under clauso (a), or from the date on which such amount is declared in Court under clause (b), as the easo may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in Rule 10, together with sub-equent interesto on such sums respectively as provided in Rule 11, the plaintiff shall deliver up to the defendant, or to such person as the defendant appoints, all doeuments in his possession or power relating to the mortgaged property, and shall, it so required, re-transfer the property to the defendant at his cost tice from the moitgage and from all meumbrances eleated by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he elaims, and shall also, if necessary, put the defendant in possession of the property, and
- (ii) that, if parment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the defendant fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interest, the plaintiff shall be entitled to apply for a final decree. Declaring the defendant from all night to redeem the property.
- (2) The Court may, on good cause shown and upon terms to he fixed by the Court, from time to tune, at any time before a final decree is passed, extend the time! Fixed for the payment of the amount found or declared due under Sub-Rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest
- (3) Where, in a suit for forelosure, subsequent mortgagees or persons deriving title from, or sublogated to the rights of, any such mortgagees are joined as parties, the preliminary decree shall provide for the adjudication of the respective rights

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and liabilities of the parties to the suit in the manner and form set forth in Form No. 9 or Form No. 10, as the case may be, of Appendix D with such variations as the eircumstances of the case may require.

[See Rr. 3, 10 and 11 below ]

## BOMBAY

Local Amendment

Substitute for Cl (d) the following -'(d) that, if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall be entitled to apply for a final decree for foreclosure under R 3

		Syno	psis		
1V 111 111	Legislative changes Analogous law—TP Act, S 86 Scope and object of the Rule Persons entitled to the right of foreclosure Form of preliminary decree 'Ordering that an account be taken'' (a) Principal. (b) Interest (c) Interest subsequent to the date fixed for payment (d) Rule of Damdupat—See Note 16 to S 3 (e) Costs of the suit (f) Other costs, churges and	No 1 2 3 4 5 6 7 8	VIII VIII IX X XII XIII XIII	expenses  (g) Account against mort.     gages in possession (h) Accounts in suits by or     gainst sub. mortgages (r) Subsequent mortgages  Respedient  Respedient  Equitable mortgage of personal property See Note i, ante	No. 12 13 14 15 16 17 18 19 20 21 22 23

## Other Topics

Note 5, Pts (1) and (2) Irrogular decrees See Note 5 Pt (3)
Personal decree See Note to R 6 below, - see also Note 5 Pt (3) to R 4 below Right of redemption See Note 3. Pt (1) and Note 18. Pts (7) to (9)

Instalment decrees in mortgage suits See Rights of mortgages after preliminary decree See Note 1 I't (3) Subsequent mortgages s subrogation and effect See Note 15, Pt (3) Validity of part of mortgage See Note 7. Pts (6) and (7)

Legislative changes

The Rule has been extensively amended by 'the fransfer of Property (Amendment) Act, (XXI of 1929) The old Rule ran as follows -

'2 In a sait for foreclosure, if the plaintiff succeeds, the Court shall pass a

(a) ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage and for the costs of the suit (if any)

awarded to him on the day next hereinafter referred to, or (b) declaring the amount so due at the date of such decree and directing-

(c) that if the defendant pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due to be fixed by the Court, the plaintiff shall deliver up to the defendant or to such person as he appoints, and shull, it so required it is trained that in the property and shull, it so required it is trained the property to the defendant free from the mortrage and from all incumbrances created by the plantifi or any person claiming under him, or, where the plantifi claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property, but

- (d) that if nuch runners is not made on or before the day to be fixed by the Lourt the defendant shall be debarred from all right to redeem the property.
- The following important changes may be noted 
  (1) The pre-ent Rulo makes it clear that the decree under it is a preliminary
- le ree 1

  ( ) Under the off Rule it was not clear when accounts were dire tel to be taken
  - () Charf ile of Rule it was not clear when accounts were direct to be taken which for the water to be taken up to the date of declaring in Court the amount due or up to the date fixed for pasment. It is now provided that the accounts are to be taken up to the date in the preliminary decree.
    - (3) The provi ion as to other co to charges and expen es properly incurred by the
  - mort acce in respect of the merigage centrity is new

    (i) The 1 to Rulo mikes it clear as to when the period fixed for payment commences to run
  - (a) The provesion in (c) (i) relating to subsequent co is and subsequent interest is non-
  - (t) The name Sub Rule makes it clear that the re transfer is to be at the mort
    - gagor a costs

      (7) Under the same Sub Rule the mertgages has to apply for a final decises on default by the mortgager
  - (\*) The plantation as to the Court spower to extend time which was contained in the plant a to Sub R (2) in the old R 3 his been enacted as Sub R (2) of the Purk.
  - (1) Sub R (3) makes express provious for the form of decree in cases where subsequent mortgages are made parties

## 2 Analogous law -T P Act S 86

I.

This Rule corresponds to S 86 of the Transfer of Property Act, with the following differences --

- (1) Under R 2 payment has to be made in all cases into the Court while under S 86 payment could be made to the plaintiff or into the Court
- (2) The words "if so required have been added to Sub R (1) (c) (t) as it was found that, in the modusil Courts it was not the practice for the mortgages to execute a re conveyance of the property to the mortgager.

3 Scope and object of the Rule. The scheme and object of this order is "that a general account should be taken once for all, and an aggregate amount be stated in the decise for principal interest and costs due on a fixed day and that after the expiration of that day, if the property be not redeemed, the matter shall pass from the domuin of contract to that of judgment and the rights of the mortgage should thenceforth depend not on the contents of the hond but on the directions in the decree 1.

The object of the Rule is to prevent mortgagees from realising their securities otherwise than in the mode prescribed by the Rule 2

4 Persons entitled to the right of foreclosure

Under S of of the Transfer of Property Act, as it existed before it wis amended by Act N of 1929, the remedy by way of foreclosure was available only in the case of

Order 34 Rule 2—Note I
1 (1923) 1.923 I om 420 (421) Where the opinion was expressed under the old Rule that the point should be made clear by amendment

Note 3

1 (1907) Si Cal 150 (101) 34 Ind App 9 (P C) Observations were with reference to the old Transfer of Property Act actions but apply equally to the present Order (1919) 1919 Pat 420 (422) 4 Pat L Jour

306 (1921) 1921 U E 5 (7) 4 Upp Bur R 1 (1919) 1917 All 17 (20) 39 \land 11 506

(1919) 1917 All 17 (20) 39 îll 50: 2 (1895) 22 Cal 513 (816)

.

a mortgagee by conditional sale,

(2) an English mortgago, and

(3) an equitable mortgage by deposit of title-deeds in Bombay 1

The newly amended S 67 now provides that no mortgagee "other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, can institute a suit for foreclosure 2 It follows that neither a mortgageo under an English mortgage, nor an equitable mortgagee by deposit of title deeds in Bombay can sue for foreclosure. Then remedy is only to sue for sale. By S 15 of the Amending Act XXI of 1929, however the remedy of the equitable mortgagee in Bombay to proceed by way of foreclosure was kept open till 1st April 1932.

The characteristic of a foreclosure decree is that it completely extinguishes the mortgagor's right to redeem and thereafter makes the mortgages owner of the property A mortgagee who has obtained a preliminary decree for foreclosure is entitled to apply for setting aside an execution sale under O 21, R 90 on tho ground of material irregularity 3

### 5 Form of preliminary decree

See also appendix D, Forms 3, 3-4, 9 and 10

In a preliminary decree for forcelosure, the Court cannot, except with the consent of parties, direct payment of the mortgage money by instalments 1 But where a picliminary decree allowing payment by instalments is passed by consent of parties it does not necessarily fall outside the scope of R 2, the provisions of Rr 2 and 3 may still apply to such a decree 2 A proliminary decree for foreclosure which does not conform to the form prescribed by this Rule is irregular, but after it is made absolute, the defendant cannot object to delivery of possession under the decree to the decree bolder 3

## 6 'Ordering that an account be taken"

The amount (whether accounts are directed to be taken or not) is to be calculated up to the date of the preliminary decree The object of the Rule is that a general account should be taken of all amounts due between the parties ouce for all and that the aggregate amount should be declared as due to the plaintiff on payment of which the property is to be redeemed 1 The accounts have to be taken before the final decree, they cannot be directed to be taken in execution of the final decree 2 In the taking of such accounts, not only sums due by the mortgagor but also those due by the mortgagee should be taken into consideration 3 If the decree is silent as to the person selected to take the accounts, the

(1920) 1920 Oudh 204 (206) Foreclosure decree can only be passed in the case of a montgage by conditional

sale 3 (1886) 13 ( 11 346 (348)

Note 5 1 (1878 80) 2 (11 320 (321, 322) (154) 7 Lom 482 (8.5)

(15-2) 5 Bom 604 (C07) 2 (1 124) 1924 Yag 303 (335) 3 (1.06) 4 Cal L Jour 533 (535)

Note 6 1 (1926) 1926 All 113 (120)

(See (1932) 1332 Pat 332 (334) The rule contemplates declaration, (a) at time of jud ment, or (b) after taking account, of amount due on date of

decree] 2 (1912) 15 Ind Cas 262 (863) (Mad)

3 (1917) 1917 Cal 853 (504) (1881) 6 Cal 877 (376) Mortgages not en-

titled to withdraw from the taking of accounts when they appeared to

be going against him (1889) 16 Cal 692 (691) 16 Ind \pp 107 (P C) If the mortgagor fails to set

up any equity in his favour, he cannot subsequently sue on it.

<sup>1 (1890) 14</sup> Bem 20J (273) 2 (1896) 19 Mad 249 (252 and 253) 23 Ind App 82 (P C) Simple mortgages not entitled to foreclose

<sup>(1935) 1935 411 778 (781)</sup> 

#### 7 Principal

I.

The caus of proving the imount due to him is initially on the mortgagee Hence if the mortgage deed is not properly stamped and the mortgages refuses to pay the stamp duty and penalty with the result that the mortgage deed is inadmis sible in evidence the mortgagee cannot recover anythin, beyond what the mort ga\_or admits to be due 1

The statement in the mortgage deed is prima facie proof of the amount due. But the mortgagor can plend a total or partial discharge of the debt or that the recital is to consideration in the bond is wholly or partially untime? But in such a case the burden will be upon him to substantiate his allegations It is not for the mortagee to prove that the consideration stated in the bond was actually paid by him . But recalals in deeds are not evidence against thind parties 5

Where only part of the alleged consideration is pro ed to have been paid. the mortgage is valid to the extent of the part so pud 6 Similarly in the case of a mortgage of property belonging to a Hindu joint family, where it is proved that only a part of the consideration was supported by legal necessity, the mortgage is valid and binding to that extent?

#### 8 Interest

By the Act XXI of 1929, a new Rule (Rule 11) has been enacted which deals specially with the power of the Court to order payment of interest in mortgage suits. See the note, under that Rulo for full information on the subject According to Section 58 (a) of the Transfer of Property Act mortgage money includes interest on the principal secured by the mortgage principle is recognised by the present Rulo which inter alia makes the payment of the interest, provided in the mortgige deed, a condition of redemption. In the absence of anything to the contrary in the mortgage deed, interest as well as the

4 (1909) 33 Bom 216 (218 219)

5 (1921) 1927 Oudh 170 (173)

(1925) 1925 P at 59 (63) 3 Pat 829 6 (1927) 1927 P C 17 (17) (P C) Future to direct accounts to be taken not serious error when the result of taking accounts would be to give the same sum as that for which decree

(1914) 1914 Lah C4 (65) Mortgagee undet stating his real claim - Purther deductions not to be allowed

#### Note 7

1 (1882) 6 Bom 669 (6:0)

was passed

- 2 (1914) 1914 All 319 (319) 36 All 475 3 (1896) 20 Bom 636 (645) (1920) 1920 Cal 889 (588) Plea of partial
- adjustment 4 (1915) 1915 Lah 221 (222)
- (1896) 23 Cal 9°0 (955) 23 Ind App 92 (PC)
- (1905) 27 All 71 (72)
- (1°02) 15 C P L R 24 (25) Onus of promisor not shifted by promises a dimission

ferent from that stated in bond [See (1831) 6 Cul 263 (277 2"8) Transaction not honest and bota f de-The recital is to 1 is ment of consideration entitled to little ma fide

that actual consideration was dif-

- 7 (1929) 1929 All 1 (15 and 16) Note 8
- 1 (1925) 1975 Lab 182 (189) Wortgage deed providing for redemption on lay ment of princ 1 il sum ouly interest stepulated is not a charge
- (1971) 1971 Bom 28 (29) 45 Bom 573 Mort gage not for interest but mortgages to take possession of property-Mortgagee making no attempt to oltin pesse sion cannot claim in

principal constitute a change on the property 2

# 9 Interest subsequent to the date fixed for payment

Before the amendment of the Rule by Act XII of 1929 there was no provision either in R 2 or R 3 for the payment of interest subsequent to the date fixed for payment. Hence there was tack of unformity in the decisions on the question. Express provision has now been made for the inclusion in the preliminary decice for foreclosure of a direction for the payment of "subsequent interest up to the date of ictual payment. For fuller information on the subject see Notes under R 11 below.

## 10 Rule of damdupat - See Note 16 to S 31

## 11 Costs of the suit

The general rule in all sonts relating to mortgages is that the mortgages is entitled to his costs. But it is within the power of the Court, in view of the mortgages a conduct and the peculiar circumstances of any case, to refuse to award him any costs. Ordinarila costs awarded against a mortgage rare part of the mortgage money and are recoverable from out of the mortgaged property. But the Court can in the everses of its discretion under S 35, make such costs recoverable from the mortgager personally. Where a defendant in a mortgage suit claiming title paramount to that of the mortgager is struck off from the array of parties and is wirded costs the mortgager who is in no way responsible for it of the mortgaged property should not be made liable for such costs.

A pulsae mortgagee who is made a party to a suit on the mortgage is also entitled to his costs against the mortgage?\* Similarly no mortgage is also entitled to his costs even though be refused to you the plaintiff in suit on a

2 (1324) 1974 P U 193 (183 184) 5 Lah 425 51 Ind 1pp 37" (P C) Note 9

1 (1916) 1916 Mad 1202 (1202) Court has power to provide for future interest in its | religious aprecedent of the provision for pyymath of juterest may be made

at the time of enlarging the period fixed for payment (1504) 16 411 200 (2 0) Future interest

not charge on projecty
[See also [1921] 1921 U B 54) 4 Upp
Bur R1 typellate Court confirming
lower Court's decree—No provision
for subsequent interest therein sor
in the final decree—New provision
to the final decree—Review or ap
peal only semely—Allowing subse
quent interest on aggregate amount
by way of amendment to meet ends
of justice is inrahlad?

### Note 11

1 (1878 "9) 3 Bom 202 (203) Costs relused on ground of usurious nature of tran saction

(1684) 8 Bom 100 (198) Defendant in re demplion suit is ordinarily entitled to costs unless he has refused a Both parties maintaining pleas far

s 31

um Boni

459 (1918) 1918 Oudh 440 (445) (1918) 1918 411 306 (866) 40 411 100

(1918) 1918 411 356 (866) 40 411 109 (1689) 2 C P L R 94 (98) (but see (1909) 4 Ind Cas 545 (545)

(Cal)) (1888) 10 All 179 (191) (1888) 10 All 121 (129) Judgment debtor in

a forcelosure de ree is personally hable for the costs of the suit 3 (1887) 14 Cal 185 (187)

(1907) 3 Nag L R 9, (100) (1919) 1919 111 237 (208 279) 41 111 473 (1909) 3 Ind Crs 33 (33) (111)

(1918) 1918 Nag 1b2 (180) (1988) 10 111 179 (181)

[See (1993) 0 11 523 (521) More separate order of costs under the Rules of the Code is not necessarily

to

mortgage and was therefore joined as a defendant in the suit " It has been held that costs are to be awarded to the mortgagee on the scale of costs as between attorney and clust' The inortgues is also entitled to his costs incurred subso quent to the preliminary decree up to date of payment (See R 10 below)

### 12 Other costs charges and expenses

The Rule as amended by Act XXI of 1929 makes express provision for payment to the mortalises of all expenses properly accurred by him in respect of the mortgage security, to other with interest thereon 12 Even prior to Act YM of 1929 the mortgages was entitled in a suit on the mortgage to claim as part of the mortgage money, expenses properly meured by him for the preservation of the mort gaged property, the protection of his title to the property etc 1 (See Transfer of Property Act, Ss 72 and 63 \) R 10 below also provides for the payment of such expenses incurred subsequent to the preliminary decree up to date of payment

### 13 Account against mortgagee in possession

Under S 77 of the Irmsfer of Property Act a mortgageo in possession of the mortgaged property is not liable to account for the rents and profits of the property where under the terms of the mortgage the mortgages is to take rents and proper in licu of interest or in hear of interest and defined partions of the principal In other cases a mortgagee in possession is liable to account for the rents and profits of the property Under S 76 (a) of the Transfer of Property Act he must keep clear full and accurate accounts of all sums received and spent by him as mortgagee 1 and 1, bound to deduct the rents and profits realised by him from the amount claimed by him amount the mortgager Further he is hable to pay a reasonable occupation rent if he is personally in possession of the land 3 He must also in the absence of a contract to the centrary, pay the Government revenue and all charges of a public nature and all rents accruing due in respect of the property, and if owing to his default, the mortgager has to pay any of these tems of expenditure he is entitled to a set off in respect thereof 4 | See Transfer of Property Act. S 76 (c)]

### 14 Accounts in suits by or against sub mortgagee

A sub mortalnee is entitled to sue for sale or foreclosure to the same extent as the original mortganee lumsoif 1 Where a sub mortgageo is a party to a suit

5 (1929) 1943 Cal 514 (544) (1804 66) 2 Bom H C R 214 (218) Costs of G (1877) 1 Ind Jur (N S) 22

(1891) 8 Cil L Rep 43, (438)

#### Note 12

la (1933) 1933 Rang 112 (117) Mortga,ce pav ing Government revenue to save land may add it to the mostgage nioney

1 (185a) 9 Bom 43a (437) (1605) 21 Mad 2 (34) (1698) "2 Boin 410 (416)

(1891) 15 Bom 625 (637) Costs of proceed ings against tonants of mortgaged property - Mortgagor not personall : liable

(1s. 0) 4 Hom 584 ( 59) Mortgages in pos-session entitled to reasonable costs of relairs

(1598) O 414 401 (408) Mortgagee in 10s session paying Government revenue payable by miortgagor He has a right to tack on amount so paid to his mortgage debt

improvements

(1905) 32 Cal 576 (580) (1904) 28 Dom 181 (188) Mortgageo in Pos sion can add sums spent for making good his title against mortgagor

Note 13

(1903) 7 Cal W N 514 (517) 25 All 287 30

(1905) 1 Cal L Jour 531 (537) 4 (1534) 4 All W N 92 (95) 6 All 303. Note 14

1 (159r) 20 Mad 35 (40)

2, on the mortgage, the proper course is to direct accounts to be taken, both of the amounts due to the original mortgagee and of the amounts due to the sub mortgagee and to order that, out of the sum due to the original mortgagee, the submortgage should be paid the amount due to him on his mortgage, that the balance should be paid to the original mortgages and that, thereafter, both the mortgagees should re-convey to the mortgagor the mortgaged property 2 (See also Appendix D, form 11 and Notes under R 1)

## 15 Subsequent mortgagees

The form of the preliminary decree given in the present Rule should be adapted to the circumstances of each case Where pulsue mortgagees are impleaded as parties in a suit on a prior mortgage a form similar to the one in uso in the Chancery Division in the High Court in England may be found useful 1 (See also Appendix D forms 9 to 11) The chief point to be noted in such cases is to give effect to the principle redeem up, and foreclose down right of redemption belongs to the next pulsae mortgages. If he makes default, he is foreclosed and the right to redeem devolves on the next puisne mortgagee and in the event of his default the right belongs to the next mortgages and the process goes on until the mortgagor is reached. If the mortgagor also fails to redeem he will be forcelosed 2

A subsequent mortgagee who has been added as a party to a suit for fore closure by a prior mortgage and who pays off the decree amount can, on his heing transposed as plaintiff apply for a final decree 3

### Pays into Court

Under S 86 of the Transfer of Property Act the defendant could pay the mortgage money under the preliminary decree to the mortgage plaintiff direct or into the Court! But the present Rule requires the payment to be made only anto the Court in all cases 2 As to when and how far a payment made out of Court can be recognized by the Court dealing with an application to pass a final decree, see Note 14 to R 5 infra

## On a day within six months

The Rule only fixes the outer limit for the period to be fixed for the pas ment of the mortgage money under the prehiminary decree. The Court has a discretion to fix any smaller period it thinks fit 1 Where accounts are directed to be taken, the six months period should be calculated not from the date of the preliminary decree, but from the date on which the Court confirms and counter signs the accounts taken under its decree 2 [See Sub R (1) Cl (c) and Sub Ci (t) As to the question whether, when the preliminary decree is appealed against, the period fixed for payment runs from the date of the first Court's decree or from the date of the appellate decree (See also Note 5 to R 3 and Note 9 to S 148)

2 (1891) 15 Bom 602 (693 and 694) Nate 15

- 1 (1905) 27 All 325 (330) 32 Ind \pp 193 (P C)
- 2 (1583) 7 Bom 526 (529) (1.11) 10 Ind Cas 174 (175) (Oudh) (1905) 27 \11 325 (330) 32 Ind App 123 (i c)
- " (19 -) 1929 Nag 145 (146) 24 Nag L R 119 (But see (1 )05) 9 Cal W N 577 (583) 32 Ind App 123 27 All 525 (P C) Case under Transfer of Property Act]
- 1 (1901) 8 Cal W N 102 (101)
- Note 16 [See also (1903) 16 C P L R 111] 2 (1918) 1918 Cal 472 (473)
  - (1919) 1919 Mad 792 (792) 48 Ind Cas 196 (197) 42 Mad 61
  - (1912) 16 1nd C1s 987 (987) 1913 P R No. 12 (1930) 1930 Mad 10a (107, 10d) Note 17
- 1 (1927) 1927 PC 17 (17) (PC) But held that in the circumstances the full
- est tosaile term should be given 2 (1J15) 1915 t il 502 (503)

 $S_{cc}$  also the undermentioned case under the Co operative Secreties act of 1919

18 Extension of time

Sub R (2) of this Rule which conserved to the mouse to the old Sub R (2) of R 3 empowers the Court on good cuise being shown to extend the time fixed for payment of the motistise money under the preliminary decree But the motistise is not entitled to in extension of time as of right? The Rule trieff provides that extension of time may be guited on good cruse shown 'I is not a good ground for extending, the time that the motistisc with misconception that priment within the period fixed has unnecessing? As to what constitutes good cruse we the undermentioned cases. Them may be extended even after the expiry of the period originally fixed? provided a final decree has not here I issed \* to high to redoom continues until the final decree has not here I issed \* the mortging may pig in the money it my time before the hand decree by assed though there may not be a regress order extend-

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3 (1933) 1933 Nig 211 (213) Rules under
5 43 depriving tight of six months
under 0 34 R 2 1 e not ultra tires
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Note 18
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1 (1892) 5 C P L R 54 (55) (1897) 5 C P L R 104 (106)

(1914) 1916 411 95 (99) 40 A11 579

(1971) 1921 Oudh 185 (185) Decres was construed as extending time for pas

[See also (1933) 1933 Nag 164 (166) I reluminary decress-Compromise— Undertaking by mortgager not to oppose application for mail decree bixtutory right to 184 for extension

18 not taken away] 2 (1919) 1919 I 15 497 (500) 4 Pat L Jour

347 (1916) 1316 Mad 552 (852) 39 Mad 882 3 (1891) 13 411 160 (195)

> ving btor

> nust

(1930) 1930 Vng 1°S (179) No sufficient cause for extension of time slown— Final decree must be passed

(1910) S Ind Cas 592 (593) (L B) Question of good cause to be decided in view of

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ru ed
(1919) JJ19 Oudh 381 (382) Fret that
mortgages to es nothing by exten
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sion of time mix be good eru e
(1J30) 130 Nig 12 (13) No evidence of
bons fide efforts to secure low—
Good cruss entitling applicant to ex

tension held not shown (1929) 1923 Nag 263 (264) Semble difficulty

in raising money is good cruse
(1928) 1J28 \ \text{ig 301 (303) } \text{Failure of etop—}
Consequent inability to pay—Time

extended (1925) 1925 Nag 2.8 (258) Bona fide at tempt to ruse money—Time may be extended

(1932) 1932 Nog 175 (179) 98 Nag LR 221
Time extended—One third amount
deposited — Time again saked for
refused and final decree pared in
ignorance of deposit—On review
time extended—Held justified as
balance also deposited in menitime

5 (1920) 1J20 Nag 24 (25) (1902) 26 Bom 121 (126) (1902) 25 Mad 244 (289) (F B)

(1509) 22 Dom 771 (173) (1839) 22 Vard 133 (136) (See however (1891) 13 411 400

(403))
6 (1918) 1918 Cal 424 (424) Court cannot accept payment after final decree has

tel t pryment after hast decree has been passed 7 (1921) 1921 Jour 22 (1) 70 Ind Cas 152 (Ca)

(1889) 16 C 11 246 (249) (1902) 25 Mad 200 (307) (F B) (1331) 1931 All 223 (223) (1931) 1931 Oudh 121 (122) (1903) 25 All 231 (239)

(1608) 1 Oudh Cas 91 (93) (1910) 7 Ind Cas 50 (50) (411) (1914) 1914 Oudh 203 (211) 17 Oudh Cas

(1920) 1920 Bom 29 (29) 44 Bom 939 (1914) 1314 Bom 200 (201) 39 Bom 41

be exercised liberally-Time to be extended to enable money being C P C 301 & 302

and the period 8. This is made clear now by the substitution of the words before t final decree has been passed at the beginning of R 3 in place of the words "on or before the day fixed which occurred in the old Rule Even where a prelimimary decree is passed by consent of parties, the Court can excicise its power of extending the period fixed for payment if there is nothing in the decree e cluding such power 9

In express application for extension of time is not necessary 13. Not need the application where one is made be in uniting 11 But the Court cannot post pone the passing of a final decree on the application of a third party 12

19 Plaintiff to apply for final decree

The Rule [Sub R (1) (c) Sub Cl (11)] makes it clear that plaintiff has to apply for a final decree for foreclosure if the defendint fails to my the mort-age money within the time fixed by the Court In one case it was contended that a final decree passed on the application of the transferce from the mortgance was not binding on the mort agor. It was held that as the decree was passed in the presence of the mortgigor he could not subsequently object to it 1

20 Mortgage of chattels and intangible property

It has been held by the High Court of Calcutta that a mortgage of chattels is entitled to sue for foreclosure 1 The High Court of Bombay " the Judicial Commissioner's Courts of Napur and Oudh on the other hand have held that he is not so entitled \ \ mortgigee of a turn of worship is entitled according to the Culcutta High Court to sue for foreclosure of that right 5 the turn of worship being regarded as intan\_ible property

- 21 Ras judicata See Notes to S 11 Note 40 sepra Sealso Notes under Rr 7 and J
- 22 Equitable mortgage of personal property Nee Note 4 and
- 23 Appeal

An appeal hes from a prehimmary decree 1 Under O 43, R 1 (o) an appeal hes from an order refusing to extend time under this Rule but not from an order granting an extension of time? In application for revision may however he

5 (1309) 1 Ind Cas 780 (782) 36 Cal 192 Contra (1884) 1884 AH W N 1"8 (178) Case superseded ly mend ments introduced by Act XXI of

(1807) 14 Mil a29 (530 531) Obsurations as

to right of redemption not being tvilible after expry of t me fred [Compare (1905) 8 Oudh Cas 33 (35) Mortganes oblaining possess on of the mortgiged projects before the expres of the period fixed in prehim mary decree for payment of mort

11 (1902) 26 Bom 121 (120) 19 (1902) G Cal \\ \ G54 (600) Note 19 1 (1919) 1919 Pat 497 (500) 4 Pat L Jour 347

Note 20

1 (1.115) 1315 Ctl 161 (169) 2: Ind Cts 400 (400) 4? Ctl 455 Following the decision of the House of Loids 11 Harriso : \ Hart (1776) 1 Comb 393 Fancied \ Polis 2 Fonblin que on Equity

5th Edn Gin and he p v West broof (1:43) 1 Ves Se 1 2:5 (279)

2 (1316) 1316 Bom 77 (50) 3 (1311) 10 Ind Cas 869 (573) " \ g L R " ?

10 (1904) 98 Bom 109 (10a)

4 (1.01) 4 Oudb C15 °01 (30") It is hell that the provisions of 5 56 to 53 of the Transfer of Irojecty te. corresponding to O 34 Rr 2 to 5 did not apply to the mortgage of moverable property

5 ft.) 1915 Cal 1(1 (165) 42 Cal 155 Note 23

1 (1318) 1315 Nag 185 (18 ) (1617) 13 Cd 163 (407)

> Inh 53 Parties compromising— Mortgages given posses ion—One year allowed for redemption—Mee one year mortgage automatically be omes fall o merl

2 (1 131) 1931 Nat, 1 (3) Te lowever (1334) 1134 O mlh 44 (1857) J All 500 tl 1 ac 0'1 tin il 1 111 has been a used . See also S 97, ante

R 3. [New Act IV of 1882, 5 87] (1) Where, before a final decree debarring the detendant from all right to Final decree in redeem3 the mortgaged property has been passed. foreclosure suit the detendant makes payment into Court of all amounts due from him under subrule (1) of Rule 2, the Court shall on application made by the detendant in this behalf, pass a

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree, and, it necessary,-

(b) ordering him to re-transfer at the cost of the defendant the mortaged property as directed in the said decree,

ind also if necessary -

final decree—

(1) or learny him to put the detendant in possession of the property

(2) Where navment in accordance with sub-inle (1) has not been made the Court shall on application made by the plaintiff in this behult pass a final decree, declaring that the detendant and all persons claiming through or under him are debured from all 112ht to redeem the mortgaged property and also, it necessary, ordering the detendant to put the plaintiff in possession of the property

(3) On the passing of a final decree under subrule (2), all habilities to which the detendant is subject in respect of the mortgage or on account of the suit shall be deemed to have been discharged 3

Smorses Note No Note No 1 Transfer of Properly Act S 87 Vil Final decree for foreclosure Il Transfer of Property (Amend (a) Putul foreclosme s ment) Supplementary Act XXI (b) Discharge of debt etc. of 1929 2 Where before a final decree has been passed debarring de on foreclosure (c) Delivery of title deeds 10 fendant from all right to re (1) Lumitation for applica deem 3 tion for tinal decree Sec IV Power to enlarge time See Note 18 to 1 2 in 18 148 Note ) Note 12 to R 5 11 V Effect of appeal on time fixed for (c) Application for execution payment of final decree 12 VI Where payment in accordance VIII Appeal 13 with sub rule (1) has not been IX Court fee 14

the Code (now 5 4) in 1 hence it

<sup>(1032) 14 111 5.0(521)</sup> (1 10 ) 26 Bom 121 (12 ) Upl : tl Trus frof hopity let such morles was hill to e ne within \$ 44 of

r thise 018111 C ((0) 400 1417 3161 (1111) (1 114) 1914 \15 8 (1) 10 NJ L H 1J0 3 (133) 134 Ng I ( ) 4 (1) 0) 1970 \1, 240 (240)

#### Other Tomes

Application by plaintiff See Note 7 Pts (2) Costs See Note 12 Pt (5) R 2 and Note I1 above

Court to which up; heation is to be made See Note 7 Pt (3) Form of de ree See Appendix D Form No 4

Nature of proceedings suit and not execu-

tion See Note 7 Pt (5)

Notice See Note 7 Pts (7) to (10)

Payment after date fixed but before final de cree See Note 3 Pts (1) and (2) I syment before time fixed See R 2 Note 17

I t (1) I wment under R 2 Sub R (2) See R 2

Note 16 above Right to interest See Nois 6 Pt (3) and R 11 Notes

1 Transfer of Property Act S 87

This Rule corresponds to S 87 of the Trinsfer of Property Act with the following differences -

(1) The present Rule provides for the passing of a decree when the defen dant pays up the mortgage money within the time allowed S 87 merely provided that in such a case the defendant should if necessary be put in possession of the mortgaged property

(2) Under the present Rule of the defendant does not pay the mortgage money within the time allowed a final decree is rassed. But under S 87 the procedure was to pass an order absolute for foreclosure

2 Transfer of Property (Amendment) Supplementary Act XXI of 1929

The present Rule has been amended by Act \\I of 1929 The cluef points of distinction between the old Rule and the new Rule are -

(1) The words before a final decree deburing the defendant from all right to redeem the mortgaged property has been passed have been substituted for the words on or before the day fixed

(2) Under the amended Rule the defendant mortgager has to aprily to the Court for a decree in his favour if he pays the mortgage money within the time allowed. The old Rule did not require this

(3) The new Rule makes it clear that the decree to be passed under it is a final decree

(4) The provise to Sub R (2) of the old Rule regarding the Court's power to extend the time fixed for payment of the martgage money has been transferred to R (2) abovo

(2) Sub R (3) makes it clear that the passing of a final decree for fore closure discharges not only the mortgage debt but all hability of the defendant in respect of the mortage or on account of the suit thereon

3 Where before a final decreo has been passed debarring defendant from all right to redeem The substitution of the words 'before a final decree has been passed etc

for the words on or before the day fixed now makes at clear that though a most hagor has not pud the mortgage money under the preliminary decree for fore closure within the time allowed by the Court he does not lose his right to redeem but can exercise the right till a final decree for foreclosure is actually passed 1 In view of this the under mentioned decisions prior to the Transfer of Property

In sel -

(1900) 27 Cal 70a ( 03)

Order 34 Rule 3-Note 3 1 (1931) 1931 Oudh 121 (122) Is it e following cases the sortgagor was tell estitled to releem till order absolute r final lecree fr foreclosure was actually

<sup>(1878 18 9) 3</sup> Cal \_03 (50J 510) (1693) 72 Wrd 183 (180) (189 ) 22 Bom "71 (113) (18 9) 16 Cal 246 (24 )) (1835) 22 Cal 931 (J31)

(Amendment) Supplementary let \\I of 1929 which disclose a conflict of judi cial opinion are only of academic interest now Where a mortgagee after the date used for nament but before a final decree for foreclosure as passed enters into po ession of the mortaneed property he does so in his capacity as mortgages and not as owner But if he remains in possession and the mort stool keeps quict for a long time the mortagor will be held to have acquiesced in the mortgages holding the property is his own and may thus be deprived of his in hit on the ground of estonnel 4

4 Power to enlarge time -See Note 15 to R 2 above and S 148 Note 9

5 Effect of appeal on time fixed for payment

O 41 R 5 expressly provides that an appeal shall not operate as a stay of proceedings under a decree or order appealed from, except so far as the appellate Court may order to that effect Hence the mere pendency of an appeal from the preliminary decree does not extend the time fixed, and is no bar to the passing of a final decree unless the innellate Court expressly or by necessary implication extends the period for payment 2 Nor is it a ground for enlarging the time fixed by the preliminary decree for payment 3

Is to the effect of a decree passed in, or dismissal of, the appeal on the time fixed by the preliminary decree, see S 148. Note 9, and the undermentioned cases 6

6 Where payment in accordance with Sub R (1) has not been made

A mortgaged is not bound to accept a smaller sum than that due as part satisfaction of his decree but is entitled to maist on a final decree for forcelosure being passed in his favour where the whole of the amount found due to him is not paid into the Court 1 But this principle only applies where there is no dispute as to the sum due 2 Thus, where the mort of deposits in Court the sum found

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(1902) 25 Vird *44 (259)
(1663) 16 Nid *14 (119)
(1.697) 2 Nid 300 (306 30,)
(1909) 1 Ind Cre :60 (762) 36 Cul 122
(1904) 1 All LJ 300
(1910) 7 Ind Cas :0 (50) (411)
(1933) 90 All :416 [457]
 (1698) 70 311 3.5 (377)
(1902) 24 311 4.9 (480)
(1903) 25 311 231 (233)
  (1305) 27 411 501 (*04)
  (1913) 18 Ind C1s 8.7 (3.8) (C1)
(1914) 1914 Oudh 200 (210) 17 Oudh C1s
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the time ] in its discretion refuse to extend

(1907) 3 Nig L R 146 (155) The Court can

į tri jasternards – (1930) 1930 Nag 55 (55) (1930) 1930 Nag 1°8 (179) 3 (1905) 8 Oudh Las 33 (35) 4 (1926) 1926 Bom 273 (277) (1857) 1 Cal W N 197 (135) 2 (1859) 18 AN 430 (157) (1918) 1918 Cul 494 (124) (1966) 1906 MI W N 709 (200) (1893) 90 Cal 279 (194) 3 (1906) 19 Cal W N 710 (1912) (1859) 13 Bonn 100 (109) (1859) 17 Lorn 547 (523, 554) (1892) 16 Born 243 (248) (1691) 1 Wad L Jour 745 (746) (1913) 18 Ind Cas 747 (743) (Cal) (1915) 1918 Med 91 J 1920 Appellate Court confirming decree of lower Court-Time not extended

Note 5 1 (1930) 1930 Pat 227 (229) (1697) 1 Cal W N 197 (108)

(1912) 16 Ind Cus "99 ( 99 500) (Mid) (Do) (1921) 1921 U B 5 (") 4 Upp Bur R 1 (Do) (1896) 11 C P L R 115 (1"0 121) \( \text{v} \) exten sion of time unless expre all gran ted mu appellate decree (1914) 1914 Cal 323 (324) High Court in

second appeal while restoring decree of first Court which had been re versed by lower appellate Court, fixed fresh date for redemption [Put see (1835) 22 Cal 467 (472) ]

pud by him 2 (1910) 5 Ind Cas 165 (169) (Cal) due hy the lower Court, but the sum is increased by the appellate Court, the payment by the mortgager reduces the debt pro tante and interest is payable afterwards only on the balance. The mortgager is not bound to accept payment after the passing of the final decree for forcelosure.

### 7 Final decree for foreclosure

The Rule makes it clear that the decree to be passed under this Rule is a final decree. The procedure under the Transfer of Property Act was to obtain an order absolute for forcelosure or sale.

An application for a final decree for foreclosure should be made by the plaintiff and he should make it to the Court of first instance even though the preliminary decree was modified in appeal 3. But a defendant who is present and allows a final decree to be passed on the application of a transfere from the plaintiff will be estopped from questioning the validity of the decree afterwards 4.

The legal representatives of a party who dies after a prehiminary decree can and should be brought on record under the provisions of O 22 in the proceedings to obtain the final decree maximuch as the suit must be deemed to be pending till a final decree is passed. But a person, who was not a party to the prehiminary decree, cannot be added as a party to the proceedings to obtain a final decree.

No notice is necessary to be given under this Rule to the defendant before a final decree is passed, though, in practice, it is generally given on grounds of justice and equity. Notice is, however, necessary where the defendant happens to be a numero. But the failure to give notice is if anything, only in arregularity and, unless the ments of the case are affected, will not invalid to the proceedings.

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3 (1910) 5 Jud Cas 165 (169) (Cat)
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<sup>(1912) 16</sup> Ind Cas 374 (375) (Cal) 4 (1918) 1918 Cal 424 (424)

<sup>1 (1920) 1120</sup> Mrd 295 (267) Right to order the olute ilrerdy accrued at the time of comming into force of Code of 1908 not affected by the Code (See (1914) 1914 P. GG (67) 20 111 550 (P. C) Excention of order about the brief before Code of 1908—1908.

<sup>1011</sup>sed by pissing of new Code)
2 (1919) 1919 Pat 197 (500) 4 Pat L Jour

<sup>3 (1001) 23</sup> A11 55 (5))

<sup>(1900) 23</sup> Vad 521 (521)

<sup>(1910) 6</sup> Ind Cas 323 (325) (C11)
[See (1881) 6 C1 513 [515] Contt
plassing preliminary decree—Jurisdiction trussferred to another
Court—Application for final decree

<sup>7 (1902) 29</sup> Mad 506 (507) (1901) 29 Cal 644 (646) (1923) 1923 Nag 17 (15) (1906) 4 Cal L Jour 217 (415) (1806) 9 C P L R 7 (8)

In some cases under the Tlauster of Property det, notice was held to be neces war of the application for order absolute was made more than one sear offer the decree the usen being that such an application for exception, as a magnification for exception, we the following each of the following cases.

<sup>[</sup>but see (1593) 6 C P L R 1 (3)

<sup>8 (1935) 1935</sup> Mad 716 (717) (1930) 1930 Mad 195 (107-105) (1917) 1917 Oudh 529 (321) 20 Oudh Cas

<sup>215</sup> but where mortgiged property is trunsferred offer pedamating whereas the final decree is binding on the trunsferre even though he was met a party-He is affected by his join lens and the decree can be executed against houl.

In ax parte final deeree can le set iside under O 9, R 13 if sufficient cause within the meming of that Rule is established " The dismissil for default of an application for a final decree dies not preclude a fiesh application for the sume fulpise 18

The procedure for obtaining a hard decree applies to preliminary decrees I used a compromise between the parties" unless the decree by its terms provides for execution on default without any fresh decree being passed 14 A could be decree for freedespre is not contemplated by the Rule 10

Where a mark is entitled to me emitted on foreclesure the right arises not on the expire of the period fixed for prement but on the passing of the final occree for foreclosure 10 is until then the ownership of the mortgiged property vests in the most, 1-11

In omission to draw up a final decree is only in megularity so that where a Court on meanth a seed in order absolute instead of a final decree at was held that the rier could be enforced by execution 18 See also the undermentioned cises 1

#### 8 Partial foreclosure

r

The nature of the trace lines for foreclesure is such that a mortalize must be forecled is I while of not it ill. Thus where a suit for foreclosure is decreed only will respect to some of the properties but dismissed with regard to others and in inject is filed from that portion of the decree which dismisses the suit, the mortance cannot first obtain a final decree in respect of the portion of the decree favourable to him and then on succeeding in the upperlas to the jest another final decree in respect thereof 1

## 9 Discharge of debt etc on foreclosure

The present Rule makes at clear that on the passing of a final decree for foreclosure not only the mortage debt but all the defendant's habilities in respect of the mortgage as well is for the costs of the suit become discharged 1. The

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\ unt of notice to inc. ()
(1.) a 1.12a Mad 716 ( 17)
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(100) - 311 103 (1) ) (1001) > Bom of (347 "1-) 27 Ind 410

216 (P C) [5et il o (19°2) 13°2 111 634 (633

11 (1) (1 ) 1 2) All 270 (250) 51 AB 624 1 ( d 23 (2 6) (F b) (130)

(1301) 3 N. LR 3 [6] "ce [1901] 4 Oudh Cis ... 38 [240] West of n tie is no ground for cting a ile a final decree under 0 ) 18 131

[ c also (14,19) 12 C I LR 52 (53) Sat lies to set asile ider Isolute

on ground of fraud] 12 (197 ) 1J.T Oudh 4J ( 0)

13 (1342) 13-2 \ag 162 (184) 14 (1911) 10 Ind C is 5 ( (398) (C il)

(19 1) 1931 Cal 546 (148) (19 a) 1372 Bom a03 ( 69 a10)

15 (1 /21) 1971 Oudh 138 (189) [Lut sec (1839) 12 C P L R 193 (10)

100) Pos e sion obt i ned under couds tional decree for foreclosurer unnot be di juted on ground of finil decree not having leen [ 15 cd]

1C (1895) 20 All 315 (319) (1539) 20 A)1 358 (8(1)

(1596) -0 All 375 (\*77) (See also S & Cl (?) & Gaul S 10

1, (1896) J C P L R 140 (131)

18 (1327) 1927 Bom 131 (139) 51 Bom 120 19 (19 3) 1923 Nag 130 (132) Interpretation of tinal decree for foreclosure

(1314) 1314 All 177 (178) 36 All 976 Fore igiculturil trite-Finding negi trying plea by Collector-La e refer lor foreclosure must mentably be

passed (1551) 7 Cal 394 (400) Suit in neture of foreclosure suit-Defendant not to be ordered to pis deficiency in principal interest ate which the moneys to stike from the sale may be insufficient to meet

Note 8 1 (190a) 27 All a01 (a01) Note 9

1 (1000) 4 Ind Cas 545 (o45) (Cal) Case under Transfer of Logerty Act-On order absolute for foreclosure mortgage mortgagors 11,bit to redeem revives if notwithstanding the foreclosure the mort gage pursues his personal remedy a ninst the mortgagor. Where a person holding several mortgages on the same property forecloses under the first mortgage, it will be inequitable to allow him to sue the mortgage are personally for the debt secured by the second mortgage?

Sec the undermentioned case 4

## 10 Delivery of title deeds

A mortging can institute a separate suit to recover compensation for loss of title deeds the Court may also grant in the mortgage decree itself an after native rehet for damages for such loss. But if no such alternative relief for damages is provided for in the preliminary and final decrees the Court cannot grant it in execution.

11 Limitation for application for final decree -See Note 12 R 5 1 ifig

### 12 Application for execution of final decree

An application for the execution of a final decree is governed by Art 182 of the Limitation Act 1

A final decree in a mortage suit may be adjusted out of Court like any other decree and O 21 R 2 applies thereto. Where a mortage decree is time barred it cannot be enforced, the mortage itself having meiged in the decree S 48 of the Code applies to a final decree under O 34 though the preliminary decree on which it was based had been passed under the Transfer of Property Act Where in a foreclosure decree against the defendants costs are awarded to the defendants O 21 R 19 is no bar to their executing, the decree for costs Where a foreclosure decree contains no direction for delivery of possession the mortage cunnot obtain possession by applying in execution. The proper course is to apply for an order for possession §

## 13 Appeal

It is clear under O 34 that a final decree is a decree and appealable as such Even under the Transfer of Property Act an order absolute was held to be appealable as a decree 1

## 14 Court fee

Ad valorem Court fee is payable on an appeal against a final decree in a mort sage suit 1

thility for

(05 (706)

juent mortgagee made party to decree under R 2 but not myte party to decree under R 3 and redeeming prior mortgage—Mort Agge ccases to hase ny intrest in the project) and cannot redeem the subsequent mortgage.

#### Note 10 1 (1322) 1922 Mad 299 (300)

Note 12 1 (19 7) 132 1 at 215 (217) 6 I at 780 9 (1923) 1923 Nag 20 (21) 3 (1913) 16 Iud Cas J23 (925) 55 411 250 4 (1J24) 1924 411 656 (556) 5 (1903) 16 C P L R 73 (5 76) 6 (1904) 17 C P L R 62 (54)

Note 13

#### 1 (1901) 3 Neg L R 146 (152 153) (1630) 12 \11 61 (62)

[See also (1932) 1032 Lah 714 (215) Order di missing application for mail detree amounting to dismissal of suit—appeal tale as decree)

[See al o (1914) 1914 P C 66 (67) 36 11 3.0 (P C)]

#### Note 14

1 (1328) 19.9 \ 18 14C (14") (1915) 1915 Oudh 121 (121) 19 Oudh C14 ĭ

R. 4. [New; Act IV of 182 S 88] (1) In a suit for sale, if the plaintiff sneeeeds the Court shall pass a preliminary decree 3 to the effect mentioned in

clauses a) (b) and (c) (e) of sub rule (1) of Rule (2), and further directing b that in default of the defendant paying as therein mentioned the plaintiff shall be entitled to apply to a mad decree directing that the mortgaged property of a sufficient rule thereof be sold and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in runment of what has been found of declared under of by the richminary decree due to the plaintiff together with such amount is may have been adjudged due in respect of subsequent costs 12 charges, expenses and interest, 11 and the bulance if any be paid to the defendant of other persons entitled to receive the same

- (2) The Court may, on good cause shown and upon terms to be five I by the Court from time to time, at any time before a final derive for sale is passed, extend the time s fixed for the payment of the amount found of declared due under subjudged of the amount adjudged due in respect of subsequent costs, charge, expenses and interest.
- (3) In a suit for forcelosure in the ease of an anomalous mortgage, it the plaintiff succeeds, the Court may, at the instance of any pathy to the suit or of any other person interested in the mortgage-security or the right of redemption, pass a like decree 9 (in heu of a decree for forcelosure) on such terms as it thunks it including the deposit in Court of a reasonable sum inved by the Court to meet the expenses of the sale and to secure the performance of the terms.
- (4) Where, in a suit for sale or a suit for foreclosure in which sale is ordered, subsequent mortgagees of persons deliving title from or subrogated to the rights of any such mortgagees, are joined as parties, the prohimmary decree referred to in subrile (1) shall provide for the adjudication of the respective rights and habilities of the parties to the suit in the manner and form set forth in Form No. 9, Form No. 10 or Form No. 11, as the case may be, of Appendix D with such variations as the encumistances of the case may require

## Local Amendments

ALLAHABAD

i (2) After the words the Court may t seert the words of its own motion or CALCUTTA

Renumber Sub Rules (3) and (4) as Sub Rules (4) and (5) respectively and assert the following as Sub Rule (3) —

13

14

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16

(3) The Court max in it, do cretion direct in the decree for sale that if the proceeds of the vile are not at a creat to par the mortgage delt the mortgage shall have the balance personally

Note No

Syne	opsis					
No.	Note  V Decree for sale in foreclosure	٥/				
2	sust Sub R (3)	9				
2 3 4 5	VI Order in which properties should					
5	be sold	10				
	VII Interest -see Notes unier O 31,					
6	R 11	11				
	VIII Costs	12				

IX Succession certificate

XI Consent decrees

X Award

XII Appeal

Other I pres

7

Sub

Anomalous mattage See Note 3 It (1) also Note 9 and 8 as Cl (g) of T 1 Act Amount fixed-Lump sum once for ill Sce Note G It (1) to I (2) above

I Transfer of Property Act S 88 Il Amendments subsequent to 1908 III Who may obtain a decree for sale IV Decree for money in suit for sale (a) Form of decree (b) Contents of decree in smt for sale by first mortragee

(c) Court's power to admist

(d) Power to restend time

in suit to sile

countres

R (2)

Charges See Note 4 I to (2) and ( ) Construction of mortgage decrees See vote

1 ts (a) to [H] Tingt h mort, age > 1 to 3 1 t (1) at o S 58 L1 (e) of F 1 Act

Lquitible moitgiges or mortg gee 17 dep sof title deeds See Note 3 ft (1) al o S 58 Cl (f) of T P 1ct

R 5 te 7 Final decree-Direction to take accounts in e ecution-Aguast law See Aote a

I t (4) Person having two or more mortgages See > te 10 11 (J) to (15) to R 1 1boye let oul decree not to be included See

Right of sub equent mortgages See Note 6 and Note & Pt (6) Sat mortgagees See R 1 Note 9

1 Transfer of Property Act 5 88

The provision as to the payment of subsequent costs and interest to the mortgages out of the sale proceeds of the mortgaged property as new sent Rule is not retrospective in effect so is to affect decrees already passed under the Transfer of Property Act at the time of comma into force of the new Code 1

2 Amendments subsequent to 1908 The present Rule has been amended extensively by the Transfer of Property

(Amendment Supplementary) Let, XXI of 1923 The material changes introduced by the amendment are is follows -

- (1) The new Rule miles it clear that the decree under it is a meli minary decree
- (2) If the mertator makes defult in pariment the mortatoes has to anyly for a final decree for side
- (3) The Rule makes it clear that the most abees should be paid out of the sale proceeds not only subsequent costs and interest but sulsegment charges and expenses properly incurred in respect of the mort, and security
- (4) Sub R (2) enables the Court to extend the time fixed for pay There was no such provision in the old Rule
- ment (a) Sub R (3) corresponding to Sub R (2) of the old Rule is now extressly limited to momilious mort, uses while Sub R (2) of

Order 34 Rule 4-Note 1-1 (1321) 1321 Mrd 126 (128)

the old Rule upplied to all most uses other than mort of es by O conditional sale

(6) Sub R (4) makes express provision for the adjudication of the rights of salequeut machine new tho are joined as parties to a suit by a man model set.

## 3 Who may obtain a decree for sale

The right to sue (c) sile in forcelesure is conferred by S 67 of the Trus of Propriet let A decree for she country be obtained by mattricturing a corting is such as in mericage by conditional sile as such. Such a decree on Le obtained only by a simple mortage on Laglish mortage, in equitable mericage and in animalism mortage see Note 4 to R 2 and the under a central lesses. As to the plants of sub mortage see Note 9 to R 1.

The High Court of Midris his hold that a mortgage of chattels is on titled from a decree for side in enforcement of his mortgage quite as much as a management of the mortgage quite as much 20 to Rob 2 and

## 4 Decree for money in suit for sale

In a suit in a mail, i.e. it is open to a modifice to relinquish his security of the entent himself with a simple money decree. A meri decree for money viuch creates a charge in announce like property for the decree thannount of the property for the decree holder to enforce the decree by solling certain more retained and the property for the first partial in a first property of the first property for the first property for the first property of the first property for the first

## 5 Form of decree

ī

The forms in Appendix D for decrees in suits relating to motigates have been already changed by the Transfer of Property (Amendment) Supplementary Act NM | 1929 | For the form of preliminary decree in suit for sile, see Appendix D 1 am Nos 5 and 5 A

In framus, decrees in mortane suits the provisions continued in O is stuff in the overficed of 1 preliminary decree in a mortane suit must be a proof within which the mortane should be the mortane mortane make the more und the decree should lucet as de of the property only if the mortane fulls to pay the money within the period fixed.

Note 3
1 (1554) 11 All 267 (570) Unifractions from gigee not cutilled to sue for side (1335) 1935 All 28 (181) In the case of in

thomal inclining of Court has discretion if 13 × 1 decret for sile in lieu of 1 dr rector foreclosure

(15.3) 17 Bom 42 (125) (10)

(1853) 14 Boin 42.5 (125) (1856) 14 Mad S (190) (106) (1851) 12 Mad 10.7 (110 111) (106) (1811) 14 Mad 2.12 (234) (106) (18.71) 24 Cal 07.7 (CSO) (16.7) (1896) 20 Boin 2.16 (228) (106)

(1831) 11 Mad 131 (133) Personal coverant in usufu clusiv mortgage — Mort gagee entitled to see for sale (1831) 11 All W. N. 168 (169) (Do)

(1904) 27 Mad 2.6 (324) Combination of a simple and usofructuary moriga-e the mort, i.e. has a right to i.d. cree for the mort, ign mouey and for

(1888) 8 AH W N 171 (172) (Le)

(1886) C VII W N 212 (21°) (De) (1851) 24 C d 348 ( 50) I quitable mort, ne

nilional te temeda is a decree for sile (1878 40) 2 All 527 (500) Simple mortgages

(1904) 1 All L J 20 (25) 2 (1984) 1 143 Al d 241 (241 247)

Note 4 I (1904) 24 All 456 (457)

2 (1925) 1925 Vid 1101 (110") 3 (1325) 1325 Vid 10×5 (1044)

Note 5
1 (1914) 1914 Lah 224 (2-5) 27 Ind Cas 4-9
(492) 1915 Pun Re No 23
(1911) 11 Ind Cas 192 (1 to) 5 Smd L R 71

cold in execution of the decree-

sold in execution of the decree-Sile confirmed—Held that right to reduce was barred!

It will be noted that the form of a preliminary decree for sale under this Rule does not contain any provision regarding the mortgagors personal hability decree which contains such a provision is in contravention of the Rules which con template the determination of the question only when the sile proceeds of the mortgaged property are not sufficient to pay off the mortgage debt 3 Accounts between the mortgagor and the mortgage should be taken before passing the final A direction in the decree for taking accounts in execution is against law A decree directing sale of the mortgaged property in default of the mortgage money being paid within a fixed time, or a decree for the debt which provides that the mortgiged property shall be hable for the debte is in substantial compliance with the present Rule. Where a decree purporting to be a decree on a mortgage is umbiguous it should be construed so as to accord with the law 7 See the following cases as regards the construction of mortgage decrees "

### 6 Contents of decree in suit for sale by first mortgages

For the form of a preliminary decree in a suit for sale impleading the mortgigor and a puisne mortjager see Appendix D. Form 9 For the form of a decree in a suit by puisne mortgree for redemption of a prior mortgree and for foreclosure or sale on the puisne mort age, see Form 10 in Appendix D. In a suit on a prior mortgage in which puisne mortgagees are also impleided as parties, each of them is entitled to an eader that an account be taken of the amount due to him and to a declaration of his right to participate in the surplus sale proceeds remaining after paying off the prior mortragee in the order of his priority 1 But the pursue mortgages a right is dependent on a sale being held under the prior mortgage Honce where the prior mortgage is paid off before the sale under it is held the pushe mentgagee cannot ask for a sale of the property 2. Where the puisno mortgago includes some properties in addition to those mortgaged to the prior mortgageo the puisne mortgagee counct ask that if the sale proceeds of the properties subject to the prior mortgane are not sufficient to pay off both the prior and the pulsne mortanes the additional properties subject to the pulsne mort gugo should also be sold. His right is only to have his mortgage debt satisfied out of the sale proceeds of the properties subject to the prior mortgage 1 In a suit by

(See al a (1939) 1933 Cal 316 (318) Court holding mortgage hen pro-Portionately to property in losses sion of mortgagee dischargel-De cree directing account due to plain tiff and in defiult of pryment sum cient property to be sold-Decree held to be one under O 34 R 4 1 3 (1917) 1919 Pat 36, (866) Decree providing

that if sale proceeds of mortgaged property fills short of mortgage debt there should be a personal decree against mortgagor Hell that it was not a preliminary decree on a mort Lige in the strict sense of the term

(1)14) 1914 Ctl 914 (21.) 23 Ind Cts 35.) (390) I relimit to detree should not

n ter R 6 110 o) 1325 I h 640 (641) A combined le ree lee Rr 4 11 d 6 14 in contra sention of the rules

(1904) 31 Cal 73? (795) Combined decree under Ss 59 and DO of the Transfer of Property Act contravenes 11011 sions of the Act

(1300) 22 411 412 (44.) Note 6 1 (1906) 33 C et 92 (111)

2 (1910) 37 C 1 307 (310 911) (1)13) 1319 1114 100 (102) (98) 42 Mal JO

[See (1392) 1382 Cal 126 (123) 53 Cal 117 He must file a sejarate

49 Ind C13 6

ftters

3 (1910) 37 Cal 307 (310 911)

t prior mortgagee impleading both the mortgager and the puisse mortgage the mortgager cannot be called upon to pix off both the mortgages on pum of his property being sold. The puisse mortgages right to have his mortgage depicted by such sale proceeds statisfied out of the simplus sale proceeds is not affected by such sale proceeds being withdrawn from the Court by a person having notice of the puisse mort

## 7 Court's power to adjust equities

gagee s title 3

Where a sale of the mort, sed properties is unpossible as where the mort gaged properties have been sold for irrears of reconnect of tent the decree must be suitably modified. The Court his inherent power, in such cases to give appropriate directions for the disposal of the fund which represents the property. See also Note 19 to R. 1.

8 Power to extend time in suit for sale-Sub R [21-See also Note 15 to R 2

The provision in Sub R (2) enabling the Court to extend the time fixed for payment of the mort, age money under the preliminary decree is new. There was no such provision before the amendment of the present Rule by Act NM of 1920 <sup>1</sup> Hence, it was held that the Court had no power to extend the period fixed for payment of the mortgage money under a pichiminary decice for sale <sup>15</sup> It was however, open to the mortgager to precent a vale at any time before it was open to him to have the sale set aside at any time before it was open to him to have the sale set aside at any time before it was continued, by applying under O 21, R 89 <sup>3</sup> But in some cases it was held that the provisions of the Code as to execution of decrees were not applicable to mortgage decrees <sup>4</sup> This view is no looger tenable especially since the transfer to the Civil Procedure Code, of the provisions of the Transfer of Property Act relating to suits on mortgages O 21, R 83 expressly provides that that Rule does not apply to decrees or mortgage.

In a suit for sale by a puisne mort, a,ce he was given a decree conditional on his redeeming a prior mortgage within two months from the decree. He fulled to redeem the prior mortgage within the period fixed but did so about four months after the decree. It was held that as the defendant had not taken any steps to redeem, the plaintiff was entitled to the benefit of the payment though made after the pre-combed time and to a decree absolute for sale.

9 Decree for sale in a forcelosure suit-Sub R (3)

Sub R (3) has been taken from S 25 of the English Conveyancing let, 1881. The provision occurred even in S 88 of the Transfer of Proporty Act and

was repeated in O 34 Sub R (2) [now Sub-R (3)] (1.04) 26 All 504 (506) (1911) 11 Ind Crs 528 (530) 14 Oudh Cas 147 2 (1903) 31 Mad 354 (958) (See (1932) 1932 Cat 126 (129) 59 Cal 117 But he must bring a suit of (1903) 31 Mad 554 (358) (1904) 31 Cal 563 (568) (1894) 20 All 354 (356) (1894) 19 All 205 (208) (1888) 10 All 1 (4) 3 (1908) 31 Mad 354 (358) (1902) 25 Mad 244 (258) his own ] 4 (1901) 1 Cal L Jour 81 (35) Prior to T P Act (Amendment Act) of 1929 5 (1921) 1921 All 312 (314) 43 All 268 Note 7 1 (1313) 191 > Cal 203 (207) Mortgage security (189J) 22 Mad 286 (288) lost or converted -- Court has in (1901 25 Bont 101 (106 107) herent jurisdiction over conversion 4 (1902) 29 Cal 651 (Ga3) which represents [roperty 5 (1921) 1921 Lah 384 (38a) [See also Note 20 to R 5 of O 31] 6 (1902) 24 All 4.9 (191) Note 8 1 (See (1331) 1931 All 386 (387) 53 All 2831 11 (1911) 9 Ind Cas 771 (777) (L B) Note 9

(1900) 24 Bom 900 (902) 1 (1888) 11 Vad 88 (90) (44 and 45 Vict, (1857) 15 VII 205 (207) C 41 S 25)

The Transfer of Property Let (Amendment) Supplementary Act, NI of 1929, his mide a slight change in the linguige of the Sub Rule and it is this The old Rule applied to most likes other than unortages by conditional sale. The new Rule applies only to anomalous mortgages. The doubt that was felt under the old Sub Rule is regards its applicability to anomalous mortgages or thus no longer exist. In such cases, the Court in order to protect the interests of all prities concerned can in the exercise of its discretion under this Sub Rule plass a decree for side instead of one for foreclosure. In the Sub-Rule where it does not appear that the property was undertained under this Sub-Rule where it does not appear that the property was undertained.

Where a pluntiff most suggestance for forcelessure on the allegation that the most suggestance is not one has conditional sale, and it is found that the most suggestance is not one has conditional sale the proper course is not to dismiss the suit but to  $_{\rm pl}$  into relief under Sub R (3).

10 Order in which properties should be sold

Prima face the decree-holder is entitled to have the mortgand properties sold in any order he like, 12 There are however, two important exceptions to this general rule—

- (1) the doctrine of marshalling securities as lud down in the Trinsfer of Preperty Act, and
- (2) The Court's power under O 34 R 4 to adjust the equities between the parties

Decline of mashalling —S 56 of the Tiansfer of Property Let is it stood before its amendment applied only as between the value, and his bayer. The Section has now been recisibly Let N of 1929 and it is now provided that this bayer curclaim the right of mushalling a unit not only the seller but also a, unit the mortgage but not so is to prejudice his right. Similarly the old S 81 of the Trunsfer of Property Let provided for mushalling where there were two properties only. The scope of the Section his now been valenced by Let NN of 1929 by providing that the Section should apply to case, where there are more than two properties and to all subsequent mosts, so.

Count's power to adjust equality:—Them of the doctains of mushalling above.

Court's pour to adjust equities—then it the doctrine of maistrining flower referred to is not strictly applicable, the Court his, under this Rule, the power to direct the order in which the various mort-aged properties should be sold, for the purpose of protecting the equities that may exist in fixour of into the putties.<sup>2</sup>

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2 (1)13) 18 Ind Cvs 21 (20) (Oudh) Provision does not upply to montilous mort
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3

[5ce (1323) 1329 Oudh 252 (252) R 4 Gl 3 applies to monistons mort

will be excissed only on the rest lence of some distinct ally intractor were thereby to the jury in whose from the discretion as a lel to be excissed without impast to the risorable in lequipile claim of the liposte alle

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(180 ) 180 ; MI W \ 723 (32)h

Note 10

(1) (1) (1) (MI \ \( \infty \) (32) (47 Mi (60))

(1) (2) (47 Mi (60)) (47 Mi (60)
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(1867) 8 Suth W R 371 (322)
(1897) 31 Ga 113 (17)
(1897) 17 Wii 32 (1875)
(1991) 17 Wii 32 (1875)
(1991) 17 Ho G S. 41) (43) 440) (Vi 1)
(1994) 17 Hi 11 Hi 12 (1875)
(1994) 18 Hi 1 Hi 12 (1875) 1 Hi 12 (1875)
(1994) 18 Hi 1 Hi 12 (1875) 1 Hi 12 (1875)
(1994) 18 Hi 1 Hi 12 (1875) 1 Hi 12 (1875)
(1894) 18 Hi 12 (1875) 1 Hi 12 (1875)
(1894) 18 Hi 12 (1875) 1 Hi 12 (1875)
(1895) 18 Wii Hi 12 (1875)
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(1311) 12 In I C., 143 (1,2) CC Police. (1317) 1917 Mat 772 (773) Thus where I som undertakes that where the sale of the father's share alone is insufficient to sitisfy the mortgige he will agree that his own share also may be sall the Court may direct that the interest of the father alone may be sold first 3

I and B mortgage certain items of property to ( B then mortgages to D his own items of the mortal ed property. In a suit by & D cannot claim that the items belonging to I ilone should be sold first the reison is that the mortal gor is not the same in both the most was If however the mortginee his agreed that the properties should be sold in a particular order the agreement should be aven effect to 5

See also Note 17 to R 5

11 Interest - See Sot sunir (1 31 R 11

### 12 Casts

Costs awar led to a mort place in a suit for side on a mortgage are part of the mortale money and the primarily recoverable from the mortgaged property and not from the mortagor personally unless the decree makes the mortgagor personally hable for the costs 3

Ordinarily in a mortgage suit a pursue mortgagee is not personally made hable for the casts. But if he makes himself responsible for any unnecessary contest in the suit he may be mulo personally hable for the costs." The utmost that he can be made hable for as the extra costs caused by his unnecessity contest

#### 13 Succession certificate

It has been held by the High Courts of Bomby 1 Cilcutta2 and Madias3 that 5 4 of the Succession Certificate Act (now 5 214 of the Succession let 192) does not apply to smits for sale on mortganes of immortable property. where no personal decree against the mortgroor is asked for But a contrary view is beld by the Allababad High Court !

## 14 Award

Rules 4 and 5 of O 34 do not upply to a decree passed on the award of an arbitrator and honce a final decree is not necessary in such a case before the decree can be ovecuted 1

(1903) 23 All 42 (45)

(1924) 1924 Mad 509 (510) I secuting Court

can also do so (1 132) 1932 All 85 (87 88 90) 53 All 311

3 (1)11) 12 Ind Cas 949 (Ju2) 36 Bom 61

4 (1)20) 1930 Wad 178 (190) 5 (1 11 J) 1010 L at 281 (283) 4 Pat L Jour 207

Note 12 1 (1914) 1914 All 444 (445)

(1332) 19.2 Cil 521 (333 534) 29 Cil 6Ci A case of mortgage of moverbles

[See also (1933) 1933 Rang 81 (931]

57

Note 13 1 (1J04) 25 I on 630 (634) 2 (15J9) to Cal 83J (641 542) (1592) 1J Cal 536 (33J) (1535) 27 ( 11 143 (14 )) (1000) 2r Usl 300

costs rerappalls

[See houses et (321)1

3 (1301) 29 11 11 77 (3) 4 (1511) 16 (11 17 (3) Note 14

1 (1327) 1377 Sun i 103 (104) 19 Sund L R -02

left for In olvency Court to decide] (1J31) 1931 1 ang 1J3 (1o9 1C0) 9 Rang

186 Persons other than mortgagors

such as prior mortgagees impleated

and unsuccessful - Ordered to 1 17

[Se al o (1333) 1933 Lah 9 9 (330) Pre emption of mortgiged property

i using filse defence-Personal de

(See also (1930) 1930 Born 11 (1 i)

of mortgage-Orlere I to pay costs the question of his right to it

Official Receiver disputing vilility imbursement out of surplus terng 4.

The Transfer of Property Act (Amendment) Supplementary Act, ACI of 1929, has made a slight change in the larguage of the Sub Rule and it is this The old Rule applied to mortgages other than mortgages by conditional alc. The new Rule applies only to anomalous mort, ages. The doubt that was left under the old Sub-Rule as regards its applicability to anomalous mortgages, os can thus no longer exist. In such case, the Court in order to protect the interests of all parties conceined can in the exercise of its discretion under this Sub Rule pass a decree for all instead of one for foreelosine, although the suit may be for fore closure. But the Court will not pass a decree for side instead of one for closure under this Sub Rule where it does not appear that the property was under tailed?

Where a plaintiff montgages such for forcelosure on the allegation that the montgage is not one by conditional sale, and it is found that the montgage is not one by conditional sale, the proper course is not to dismiss the said but to  $_{\mathbf{n}^{\prime}}$  and relief under Sub R (3)  $^{\circ}$ 

## 10 Order in which properties should be sold

Prima facte the decree holder is entitled to have the mortgaged properties cold in any order he like, 12. There we however two important exceptions to this general rule —

- (1) the doctrine of marshalling securities is lud down in the Trunsfer of Property Act, and
  - (2) The Court's power under O 34, R 4 to adjust the equities between the parties

Detine of mashaling—S so of the Transfer of Property let as it stood before its amendment applied only as between the seller and his buyer. The Section has now been recast by let N of 1929 and it is now provided that the buyer cin cluim the right of mashaling against not only the seller but also against the mortgage, but not so as to prejudee his rights. Similarly the old S 81 of the Trunsfer of Property let provided for mashaling where there were two properties only. The scope of the Section has now been undered by let N 1929 by providing that the Section should apply to cases where there are more than two properties and to all subsequent mortgages.

Courts power to adjust equities—Even if the doctrine of maishilling above referred to, is not strictly applieable, the Court his under this Rule the power to direct the order in which the various mortgaged properties should be sold, for the purpose of protecting the equities that may exist in favour of my of the printes.\*

2. URBLUSH MA Co. 24(27) (Modhl) Probable (1897) S with Wil 37 (1821)

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2 (1)13) 18 Ind Cas 24 (25) (Oudh) Provision
does not apply to anom dous mort
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[See (1923) 1927 Ondh 282 (257) R 4, Cl 3 Hilles to moundons mort

will be exercised only on clear or lance of son a distinct a land in the concrete thereby to the farty in who e favour the discretion is isked to be exercised without injury to the reasonable in a control lance of the

```
(1907) 34 Cs.1.3 (17)

(1903) 17 HI 331 (13)

(1311) 12 Had Cs.4.29 (13) 440) (V. 1)

(1324) 124 Ps.4.70 (1703)

(1324) 134 Ps.4.70 (1703)

(1324) 134 Ps.4.70 (1703)

(1324) 134 Ps.4.70 (1703)

(1324) 134 Ps.4.70 (1704)

(1324) 134 Ps.4.70 (1704)
```

(1311) 17 In 1 C to 343 (152) Ct Porture (1317) 1917 Vit 1772 (743) Thus where a son undertakes that where the side of the fathers share done is Consultation to satisfy the modified he will ignore that his own share also may be sold the Court may direct that the interest of the father alone may be sold first.

I and B mortage certain tiens of property to ( B then mortages to D is own items of the mortaged property. In some by C D cannot claim that the atems belonging to I alone should be sold into the action in its thirt the mortage ris not the same in both the mortages. If however, the mortages has agreed that the properties should be sold in a particular order the actions as should be sold in a particular order the actions.

See als Note 17 to R 5

II Interest - See Stamfer O T P II

### 12 Costs

Costs warded to a mortage in a suffor sile on a mortage are part of the mertage money and are primarily accordable from the mortage incoperty and not from the mortagen personally andess the decree makes the mortager personally hable for the costs?

Ordininily in a mortgage suit i putsur mottgage is not personally made lable in the case.\* But if he makes humself responsible for my unnecessity contest in the suit he may be made personally hable for the cases.\* The utmost that he can be made hable for is the extra costs curved by his unnecessity contest.

## 13 Succession certificate

It his been held by the High Courts of Bombis, Celeutt's and Madras's that S 4 of the Succession Certificate Act (now S 214 of the Succession Act 1923) does not apply to suits for sale on montriges of monocicible property, where no personal decree against the meritage is tasked for But a contrary year is held by the Malabada High Court's

#### 14 Awar

Rules 4 and 5 of O 34 do not apply to a decree passed on the award of an arbitrator and hence, a final decree is not necessary in such a case before the decree can be executed.

(1903) 23 411 42 (45)

(1974) 1924 Mad 509 (510) Executing Court

(1939) 1932 All 55 (57 88 90) 53 All 331

2 (1911) 12 Ind Cas 949 (1)2) 6 Bom CI

4 (13°0) 13°0 Mad 178 (180) J (1313) 1919 Pat 281 (283) 4 I at L Jour 207

Note 12

1 (1914) 1914 All 444 (442) (1932) 1992 Cal 524 (533 534) 53 Cal Co. A case of mortgage of moveralles

[See also (1937] 1933 Rang 81 (531)

(1535) 20 All 523 (526 227 528)
(1316) 1316 All 366 (\*66) 43 Ind Gra #7
(529) 40 All 109

0 (1010) 1013 4(1 297 (235) 41 MI 479

3 (131) 1313 411 297 (238) 41 411 478
[S.c. 1480 (1330 1330 Bom 11 (14)
Official Receiver Institute, will fits
of mortgage—Ordered to 1 at costthe picture of the right to re
imbursement out of mritus, temps

left for Insolving Court to decode]
[131] 1931 Ring 133 (159 160) 9 Rang
156 I essens other than mortgagers
such as prior mortgages impleaded
und unsuccessini - Ordered to pry
costs per on tilly
(Yee 150 (1933) 1933 Lvh 329 (390)

fre emption of mottgaged property

Note 13
1 (1001) 23 horn 620 (631)
2 (1501) 23 horn 620 (631)
2 (1501) 6 Lot 330 (631 542)
(1501) 22 (1113 (141)
[See hosever (1000) 27 Cit 3.55
(3701)

3 (130) [29 Virt 47 (73) 4 (1894) 16 Vir + 1 (268)

Note 14 1 (13%) 1977 Sant 103 (104) 19 Sant

## 15 Consent decree

It is open to the parties to a mortgage suit to enter into a compromise and the Court can, in such a case, pass a decree in terms of the compromise. Such a decree need not conform to the provisions of O 34 1 For instance, instead of a lump sum being directed to be paid on a fixed day, a compromise decree may pro vide that the mortgage money should be paid in certain instalments and that in default the mortgaged property should be brought to sale. In such a case, it is not necessary to have a final decree passed under R 5 before bringing the property to sale 2 For it is open to the mortgager to waive the henefit of the provision which requires that a final decree should be passed before the property can be sold and where by his agreement he has wayed the benefit, a final decree which is intended only for his benefit is not necessary d But the deeree-holder is not precluded from applying for a final decree in such a case . So also where the parties have a reed that the decree should be drawn up under R 4, a final decree under R 5 is necessary " O 34 R 14 does not apply to a compromise decree "

A compromise decree on a mortgage may fix a longer period than the six months allowed under the Rule, for payment by the mortgagor 7. The Court has no nower to extend the period fixed for payment by a consent decree " Where a compromise mortgage decree authorises its enforcement against properties other than the mortgaged property, execution of the decree by the arrest of the mont gagot is permissible

Sc. also Note 5 to R 5

## 16 Appeal

Under O 43. R 1 (o) an apped has from an order refusing to extend time for payment under this Rule But no such appeal his after the final decree has been passed 1 In an appeal from a preliminary decree, ad talorem Court fee is payable on the amount found due and not the amount claimed by the plaintiff 3

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Under S 97 of the Code where a preliminary decree is not appealed from it
  (1324) 10°4 Pit 463 (264) 3 Pit 221
(1380) 1930 Lih 116 (11°)
                                                     (1925) 1J28 Cal 626 (628) 50 Cal 650
                                                   4 (1931) 1931 All 340 (341)
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(1324) 1924 C (1 640 (64f) [But set (1833) 23 Bom 644 (650) 5 50 of the fransfer of Property

act applies to the award of a con ciliator under S 41 of the Dekkhin Agriculturists Relief Act] Note 15

1 (1920) 1320 Pat 731 (133) 5 Pat L Jour

5 (1931) 1931 All 840 (841) (1929) 1J23 All 881 (883)

6 (1325) 1925 Sind 156 (157) Comprojuise provided for sale of property in execution

(Sep however (1932) 1382 411 439 (440) Case of a suit on a pro note-Compromise hypothecatin, prop r ties for decree amount—to provi sion in compromi o to sell hypo theer in execution-Held O 34. R 11 applied ]

7 (1929) 1329 411 651 (633)

8 (1926) 1926 Nag 2-0 (231) (1J34) 1J34 Oudh 44 (45)

J (192J) 1923 Lah 56 (57)

(134,) 134, 111 033 ( 31) (1J35) 1935 Pat 385 (395) (See also (1932) 1932 Cal 775 (750)] 2 (1921) 1921 Lah 381 (353) 55 Ind Cis 816 (1J32) 1J32 All 439 (440) Lon ent de ree (816) creating charge or mortgage-Silent as to mode of execution-Atrest or (1334) 1334 Cul 735 (731) execution against other properties available in execution—I at prop r ties charged or mortgage! can be (132) 1923 Lih 390 ("JI) (1309) 1 Ind Cas 677 (6:1) (Cil) sold only by selicita suit under

(1323) 1923 Cal 11 (12 14) (1321) 1927 All 107 (165) AJ All 297 (F B) 3 (1361) 34 Cal 856 (5 6) (1311) 10 1a 1 Cra 5 C (534) (Cal) (1311) 1314 P C 150 (131 152) 12 Cal 776 42 In 1 11p 55 (P C)

Note 16 1 (1930) 1930 Nag 240 (240) 2 (132) 1327 Sind -51 (252) cannot be questioned in in appeal from the hall doctee 3. Under the former Code it was held that an application for tal manaccounts on a mortaine directed by a decree thereon was one in execution and that in order on such application was appealable under \$ 244 (not \$ 1) 4. The view a not tenable under the pic sent Code

R. 5. [Vit Act IV of 182 S 59] (1) Where on or before the day fixed or at any time before the continuation of a sale13 made in pursuance of a suit for sale final decree passed under Sub-Rule (3) of this Rule, the defendant makes payment into Comt14 of all amounts

duo from him under Sub-Rule (1) of Rule 4, the Court shall on application made by the detendant in this behalf pass a final decree or if such decree has been passed an order-(a) ordering the plaintiff to deriver up the decuments

referred to in the preliminary deeree 13

and if necessous -

(b) ordering him to transfer the mortgaged property as directed in the said decree

and, also, if necessity,-

(c) ordering him to put the detendant in pessession of

the preperty

(2) Where the mertgaged property or part thereof has been sold in pursuance of a decree passed under Sub-Rule (3) of this Rule, the Court shall not pass an order under Sub-Rule (1) of this Rule, unless the defendant, in addition to the amount mentioned in Sub Rule (1), deposits in Court for payment to the purchaset a sum equal to five per cent, of the amount of the purchase money paid into Court by the purchaser

Where such deposit has been made the purchaser shall be entitled to an order for re-payment of the amount of the purchase money and into Court by him together with a sum equal

to five per cent thereof

(3) Where payment in accordance with Sub-Rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decreet directing that the mortgaged property or a sufficient part thereof be seld 17 and that the proceeds of sale be dealt with in the manner provided in Sub-Rulo (1) of Rule 4

[Cf O 21 R 89]

## Local Amendment

MADRAS Sit tit ite the follows in f i Sut Rule (3) -

Where I syme it in accordance with \$1 Rale (I) has not been inide the tour tehulf and aft r notice to all the partioll Code)

(1.01) 6 Val 33, (.38)

pass a final decree directing that the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale be dealt with in the manner provided in Sub Rule (1) of Rule 4

## Cumanasa

Synopsis									
Note	No	1		e No					
l Transfer of Property Act S 89 Il Amendments after 1908	1 2		(a) Payment into Court (b) Return of documentare	14					
Ill Scope of the Rule IV Final decree when can be pass	3	VII	lating to property Dismissal of mortgagee's appli	15					
ed (a) Consent decrees and de	4	VIII	cation for final decree	16					
crees on award	S		thereof be sold	17					
V Only one final decree to be passed (a) Form of final decree for	6		Power to enlarge time Effect of sale under mortgage decree	18					
sale	7	ж	Execution of final decree for						
(b) Court cannot so behind picliminally decree	8		Transfer of final decree Injunction restraining mort	21					
(c) Court to which applies tion for final decree is		YIV	gagor from receiving income of mortgaged property Construction of mortgage de	22					
to be made (d) Application for final de	9	1	cree Appeal	23 24					
cies if and when ne	10	χvi	(a) Court fee Costs not recoverable from						
(e) Notice to judgment deb		XVII	mortgagor personally Dekkhan Agriculturists Reliaf Act	26 27					
(f) Lamitation for applica	11		Limitation for application for execution of final decree						
tion for final decree VI Mortgagors rights before con	12	XIX	Nature of proceedings for final	29					
firmation of sale	13	xx	Joint decree holders	30					

# Otler Copies

Or ler absolute

5 97 Notes 1 and ;

Sub mortgageo s rights

1 t (3)

Non liability of non parties to final decree. See Note 20 P N (2)

Partition subsequent to mortgage-Remeds

Preliminary decree not questionable in al

Who may apply for final decree See Note 10

Pts (1) and (5) also see Note SO 1 t (9)

of mortgages See Note 1: 1 t (3)

Difference See Nota 13 I ts (4) and (5) Or for in which properties are to be sold See Note 17 It (1) al o R 4 Note 10

peat from furt decree See Note 24 also

and final de ree-Effect of-

See R 1 Note J

tequisition under the Land tequisition tet-I flect-Linal lecree if essential Note 17 Pt (2)

Not a decree under R 4 See Not 5 Defective applications-I flect

See Note 10 Pt (4) il o Note 16 Pt (3) Defective final de rec-l ffc t See Note 7 F N (1)

Fulregement of mortgigors interest Note 19 Pt (3)

Mortgage suits-Decree for money can be passed See R 4 Note 4 Pt (1), ee also

R 6 Note 10 Pts (8) (4) (6) and (4) I Transfer of Property Act S 59

This Rule corre pends to S 59 of the Transfer of Property Act The chief points of distinction between the two provisions are the following -

(1) Under S 89 an or ler also ute for sale was passed while under the mic sent Rule a final Lence is passed

(2) Unler S S9, payment of the mortgage money could be made either to the pluntiff or into the Court Under the present Rule, payment has to be made only into the Court

- (3) The words it the end of S 89, "and thereupon, the defendant's right to redeem and the security shall both be extinguished have been omitted in the pre-cut Rule
- (4) The provision for the passing of a decree in case of payment by the mortgager within the proper time is new

#### 2 Amendments after 1908

The chief changes introduced in the Rule by the Amendment Act, XXI of 1929, are as follows —

- (1) The present Rulo makes it quite clear that the decree under it is a
- (2) to u prement of the mortgage money under the preliminary decice, the present Rule requires the mortgager to apply for a final decice.
- (3) The provision in Sub R (1) as to the defendant paying the mortgage money at any time before the continuation of the sile is new
- (4) Sub R (2) is new

## 3 Scape of the Rule

The present Rule applies only where a prehimmary decide has been passed under R  $\pm^{1}$ 

## 4 Final decree when can be passed

Order 34 contemplates the passing of a preliminary decree and a final decree in all moitages suits. The final decree for sale is passed when the payment directed by the preliminary decree has not been made within the propertime \( \) final decree under R 5 is necessary only when the decree originally passed is a preliminary decree under R 4. Hence where only a money decree has been passed, a final decree under the Rule is not necessary although the decree may authorise the decree holder to realise the decree amount by sale or the judgment debtor spiopets \( \) Similarly where at the time of the coming into force of the present Code of Civil Procedure a decree had already been passed under Transfer of Property Act S 88 it has been held that a final decree under the present Rule is not necessary? But where property is charged with the payment of the decreed amount it was held in the undermentioned case that the proper mode of realising the decree imment is to obtain a decree absolute for sale and that it was not necessary to attach the property.

Where the plantiff under a preliminary decree ou  $\tau$  mortgage is directed to pay in a prior mort, ago before bringing the mortgaged property to sale he is entitled to apply for a hind decree for sike even though he has made the payment only after the time fixed by the decree  $^{4}$ 

Where the purchases of a position of the equity of redemption is unide one of the defendants at a 1 suit on a most age and after the preliminary decree is passed, obtains an assiminant of the most ages a rights but is entitled to apply for a final decree although only for a proportionality addiced portion of the mortage amount. Mithough a final decree is necessary to be passed before execution, yet a most sign who allows execution to take place, without raising any objection, will be extopped from contending that the want of a final decree

Order 34 Rule 5-Note 3 1 (1993) 1 Int Cas Ge7 (690) (Cat) Note 4

Note 4 1 (192) 1925 Mail 1083 (1051)

<sup>2 (1324) 1324</sup> Mad 603 (£03) (1917) 1917 Mad 3L (31C)

is fital to the proceedings 6 Similarly, it was held under the Trusfer of Property Act that no objection as to the want of a formal order absolute for sale could be rused where execution had once proceeded without objection?

## 5 Consent decrees and decrees on award

We have diedy seen in Note 4 that this Rule applies only where a preluminary decree his been passed under R 4 A consent decree providing for payment by instilments is not a preliminary deeree under R 4 and hence, a final decree under the present Rule is not necessary in such a case 1 Similarly, a decree on an award is not a preliminary decree under R 4 and no final decree is necessary to be pissed 2. But a decree-holder is not precluded from applying for a final decree where a preliminary decree by consent has been passed 3 See Note 15 to R 4 for further notes

Where a mortgage itself is invalid, as being opposed to a certain statute. it cannot be validated by a consent decree on the mortgage. The mortgager can resist in application for final decree on the ground that the mortgage is not binding on lum 4

## 6 Only one final decree to be passed

G (1918) 1918 Pat 41 (15) 4 Pat I Jour 21 J

(1914) 1914 Vid 36, (300) 23 Ind (15 390

pressly stating that no hual decree

19 1) 1 (11 1 at \_63 (264) 3 Pat 221

(1113) 11 11 11 14 (\*0) O 11 not applies

the (113 ) 193, Pat 395 (395) ] (1 17 11 12: Sin I 103 (101) 13 Sind L R 202

1. needed

This Rule contemplates the pissing of only one final decree 1 Where the preliminary decree is appealed from, the final decree should be based on the appellate decreo 2 From this it was concluded by the Allababid High Court in the undermentioued case that a final decree cannot be passed pending an appeal from the preliminary decree and a final decree so passed is invalid and inevecutablo 3 But this view has not been accepted by the High Courts of Patna, 4 Lahore 5 and Calcutta and has been overruled by the Allahabid High Court itself subsoquently 7 Where a final decree is passed and subsequently the preliminary decree ble to decrees on an unlitiation

en ird 3 (1331) 1931 \11310 (311)

(1907) 31 Cv1 866 (831)

6 (1900) 10 Cat // 7 910 (J12)

7 (1 131) 1331 All 356 (388) 53 VII 253 (F D)

1926 111 291 Overruled

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(1937) 1927 Born 181 (1°8) 51 Pom 125
7 (1930) 2 Oudh Cas 337 (23) 340)
                                                            4 (1919) 1319 Mad 4.9 (431)
  (1902) 23 Vad 387 (299)
                                                                                  Note 6
  (1901) 31 Cal 310 (371 372)
(1901) 25 Cal 71 (77)
                                                            1 (1917) 1317 411 163 (164) 33 111 641
                                                              (1911) 9 Ind Cis 83, (883) (111)
                                                            2 (1917) 1917 VII 169 (164) 89 VII 641
(1931) 1934 VII VJ (30 JI) This principle
  (1891) 18 Cal 189 (142)
(But ecc (1893) 4 Mal L Jour 34)
                                                                      will apply even if appeal is by some
          (3,0) 1
                      Note 5
                                                                      defendints only provided the appeal
1 (1911) 10 Ind C1. 536 (337, 534) (Cal)
                                                                     to against the whole decree
                                                              (1926) 1326 P C 33 (44) 53 1a1 Apr 147
  (1934) 1934 C (1 735 (736)
                                                                     6 lat 21 (P C)
  (1927) 1927 Pit 51 (277) G Pat 3-5
  (1925) 1923 Mad 35 (33)
                                                              (1926] 1926 111 "13 (313)
   (1923) 1J23 Pat 370 (974) 2 Pat 538
                                                                      (See also (1934) 1931 Mad 65 (68)
  (1924) 1924 Mad 645 (646)
(1921) 1931 Lah "44 (38a)
                                                                      From when the appellate decree
                                                                      sample confirms the decree of the
                                                                     first Court
   (1929) 1923 C tl 11 (14)
                                                                      (See also (1933) 1933 Nag 286 (237)
   (1925) 1926 Cal 117J (1180)
   (1923) 1923 Cal 626 (628) 50 Cal 6.0
                                                                      23 Nig L R 1"0 Appeal against pre
                                                                     hannire deer adr-mis ed-Apellah
   (1923) 1 129 Lean 227 (227)
   (1327) 1927 All 167 (165) 49 All 237
                                                                     Court should fix a date for the
   (1909) 1 In 1 C 15 677 (( 50) (C d)
                                                                     ment ]
                                                           1 (1925) 1926 AH 291 (292)

1 (1927) 1927 Put 215 (218) 6 Put 780

(1934) 131 Put 225 (2.5)

5 (1924) 1924 Lich 300 (300)

(1924) 1228 Nictes 57 (3) 108 I C 751 (Mail)
   (1922) 1022 111 53 (241) 44 111 668
   (1931) 1931 Cal 546 (545) bolenama ax
```

is modified on appeal, the Court of first instance may either prepare a new final O decree or amend the preliminary decree already passed 8

Under S 89 of the Transfer of Property Act, successive applications for an order absolute were mainlainable such applications bond proceedings in execution.9

7 Form of final decree for sale

T.

For the form of a final decree for sale see Appendix D. Form 6 Nothing in R. 4 or in this Rule is pures the sp cification of the mortgaged property in the decree 1 Where the mortane money is payable under the bond in a lump sum the Court is not justified in allowing it to be paid in instalments?

Where I co most success made a party-defendant to a suit for sale on the mortgige and the decree directed a payment to him of a part of the decretal mentioned cises \*

8 Court cannot go behind preliminary decree

When preparing a final decree under this Rule the Court has no power to so behind the pick many decree ' Similarly the amount fixed in the proling has decree cannot be at sted except for some reason, which may have happened subsequent to the 17 liminary decree -

9 Court to which application for final decree is to be made

Phough the preliminary decree may be modified by the appellate Court the application for final decice should be made only to the Court of first in "tance" Under S 69 of the Transfer of Property 1ct it was held that the an plication for an order absolute under S 89 could be made to the Court charged with the execution of decrees, the proceeding being one in execution 2

10 Application for final decree if and when necessary

The Rule requires that the mortgagee must apply for a final decree. Lut

(19\_9) 1929 All 267 ( 89) 51 All 640. 1026 All 231, Doubted [See al o (19 2) 1332 All 203 (235) of til "if typeal from preliminary decice-Finil decree not to be stayed but execution of anal decree may be stayel under S 151, C P C] 9 (1926) 1946 VII 134 (187) (1934) 194 VInd 61 (69)

(Lut see (11°2) to Nag L Jour 124 (127 1's) Prelimberty desice after incd on approl-Final decree passed -Amendment of preliminary decree not illowable l

9 (1903) 25 111 212 (219) (1903) 25 111 264 (267)

Note 7 1 (1917) 1917 M1 412 (447) 33 M1 334 2 (1900) 1930 M 6"1 (635) 4 (1970) 1370 M 6"1 (635)

4 (1903) 5 Poin L R "> / (.92) Absence of the

tholute after order in order under 5 80 was not fatal (1882) 8 Cal Jo7 (363 64) Apportionment

of mortgage del t (1926) 1926 I sh 361 (J( 1 ( J) Finil de ree made by endorsement on prehimnary

decide its If - It ruce of separate final deer easmeads in irregularity Note 8 1 (1929) 1929 VII 252 (-53)

(1931) 1334 Oudh 45 (46) But Court can interpret picliminary decree and [See also (1JJ1) 1J31 All 657 (608 (al) Order in which properties are to be sold-Put in issue and negi tivel-Not incorporated in prolimi

in the final decree] [Ser also (1932) 19,2 Loin 136 (146) ] 2 (1927) 1327 111 589 (589) 49 111 609

(1933) 1933 Rang 323 (325) Mortgage de cree with interest at contract rate till suit and at Court rate till reali /ition-Judge on application by def ndant allowing mistalments and ordering that decree should cease to bear interest-Order is without musdiction

[See also [1300] 4 Ind Cas 546 (547) (Cal) Provision for any further in terest than that provided for in prehimmery decres cannot be added]

1 (1900) 23 Wal 521 (23) (1910) 6 Ind Cas 323 (325) (311)

2 (1891) 13 AH 274 (250) (E B) Note 10

1 (1918) 1318 fom 217 (218 210 to 12 ..03

it has been held that an application for sale of the mortgaged property may be treated as an application for a decree absolute. An application for a final decree in a mortgage suit need not, however, be in uniting. Nor need the plaintiff, in his application, describe the properties with respect to which he asks for final decree for sale and therefore if any item is omitted in the application, it cannot be contended that the final decree should not be passed in respect thereof. A benamiliar transferce of a preliminary decree may apply for a final decree.

# 11 Notice to judgment debtor if necessary before passing final decree

As has been seen in the Note 7 to R 3, ante, this Rule also does not require any notice to be issued to the judgment debtor before the passing of a final decree though as a matter of practice, such notice should generally be given, on the principle that a party should be heard before any order is passed against him? Where a final decree his been passed against a most gager to whom no notice has been given of the apphenation for final decree, the Court has inherent jurisdiction to set aside the expante decree in furtherince of justice and equity? For cases under S 89, Trinsfer of Property Vet, see the undermen functioned cases.

See also Note 7 to R 3, ante

#### 12 Limitation for application for final decree

1 at \$ e(19\_ ) 1923 \ag 3 0 (520).
19 \a\_0 I R 121 \choose erred-

Au application for a final decree under O 34 is not an application for execution. The article of the Limitation Act applicable to such an application is
Art 181 and time begins to run when the right to apply for a final decree accrues is. On this point however there was a conflict of opinion under the Truesfer of Property Act. The recason for this was that, under that. Let, the procedure
was to get an order absolute and not a final decree. This is views were taken of
the question.—

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Defendant not allearing - Second notice not nece tary-If one is ordered but not served, there is no
2 (1917) 1917 Wad 669 (769)
       (1909) 4 Ind Cas 42 (48) (Mad)
       (1900) 2 Ind Cas 433 (433) (Mad)
                                                                                                                                                        ground for setting acids the exparte decree |
3 (170°) 2 Ind Las 94 (^18) (C.1)
(1301) 27 Vid 40 (42)
      (1925) 19-0 Lah 610 (619)
                          [Contra (1,23) 1923 Sand 14 (1.) 17
                          Sind L R 2'5]
 3 (1976) 1976 N ig 152 (153)
 4 (1929) 1923 111 551 (551)
                                                                                                                                                                                                             Note 12
                                                                                                                                                        1 (1916) 1916 Vad 573 (523) 59 Mad 453
 5 (1J15) 1915 All 2 1 (265) 37 AM 414
                                                                                                                                                     (1933) 1333 Cal 503 (.033)
(1933) 1333 Cal 705 (753)
(1935) 1933 Cal 705 (750)
1a (193) 1319 Mad 709 (710) 42 Mad 52
(133) 1935 Rang 23 (240)
                                                      Note 11
 1 (19°0) 19°0 Mad 105 (107)
       (19.5) 1 185 Mad 710 (71-) Notice sent to
                          some defendants only-Application
                                                                                                                                                             (1 to ) 1955 Rang 2-35 (210)
(1915) 1915 Hi 1-55 (*5)
(1915) 113 Nag (3 (b) 1 to Nag L R *6
(1916) 116 Pat -52 (*5) 1 Pat L Jour 304
(1916) 116 (*1.31 (51 25)
(1914) 1041 Lon (2 (5 (-5)) 3 (5 1 3)
(1914) 1041 Lon (2 (5 (-5)) 3 (5 1 3)
(1914) 1041 Lon (2 (5 (-5)) 3 (5 1 3)
(15 (-5)) 105 (105 (-5)) 11 La (5 (-5)) 11 La (5
                          can be di missed only as against de
                           fendants to whom notice has not
                           been sent
        (1906) 4 Cal L Jour 317 (315)
        (1901) 25 Mad 505 (507)
        (1921) 13_2 Nag 17a (177)
        (15 % 19 CPLR 5 (7)
        (1530) _2 Mad 183 (136)
        (1)24) 19 *1 *1 1 3)3 (394)
                                                                                                                                                              (1924) 13-2 Mad (5 (i.e)
(t.t. 1) 13-1 Cal (51 ( 5-)
  2 (1905) 32 Cal _53 (256) (F B)
        (1035) 1035 Mal 716 (715) Application for
final decree-Notice to all parties is
                                                                                                                                                               (1923) 1023 la n 4.0 (421)
                            not compulsory -- But if any party
                                                                                                                                                              (1317) 1317 Oudh 31 (32) 20 Oudh Cas 203
(19 2) 13 2 11 "53 ( 51) 14 111 663
                                                                                                                           losbe
                                                                                                                                                              (1). (11.5 ( 11 10 0 (10'1)
                                                                                                                                                               (191_) 16 1ul Cas 7 3 (500) (Mail)
                                                                                                                                                              (1316) 1 H6 Lat -- ) (-- ) 1 Lat L Jour Soi
```

(1943) 1943 All 4 (19) (1916) 1916 Nag 1 (2) 13 Nag L II 76 (1) In application for an order absolute was an application for execution2 O and was governed by Art 179 of the Limitation Act of 1877 (now Art 182 of the Lamitation Act of 1908) 3 (2) The proceedings for an order absolute under the Transfer of Property

let were proceedings in suit and that lit 178 (now Ait 181 of the Limitation Act of 1908) was applicable to them "

(3) Art 178 did not apply to applications for order absolute under the Transfer of Property let is they were not applications under the Civil Procedure Code, within the meining of that article and therefore there was no period of limitation applicable to such an application

All these eases are only of readenic interest now in view of the fact that it is made quite clear that an auphention under this Rule is for a final decree and not one for execution

Where the Court in effect directs the stay of proceedings for a final decree limitation runs from the date of the removal of the but a Where a minor pluntiff's next friend dies after preliminary decree and ne new next friend is an pointed the suit must be deemed to be in abecauce and the limitation for an ap plication under this Rule will start from the date of the plaintiff s attaining ma jority b S of the Limitation Let will not however apply to such a case since the application under this Rule is not one for execution

Where the preliminary decree directs the mertgages to pay off a prior mortgage as a condition of his enforcing his own mortgage the time requisite for escertaining the amount due to the prior mertgagee may be deducted when calculating limitation for an application for final decree 8 Where, in such a case, no

(1914) 1918 All "6 (17) 40 All 203 (1916) 1915 Mad 3 6 (3 f) [1 ut see (1910) 1915 (at "25 ("20) 42 Cal 2041 2 (1903) 25 111 212 (213 214) 1306) 16 Mad L Jour 503 (301) (1002) 24 411 542 (144) (1690) 13 111 2 8 (251) (1 L) 3 (1645) 20 111 302 (304) (1691) 20 111 302 (304) (1014) 1314 P C [1.0] (102) 42 C 11 777 (-4 (1014) 1314 P. C. 100 (107) 2 C. C. Ind hy p8 8 (P. C.) (1317) 1310 Cal 511 (542) (1318) 1314 C. 60 (6) 76 41 784 (1. C.) (1314) 1314 C. 60 (6) 76 41 350 (PC) Rever in (110) 33 All 154, 7, 11 I. J. (1916) 1916 Mid 255 (25 ) 33 Mid 44 (1905) 27 All G25 (G2 )

(1917) 1917 411 119 (119) 39 411 532

T

(1905) 31 Mad 68 (69 TO) 4 (1907) 23 411 76 (80) (1903) 4 Nag L R 158 (1601 (1991) 21 Cal 518 (823 824)

(1839) 23 Bom 614 (650) (1303) 30 Cal 461 (764)

(1901) 24 Mad 69a ("02)

See (1834) 7 G P L R 40 (41) (See also (1838) 25 Cil 133 1130) (1902) 23 Cil 644 (647) Question in Larding order absolute for sale is not ergarding execution within S 244] (1002) 21 111 542 (544 516) In this case it

though the application was to be held to be one for execution (1903) °6 Mad °60 (°54) (1904) 1 All L J 15 (17) (1702) 94 111 300 (301 ,03) (1656) 8 411 36 (57) (See (1900) 10 M d I Jour 08 (504))

(1910) 3 Cal 496 (503) 1-12 o C 1 L R C1 (62) 1999 11 ( t L R 141 (142) [Cf (1907) 3 Nag L R 50 (09) Pro ceedings between decree mis and uider absolute are neither a con tunnation of the nit nor proceed

" (1910 " C (1 36 (803) (1910) " Ind C (2 956 (154) (Rang) 11694) 16 AH 3 (4 5) (1903) 5 Bom I R 540 (541)

6 (1594) 2 (31 974 (327)

500 (1309) 1 Ind Cas 6 7 (689) (Cal) Court to be guided by consideration whether any delay on mortgagee s part has not been unreasonable so is to bring it within the rules ap thet in such cases by Courts of can to ]

(See il o (1903) 16 C P L R 114 (116)] Ta (1972) 1922 I at °01 (703) 1 Pat 435 "b (1933) 1333 Cal 505 (505) 7c (1933) 1933 Cal 505 (505) 8 (1971) 1921 Cal 381 (382)

[See (1921) 1921 All 56 (as) 43 All

SCH

time is fixed for payment to the mior mostgages the plaintiff is not entitled to clum that limitation does not begin to run for his application for final decree until he has paid off the prior mostgage however long he may take to do so, ho is only entitled to a deduction of an months from the date of the preliminary decice?

Where, on an application for final deedee, in extension of time is granted to the mortgage, and a fresh application is made by the mortgaged subsequently, it is to be deemed a continuation of the previous application. 10

Where an appeal is preferred against a preliminary decree, limitation for an application for a final decree runs only from the date of the appellate decree ind not from the expiry of the period fixed by the lower Court for payment, it though the appellate decree is passed three years after the expiry of the period fixed by the lower Court for payment. But the dismissal of an appeal for non-prosecution does not give rise to a firsh starting point for limitation for an application for hind decree 13 See Note 9 to S 148

There is a contict of opinion as to whether a pluntuit, who obtained a decree under the Transfer of Property Act, is bound, on the coming into force of the Civil Procedure Code, 1908, to apply for a final decree before proceeding to execute his decree. The High Courts of Madias and Prina five held that he is not bound to do so ind that the Code will not affect his rights to execute the decree which had vested in him under the old law <sup>14</sup>. The High Court of Bombly has, on the other hand, taken a continuation. It is showever clear that where the right to apply for an order absolute is buried by himitation even before the Code of 1905 crime into force his first right to apply for a final decree is conferred by the Code.

There is no limitation to the mortgagers application for deposit of the mortgage money under the pulliminary decree. Where an application for a final decree is dismissed, a subsequent application is not for a revival of the previous application.

13 Mortgagor s rights before confirmation of sale

Even before the amendment of 1929 it was held that the right of a mortabase to redeem under a mortgage decree wis not lost till the sale was actually (But see also (1917) 1917 Outh at

(32) 20 O C 207] 12 (1977) 1927 P C 27 (25, 26) of Ind App 52

5 Lab 253 (P C)
13 (1922) 1922 Pat L01 ( 03) 1 Pat 1 5
11 (1919) 1319 Val 1955 (3:10)
(1120) 13.0 Val 2-6 (-47)
(1917) 1917 Val 115 ( 14 Pat L Jour 213
15 (1318) 1918 Low 317 (218, 219) 14 Dom 204

16 (1314) 1914 Vol 15 (11) 17 (192\_) 1322 Oudh 33 (34)

15 (1916) 1918 MI \_55 (256) 43 Ind Cas 515 (4.1) (1022) 1022 Ma 1 (5 (%)

[well13] Different and on time where in all lection made in time is adjourned since die and a subsequent all lection is made though interthrea years it may be treated as a continuation of the first aplication.]

2425

sile under O 21, R 69, at have the sile set aside under O 21, R 59 3 The amendment of 1929 gives express legislative sanction to the still view, namely, that the mortginor sught to redeem continues till the confirmation of the sale "

In this connection it may be noted that, under 5 50 of the Transfer of Property Act, the defendant's right to reduce and the security became both extinguished on the passing of the order absolute. The words as to the extinguishment have been omitted in the present Rule with the effect that a final decree does not now extinguish the mortgage security or the right to redeem 5

Where a period has been fixed for the payment of the mortage money under the picliminally decree it is not open to the mortgion to pay the money before the date fixed with costs and interest calculated un to the date of nanneut only and avoid further liability for costs and interest "

See also He undermentioned case?

# 14 Payment into Court

Unlike the 11 visions of S 59 of the Trunsfer of Property Act under which the defendant had to just the most of money either to the plaintiff or into the

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Note 13
1 (1920) 1523 All (14311) 51 All 50(
(1522) 1533 Lin (2034)
  (13_0) 13_0 Oudh 204 (10: 30")
  (1020) 1 1-0 311 126 (126) 43 341 517
  (1916) 1316 I at 64 (65) 1 Pat I Joni 261
  (1)11) 9 Ind Ca 158 (159) (411)
  (1930) 1 1 0 I' at 451 (452)
  (192) 192) Mad 1191 (1192) Final decice for sale not executed - Vurtgagor can
           ling sepirate suit for redemption
           [Lut see (1974) 1333 Cal 33 (42, 49) 53 Cal 1464 Held that prior to breading at of 1979 reship indemp
           tion was extinguished by the sale
          itself even hel re confirmation and if o that het 21 of 13-3 i not it
tro 1 ctive?
   (1509) 20 111 354 (376)
(1507) 10 111 205 ( 03)
(1006) 3 Cal I John ( 1797)
    (1101) 1 AH 1 1 609 (700)
    11 851 1 3 11 4 4 (455)
    (I'es) I Calmain Shills
    (1901) 1 (1) 2 (371)
  1 (1906) 1 Cal W N 171 (4 m
    (1302) J. M. F. at a 2 Ki
    (1899) =2 M +1 = (+ 5-7)
(1896) 23 = a1 (-2 - 7)
    (1901) 25 Lone 101 (to )
            [But sec (1535) 25 Cal 705 (70) 7100
            (See also (1877) _4 ( 1182 (68 ) Sale
            not's t reide un ha Order 21 Rule 5J
            or R JO-> do mu i b confined
 2a (1934) 1934 Cal 872 (523) I ven 11 uch 11
             onfirmation is delay 1 by tl at al
            the polament dettor how alf
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(1333) 1933 I rib tol (362)

4 (1 100) 23 11 td 637 (( 11 642)

(1J20) 1J\_0 P C 79 (50) 42 M 364 47 Ind

(1324) 1924 Oc Hi 55 (31)

(1924) 1924 C d 5-1 (5-5) (1923) 10\_3 Cit 2^3 (2^6)

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App il (P C)
(1020) 10 Oudh 203 (204) 28 Ondh Cas
      1 1
(1 H4) 1314 Ou lh 209 (211) 1 O C 847
      I orcelosure suit-Right of redomp
```

tion subsi to till final decice-No que tion if limitition (1913) 20 Ind Cas 59 ((0) (411) (1918) 1318 P C 34 (35) 40 411 407 45 Ind

11 p 1 20 (P C) (1921) (2 Ind Cas 53: (537) (Mid)

[But see (1905) 23 Mad 37 (40)] (1905) 23 M 718 (750) Person advincing money to mort ager in payin, off mortgage after order absolute but before ank is cutitled to subroga non-List clay on 5 5J only refers to racter connected with execution of B ithing lection int dois not iffect principle of subingation (See also (1855) 15 Cal offi (502)

11 10 at J Cal W Y Lel Until Sile is con timed mortage sursis (1322) 1322 [ ( 11 (I ) 48 Int Art Riv

4° 311 4(1 (1 () 1.01s) 1 0 s M of 10 t (10 t) 1029 102 Male 0 (co.) a Mil 1

0.624112 Cn 3 (\*) (1.6161626 (1324) 1325 Notes 52(1) 111 Init ( 1 735 (All) (112) 112 1 ( 151 (15 ) 1 1 it 352 Per on

huling in h v le piving off the m itale ifter finit de rie but tefore 11c entitled t who igetime {But see (1 125) 1 2 \ld \ld \(\si\) (\si\) (1 1 6 [ 1 1.4 \ld \si\) (\si\) (\si\) (\si\) (\si\)

1 (1 RD) 1 Nor L R 106 (10 )

in the all let in the time fixed 1. the Court 7 (1'110) 5 Ind Cis 506 (506) (Cal) Plaintiff

dsing after date of order for payment -111s hen substituted-bre h order for 1 sment into Court must be taken before sale takes place

5.

Court, this Rule provides that it should be paid into the Court 1 But suppose the money is paid out of Court to the mortgagee. Then, if such payment is made aft the final decree or after the order absolute (under the Transfer of Property Ac is passed, O 21, R 2 will clearly apply and a payment can be certified to th executing Court , in the absence of such certification within the limitation perio the executing Court will not take cognisines of it 2 Even if the payment is made ifter the meliminary decree and before the order absolute or the final decree presed, the Court executing the final decree cannot, by viitue of the provisions O 21, R 2, recognise such a payment unless contined 3 On the question whether the Court dealing with an application for a final decree, can recognise such proment, it has been held by the High Courts of Madias' and Lahore the O 34, R 5 mescribes only one method of payment, namely, into Court and that payment out of Court cannot be recognised On the other hand it was held by the High Courts of Allahahad, Calcutta, and Rangoon and by the Judicial Commissioner's Court of Nagpur, that such a payment could be certified to the Court (though it is not the executing Court) under the provisions of O 21, R 2, the therefore a certified payment can be recognised, or a payment can be certified b the Court dealing with the application to pass a final decree but that a payment not so certified within the period of limitation prescribed therefor, cannot b recognised The High Court of Patna, 10 the Chief Court of Oudh 104 and th Judicial Commissioner's Court of Nagpur 10b have held that such a payment can h secomised under O 23 R 3 as an adjustment of a pending suit, though in a late case 11 the Napur Court has disagreed with this view on the ground that O 23 R 3 cannot apply to a satisfaction of a decree already passed. The High Court of Labore has also held that O 23 R 3 is mapplicable to such a payment 112

Even in cases mising under the Transfer of Property Act, there was a conflict of opinion, but of a somewhat different nature. It was held by the Allahabad High Court and the Judicial Commissioner's Court of Oudh, that proceeding under S 89 of that Act for obtaining an order absolute was a proceeding in execution, and, therefore the Court dealing with an application for in order absolute, being an executing Court could not accognise a payment after the

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Note 14
1 See Note 16 to Rule 2 rute
2 (1910) 7 Ind Cre 6., (626) (Cal)
                                                      Mter
           order absolute
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ing 13'0 I at 731

demption

R 2 or O 23 R 3

250)

J3 5

6 (1317) 1917 All 119 (119) 59 All 502 (1922) 1922 VII 583 (353) 44 VII 664

7 (1914) 1918 Cal 172 (473) 4 [See (1924) 1925 Rang 194 (195) 6 Rang

1925) 1925 Nag 40 (49) 40 Nag L R 122 (1915) 1915 Nag 55 (57) 11 Nag L R 16 10 (1915) 1917 Put 557 (577) 2 Put L. Jour

(t.J3a) 133a I at 13a (3.30 C.Ja) Distinguish

10: (1927) 1327 Oudh 273 (270) Suit for re

<sup>(1310) 7</sup> In 1 (18 235 (2 3) (C 11) (1907) 12 Cil W N 282 (-83) liter order

Mad 105 (Sc) honever (1 192) 1932 Vad 115 (113) 55 Mad 3.0 Where mort, 1,or and mortgagee settle out of Court and report to the Court | reliminary decrea cua es to estal

<sup>1335) 1335</sup> Lah 165 (163) (1332) 1332 Lah 27 (277) (1 1 ) 16 In 1 (14 ) 57 ( 57) 1913 Pun Re

<sup>1) 2) 13 14 1</sup> th \_31 (\_ 2) I syment out of urt - \ tre ogni ible under O 21.

<sup>(</sup>See also (13.0) 1335 Ou H 313 (315) If payment is alimitted Court can record it under O 23 R 3 lut if disputed | ivinent being contiury to the terms of the Rule Court is not bound to custank up on an en juley!

<sup>10</sup>b (1J17) 1917 Nig 7J (41) 11 (1325) 1925 Nag 49 (43) -0 Nag L R 122

<sup>11. (191.) 1912</sup> I ah .31 (237) (133 d 133 Lah 163 (163)

preliminary decree unless it had been certified within time 12. The High Court of O Calcutta, on the other hand, held that a proceeding for an order absolute is not one in execution, and that the Court dealing with such application can accognise such payments especially as S 89 expressly provided that payment may be to the 11 untiff or into the Court 13

Where the decree is not one under R 1, as in the case of a compromise decree R 5 does not apply and the Court can recognise payments made out of Court 16 c also the undermentioned eases 10

15 Return of documents relating to property

Where the preliminary decree does not provide for the payment of damages by the plaintiff to the defendant if the plaintiff fails to deliver all the documents relating to the m rt\_iged property as directed by the decree the Court connot grant such relief by way of execution. The mortgagor may sue separately for dumages 1

16 Dismissal of mortgagee s application for final decree

O 34. R ) requires only that the plaintiff should apply for a final decree His sid quartiforne is not my ground for dismissing his application. If it is dismissed on this ground it should be set uside and a final decree passed 1. The Court can als entert in i fresh application for final decree in such a case 2. An application for hard decree cannot be dismissed for failure to give list of properties in respect of which the final decree was prayed for or for a way ag calculation of int ict

Directing that the mortgaged property or a sufficient part thereof be sold 1- to the Court's powers to direct the order in which the mortgaged pro-

perties are to be sold see Note 10 R 4 and the undermentioned case 1 But the 17 (1-05) 30 111 218 (7 0) (1910) C Ind Ca 1000 (1001) 13 Ou lb Cas

[Sec (1417) 18 Ind Ca 731 (792) 3

411 1"5] 13 (1.0) 19 Cil (1.1 (1.0))

(1910) 7 Ind C1 201 (20 ) (Lat) (190 ) 8 Cal W \ 102 (104) 14 (1972) 1972 411 353 (354) 44 411 665 (19 0) 13 0 1 at "31 (733) Pat L Jou

1 1 0 6 In 1 C 1 123 (32 2) (Cal) Mort. gee in 13 L u as receiver must account rint and profits lefore le en

ut i other absolute for ale (1982) 8 (a) 8 ( ) La ment into Court vithm i et i tim orlered-lt i sulcieit comil ice i judgment lebtor bring the mener is to Court within the time fixed and did gently takes the neces are tell for a tuit
payment into the T en urs
(1895) 1898 All W \ 100 (100) I reliminar

decree providing that plaintiff should redeem certain prior morts ces I laintiff laving the more int t-Layment is illusory Note 15

1 (19°2) 19.2 Mad \_JJ ( 00) Quaere-Who ther the decree in the above of pecification of documents to be delivered was not too indefinite for

execution Note 16 1 (19%) 19% All C22 (628) 4" All 540 (1934) 1934 Oulh "09 (210) If dismissed sefu il to re tore it is failure to exerci e jui sdict on ested by law

(1333) 1333 Ordh .79 (231) 5 Luck 496 192 ) 132 \ \text{11 43 (440) 43 All 597 } \( \text{Sce also (1 31) 1991 \ \text{Vird 95 (96)} \)

a) | Dishu cal for not taking steps s ordered - Period of three months under O 1 R o not given-Ultra ttres ] (1115) 1118 111 993 (256)

thee it o (1933) in a Ordl b Liel 4. I Immury decree for sale in sed- liph thou for that decreo li i issed inder O J R 3-1 Appleit on after per of of 21 years un lei 5 151 to sel de di missal should b enture ed and final decree pas ed (See al o (1333) 1333 Mad 55 (56)

Do me sal for non tweent of latta

-Fig h application alloyed under O J R 4 and S 141] 3 (1374) 1327 131 433 (440) 43 431 592

Note 17 1 (1931) 13a1 411 6as (6aS 6a3) Order in which projecties are to be sold ru ed in issue and found against-Not provided for in preliminary de cree- ot to be incorporated in final

Court cannot overrule in specific provision in the mortgage deed itself concerning the matter 12

Where the mortgaged moperts his been compulsorily acquired by the Government under the Lind Acquisition Act the rights of the mortgage iro transferred to the compensation warded under the Act

Similarly where a share m ,our family properts has been nort-aged and subsequent there of there is a long fide partition of family properties in which the specine property mort-aged is allotted to unother so parcene the mortgage can only proces 1 and 1 mortgages cannot release from his claim in portion of the properties so as to prejudice the personal interest of in the other portions.

Where the judgment debtor contends that the decree refers to some other property than the one proceeded in this by the judgment creditor, it is for him to show which that property is \*

# 18 Power to enlarge time

R is smeaded by let N1 of 1929 imposes the Count to charge the time hyed for payment of the most rage money under a packminary decree  $^{14}$ . This renders obsolete the cases before let N1 of 1929 which held that is there was no provious in R is there was in R 3 or R b) for enlargement of time, the Count hid no power to enlarge the time based by a packminary decree for payment.

Where a relational decree is appealed from but the appellate decree merely continues the lower Court's decree the tree-fixed for payment by the lower Court's decree is not in in way extended. S. A. Act. 9 to S. 148

## 19 Effect of sale under mortgage decree

(1 33) 1323 I at 161 (163) Wlege C ure

The effect of a sale under an ordinary money decree is to yest in the put charer the architecture and interest of the judjacent debto. But a sale under morts to decree assess the interests both of the morts, for is well as of the mort gage. Where the morts age his ways of its elium against a particular morts agor.

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pring morige der lefintl
        u to be old senting Court cin
        ntiinth irintchangen
15 (1313) 13131 t 1 (53) 41 tLJ.0"
2 (170) 1 Ind C + 64 to 7/(C 1
(1.0) 6 Cal 1 Jour 75, (7) 1
3 (17 3) (11 1 (12)
  (15 1) _O L 1 3(")
  (1 6") t L 11 Jour 46 f4 1
  (159 ) 31 11 71 (0 0)
4 (14 ) JC1 116. )
5 (15"1) -- Suth W Is 5 0 (131)
               Note 18
1a (1) 1) 1 13 R ng '3 (2'5)
                           In granting
        tin intere to of mert, an e should
        al ole ron il ic l-Morigis el inker
        to cliver it r -Time should
        I the ateril I much to allow
        I it mas to ray leicit frs m
        The that is vescutuite
        1 24 (1 15 17 2 (17.4)
        0 0)
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D (1)

(1 x 1)

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(1.00) 10 Cal W > 3.00 (4)
[1.53] 13 M Hz (1.55)
[1.40] 5 Ind Ca 443 (444) 13 Oridh Ca
[1.40] 5 Ind Ca 443 (444) 13 Oridh Ca
[1.40] 13 Cal (1.41) 13 Oridh Ca
[1.40] 13 M Hz (1.60) [1] [1.41]
[1.41] 14 Carrier of the per of 1
[4.41] 13.1.1.1.1.1 (5) [1.41] 13.1.1 [1.41]
[1.41] 13.1.1.1.1 (5) [1.41] 14.1.1 [1.41]
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11-> 11 Iour 17- (1) He r Vijellate
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(13) 11 \_ (all t (lRis) 29 \_ dall 17 Pred so to 1 \_ 121 = 1 f \_ 26 \_ t in Prot m that a smill alt offe d upt n | 1 m that a stack \_ u let though 1 = m that the sale does not operate on the rights of that mortgagor -

Any order, concur which takes place in the interest of the mortageor subsequent to the final decree course for the benefit of the viction parchaser. On the other hand, he is halde to pay the Government revenue account due on the property after the parchase.

A mort, see decree holder purchasing the mort, sed property in execution of his decree is not broad to a new credit to the mort, sor for the milket value of the property but only for the stand price for which he purchased it.

A mortation of himself purchases the mortation property in execution of his decree for side becomes the ewner of the property and cannot maintain, as assume subsequent purchasers the position that the mortage still remained an engindering for

See also the undermentioned elses

#### 20 Execution of final decree for sale

Proceedings for sale under a binal decree or under an order absolute are remoted ings in execution. Consequently the Court executing the final decree cannot go behind the decree though by consent of prairies, recounts not allowed by the decree can be the intervention. A mere preliminary decree under R a incapable ferencial units the first decree that on be executed. But where in coist under the lains of Property Act a decree was executed without an order absolute haring been obtained and the judgment debted all not raise any objection to such course at the proper time, it was held that he was escopped from raising the contention subsequently that the decree was not executable. A decree for sile providing in terms that the rights of putor mortgingers should not be prejudiced is not incapable of execution.

No attack next is necessary before sale under a mortgage decice, and, concernently, O 21 R 58 does not apply to chanse preferred as unst the execution of

gets sui rogsi d to pisminii s rights [S e also (1938) 1933 C d 3J (42 43) 5) C d 1444]

(S.e. also (fi.e.) 1918 Prt 522 (529) Mortgage decrees in fivo it of same riorigates under successive most gage.—Purchase by thus in her proprinting decree—Subsequent en undannee over the property soll is determined.

2 (1911) 12 In 1 C to 193 (200) (L B) 3 (1891) 18 Cul 114 (176 177) 17 Ind App 201

(P () (1894) 18 Mid 4 (2 (495)) 4 (1912) 16 Ind Cis 310 (212) 40 Cil 89 39

(1912) 16 Ind Ct. 110 (212) 40 Ct. 89 39

to for per tucular property sold — Sub-equent correction of decree does not affect

(1905) 27 All 62 (66) Judgment debtor standing by and allowing sale to take there is estopped from ques

take there is estopped from questioning vibility of sile.

1 (1306) 3 Oudh Cas 1 (7) 2 (1906) 28 M1 193 (195) (1598) 1 Oudh Cas 49 (51) (1918) 1917 (1145) (400) (1930) 1930 til 520 (520) Finil decreo presed by Court hiving jurisdiction cannot be contested by judgment debtor who remains absent on notice being scred

(1901) 1901 VI W N 23 (22) Decree cannot be executed against person not named therein (1917) 1917 Put 582 (366) 1 mal decree pro

1917 1917 Put 552 (586) I that decree providing for interest which was diallowed by the preliminary decree— Remedy of judgment debtor is by appetl and not objection in execution

(1931) 1931 Oqdh 121 (122) 3 (1916) 1916 Mad 795 (793) 4 (1905) 8 Oudh C is 75 (76)

(1321) 1921 Pet 320 (320) (1599) 9 Mad L. Jour 313 (130) Case before Code of 1 105 Decree not executable.

till order absolute 5 (1902) 5 Oudh C1, 251 (251)

7 (1879 50] 4 Born 51 a (520) (F B) (1903 04) 2 L B R 138 (13))

(1916) 1916 Wad 756 (758) [See also (1932) 1932 Wad 716 (718. mortgage decrees 8 Under S 20 of the Oudh Laws Act (NVIII of 1876) the restrictions imposed by \$ 60 of the Codo are applicable to mortgage decrees also The transferee of the mortgagors interests after the final decree is not a

necessary party to the execution proceedings 10

A Court can sell under a mortgago decreo only the property comprised in the mortgage 11 and the mort ageo cannot, in execution of his mortgage decree, seek any remedy against the other properties of the mortgagor 12

Proceedings for execution of a final decree for sale can be stayed under O 11 R 6 of the Code 13

O 21 R 83 of the Code does not, under the expressions thereof, apply to mortga\_o decrees 14

21 Transfer of final decree

Prior to the addition of Cl (e) to Sab S 1 of S 17 of the Registration Act by let \\I of 1929 a transfer of a final decree for sale was held not to require registration1 but now the law is otherwise

22 Injunction restraining mortgagor from receiving income of mortgaged property After a final decree for sale has been passed in a mortgage suit. the Court

has no power to grant in injunction restraining the mortgagor from necessing the income of the moitgiged property. It can only bring the property to sale 1

23 Construction of mortgage decree - See the undermentioned cases 1

#### 24 Appeal

In appeal lies from a final decree for sale as from any other decree decree is therefore not open to revision under S 115 1

An order rejecting an application for a final decree amounts to a dismissal

of the suit and as such is appealable as a decree 2 71J) Ront decree under Estates (1831) 9 111 230 (213)

not a mortgige decree so a claim is 8 (1,0 ) 1,0 \ \ \ \ \ \ \ \ \ \ \ \ \ \ (2 (61) (19, ) 1332 Lib 618 (615) (See (1934) 1934 Lah 176 (176) Com tromise deeres in money suit tro viding that a hou e may be leemed

Land Act v hich gives first charge is

to be mortgaged for the clam-Decree is not i tortgige decree] 9 (1,00) 3 Oudh Cis 1 (1)

10 (19 0) 1 1,0 411 217 (219) (1371) 61 la l Cus 141 (144) (181)

11 (1317) 1317 P C 137 (201) (S e ilso (1500) 2 111 412 (441) I ven though mort, age decree errone olly includes non byjothecatel

properties if of

12 (See (1902) 5 Ou lh Cas 108 (108 109)] 13 (1923) 1923 I ah 552 (552) 14 See also Vote 8 to R 1 of O 31

(But ce (1,00) 3 Oudh Cas 42 (46) Sulmitti 1 not correct] Note 21

1 (192 ) 1325 O : 1b 333 (393) \_3 Oudh Cas 352. Note 22

1 (1315) 1315 111 -77 (2"5) 37 111 423 Note 23

1 (1500) 13 Mad 13 (251) 23 Ind Mp 32 (L C) (1321) 13 4 Mal 133 (136) (1)20) 1) 0 1km A (3) 11 (1\*31) 3 til 33 (200) (F I) 11 Long 131

(1878 60) 2 411 312 (314, 315) (1900) 92 411 412 (444) Mortgage decree as per plaint wrongly including non hypothecated properties also-Held intention was only to decree against hapothecated properties at comed in the plaint (1933) 1933 Outh 1 (3) Mortgaged pro

perty ordinarily mouns hypotheca be excluded from the decree Note 24

1 (1970) > Pat L Jour 312 (313) (1,02) 23 Cil 6,1 ( ,3 Gil)

(1891) 3 41:216 (219) (18°8 60) 2 All 345 (319)

(1303) I Ind Cas 6 7 (078 673) (Cal) Order ab clute for ale under 8 83 is appulitus as a t unl decrue

[See [1 03] 2. Vind 214 ( 63)] (1500) 12 till 61 (67) (F B) Order absolute under 5 bJ Fran fer of Property

tet laing ore in execution is ol the Cola

2 (1913) 1913 Mad 703 (709) 42 Mad 52 (1321) 1321 Cal 5al (5 2)

(1332) 1332 I alı ali (21a) [-te (1331) 1931 Pat -- 5(2 6) But

where Court merely postpones pass Int of final decree on account of the pendency of an appeal again t pre deer c-It is ho soser resi alk)

The reason is that the order stands in the place of the mid-ment and it is only the decree that is drawn up in pursuince theicof that is appealable Adecision as to the order in which the most and properties should be sold

may amount to a decree if it affects the rights of co defendants inter se 3 See S 97, Notes 1 and a also, on the question as to whether when, and

how for a preliminary decree can be attacked in an appeal from a final decree

# 25 Court fee

1

In appeal from a final decree for sale should be stumped with an advalorers Court fee and not is an appeal from an order 1 Similarly, the Court fee on an appeal against an order rejecting an application for a final decree is ad talorest on the amount clumed 2

See also Note 7 to S 97 ante

#### 26 Costs not recoverable from mortzagor personally

In the absence of anything to the conting in the decree itself, the costs awarded a unst a mortgagor in a mortgage suit form part of the mortgage money and cannot be recovered personally from the mortganot 1 But see the undermeutioned cases 3

#### 27 Dekkhan Agriculturists Relief Act

A decree for sale upon a mortgage under S 10 (b) of the Dekkhan Agricul turists Relief Act is not a decree nist and no final decree is necessary before it can be enforced 1 But the award of a concileator under S 44 of the Act was held to be not exempt from the requirements of S 89 of the Transfer of Property Act 2

### 28 Limitation for application for execution of final decree

Article 182 of the Limitation Act applies to an application for the execution of a final decree for sale passed under this Rule t and time runs under that article from the date of the final decree 2 But when there has been an appeal time runs

2a (1034) 1034 Mad 198 (109) 3 (1320) 1033 Mad 500 (507)

(10°2) 1J32 All 55 (80) 53 All 301 Note 25

1 (1920) 19.40 Bom 101 (101) (1314) 21 Ind Ca4 498 (438) 35 411 476 2 (1370) 1320 411 145 (144) (1906) 12 Ca1 W 10 8 (1079) Note 26

1 (1323) 1324 All 104 (104) 43 All 630 (1324) 1928 Wid 601 (606) Question 1 one

of con truction of mortgago decree m each ca e

(19.6) 1.J6 All 424 (42 ) 48 All 425 (1916) 1916 I et 1 (1) 2 Pat L Jour 51 (1918) 1918 All 866 (367) 40 All 10J (1698) \*\*\* Cal 431 (433)

(1907) °0 Mad 464 (465) (1931) 1931 VII 194 (125)

2 (19°6) 1JL6 4H 63 (6J) Costs subsequent to final decres need not be added to mortgage money

(1933) 1J33 Lah 329 (3.0) Non mortgagor defendant raising false Heas made personally hable for costs (1932) 1932 Rang 153 (153 154) Unless the

decree directs specifically a pur ne mortgageo defer dant is not person ally halle for co is of the suit

(1919) 1319 All 291 (209) 41 All 473 (1931) 1931 Mad -72 (272) Purchaser of equity of redemption - Livolous defence in the moriging suit-Lourt can make him personally hable for

#### costs of morigagee Note 27

1 (1916) 1316 Bom 99 (J9) 40 Lom 492 (1924) 1924 Rom 16J (1:0) 48 Poin 172

2 (1901) 23 Bom 644 (6.0) Note 28

S 59 Transfer of Property Act-Tamo runs from order ab olute for sale under 5 63 as hill then there s no executable decree. [But see (1900) 15 Mad L Jour 503 (JO1) Decree under S So 18 cal able

the order ab olute for cale)

from the appellate decree ' Ware an appeal to the Privy Conneil is dismissed for non prosecution the executible decree is that of the lower Count and Art 182 applies ' See also the undermentioned case '

# 29 Nature of proceedings for final decree

There was a conflict of decisions, before the coming in a force of the present Codo of Civil Procedure, as to whether proceedings to older absolute under S. 89 of the Trusfer of Property let were proceedings in execution of the decise under S. 89 or proceedings in the smit itself some cases taking the former view and others taking the literature at This conflicts most scaled under the now Codo which males it clear that a decise under R. I is merpuble of execution and that the proceedings under R. 5 no proceedings in the autitself for a supplemental decrease and not proceedings in execution. I flence the provisions of O. 22 pipls to proceedings for final decree. Similarly, the doctrine of the pen fews upplies to such hence does not up by to proceedings for final decree so to concluded by a decree and hence does not up by to proceedings for final decree so to contible the addition of persons who were not putters to the preluminary decree, as parties to the proceedings for final decree.

# 30 Joint decree holders

One of several joint decree-holders cannot certify satisfaction of the decree boyond his own interest in the decree so as to bind the other decree-holders.

Under the Transfer of Property Act, where a joint dicree under S 88 of the tot was passed in favour of soveral persons some of them could apply for an order absolute in favour of all 2

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3 (1 103) 20 M vd 21 (12)

1 (1 114) 1014 P C ( > (c) | 96 AH 954 A1 Ind VIP 101 (P C)

5 (1,05.) 16 M d L Jour 203 (204)

Note 29
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1 (18,14) 16 VII 270 (2, 3) (18,27) 19 VII 520 (521) (1,102) 24 VII 542 (544) (1000) 27 VII 624 (6,27) (1016) 1016 VI VI 927 (2,47) 2 (1904) 33 Hom 273 (777)

(1904) 6 Born L R 1043 (1045) (1906) 33 Crl 867 (870) (1808) 25 Crl 133 (135) (1894) 21 Crl 818 (823)

See also the foliousny cases in which it was held that till order absolute for sale, there was no executable decree —

3 (1926) 1976 Mad 415 (416) (1917) 1917 Mad 444 (845)

1 (1921) 1931 Cil 551 (522) (1933) 1933 Cil 798 (793) Final decree based on a valid and aperative preh miniry decree crimot be held to be void—May for certain reasons be come voi table (1935) 1335 Pat 395 (390)

(1916) 1316 V(1d 323 (524) (1927) 1327 P(t 103 (107) (1919) 1313 C(1 254 (233) 46 Cal 215

Most gage security not extinguished by probleminary decies? (1921) 1921 Cri 551 (522) (1920) 1976 Sand 20 (21) [see the (1931) 1931 All 386 (347,

589) 53 411 252]
5 (1919) 1919 Pit 430 (433) 4 Pit L Jour 240
(F E)
(1917) 1917 Vil 423 (123) 33 Vil 551

(1915) 1915 Ali 27 (28)

6 (LH5) 1915 \range 23 (24) 12 Nig L R 50 (1903) 3 Ind Cis 791 (792) (Cil)

(1903) 3 Ind Cus 791 (792) (Cul) 7 (1916) 1916 \( \text{1g} \) 120 (121) 13 Nag L R 69 Note 30

1 (1904) 26 AH 185 (188) (1904) 26 AH 318 (920)

(1910) 32 All 1G4 (1G6)

2 (1911) 11 Ind Cas 700 (701, 702) 31 MI 72

Recovery of balance due on mortgage in suit for sale

I.

R. 6. [New. Act IV of 1882, S. 90 (1)] Where the net proceeds of any sale held under the last preceding Rule are found insufficient10 to pay the amount due" to the plaintiff, the Court, on application by him may, if the balance is

legally recoverable12 from the detendant6 otherwise than out of the property sold,13 pass a decree for such balance.3

	Synopsis		
I Transfer of Property Act S 90 II Amendments after 1908 III Personal decree for belance exami mortascor (a) Personal liability of purchaser from montascor (b) Personal liability is a question of construction of the instrument (c) Personal liability is a question of construction of the instrument (c) Personal treute suinst person not the inoit gagor (d) Personal decree suinst the heirs of mortagor (e) Personal remedy under compromise decree (f) Right of mortagor to the tach other properties of mortagor before date to be of the properties of mortagor before date to be of the properties of mortagor before date	1 2 2 3 IV 4 VIII 5 VIIII 6 X X X X X X X X X X X X X X X X X	Legally recoverable Legally recoverable otherwise than out of the property sold Prior and puine meritgagees (a) Costs against puisno mortdage Insolvency of mortgager Limitation Succession certificate Notice Execution of personal decree Appeal	No 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23

# Other Topics

Application-Necessity and form of See Note 3, Pts (16) and (17) Personal covenant in the mortgage-Express or implied See Note 3 Pt (22) also Costs See Note 11 Pt (2) Note 5 Pts (2) and (3) also Note 12 Pt Court to which it is to be made See Note 2º Pt (1) **(1)** Scope and object See Note 3

Porm of decree See Note 3 Pt (20) Hindu Law- Junior meinbets liability under

this Rule See Note 6 Pt (3) and Note 7 Pts (\_) and (3)

Mortgaged properties not saleable-Lifect as regards personal decree See Note 10 Pts (3) to (6) (11) and (12)

1 Transfer of Property Act S 90

This Rule corresponds to S 90 of the Transfer of Property 1ct with the difference that the word found between the words are and insufficient is new

As to the law before the Transfer of Property Act See the undermentioned case 1

2 Amendments after 1908

The Rule was amended by the Transfer of Property (Amendment Supple. mentary) Act, XXI of 1929, as follows -

Separate decree for personal remedy if neces

Separate suit for personal remedy barred

Two mertgage decrees in favour of same

tersou-Personal decice how for avail

(19a) also Note 8 Pt. (2) to (5)

able See Note 3 Pt (14)

See Note 3 Pt (2)

sary See Note 8 Pt- (7) (10) (11) and

Order 34 Rule 6-Note 1 1 (1917) 1917 All 149 (150)

<sup>(1 126) 1926</sup> Nag 163 (169)

- (1) The words "any sale held under the last preceding Rule" have been substituted for the words "any such sale
- (2) The words "on application by him" (plaintiff) are new.

# 3 Personal decree for balance against mortgagor

2434

6,

This Rule provides that the mortgagee may, by may of application, obtain a decree personally against the mortgagor, for the balance still remaining due to him after the mertgaged preperty is sold 1 The object of the Rule is to enable such a decree to be passed in the motgage sait itself and to avoid multiplicity of proceedings 14 In fact, a separate suit for enforcing the personal hability would be barred under the previsions of O 2. R 22

A personal decree under this Rule, will, however, he granted only after the mortgagee his exhausted his remedies against the security, in other words, it will be guinted only after the sale has been carried out and the deficiency ascertained, it is a relief which will not be grinted to the mertgagee until that stage is reached 3 The mere fact, therefore, that the plaint does not contain a prayer for such relief or that the original decree does not reserve a liberty to the plaintiff to apply for a personal decrees will not preclude the mertgages from applying under this Rule when the deficiency is ascertained. Where a compremise in a mertiage suit previded for payment of the mortgage money in certain instalments and, on default, for execution by sale of the mortgaged properties "in the usual way," but did not reserve any right to the plaintiff to apply for a personal judgment, it was hold by their Lerdships of the Privy Council that there was nothing to suggest that the plaintiff agreed to ferego the benefit of the personal covenant, and that the powers of the Court to give that relief do not depend on O 34, R 6 of the Code nor arn they derived from the clause in the decree reserving leave to the plaintiff to apply for a personal judgment 6

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Note 3
1 (1926) 1926 All 343 (344)
(1927) 1927 Lah 445 (446 447) 8 Lah 721
(1911) 11 Ind Cas 987 (989) 35 Bom 452
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(1911) 11 110 C43 987 (9 1a (1906) 28 All 865 (872) (1692) 14 All 513 (516) (1889) 11 All 486 (488) (1920) 1920 Lom 95 (96)

(1902) 25 Mad 244 (296) (F B) 2 (1920) 1920 Oudh 251 (252) 23 Oudh Cas

(1902) 25 Mrd 244 (257) (1922) 1922 Pat 450 (45%) 1 Pat 506 (1922) 1922 Pti 450 (458) 1 Ptt 506

(1904) 14 Mad L Jour 490 (491) [See (1911) 10 Ind Cts 336 (837) (AII)]

3 (1932) 62 Mad L Jour 170 (173, 174) 1931 Notes 23 (a) (P C)

(1934) 1934 Cal 426 (427) Before order is passed under O 34 R 6 property ordered to be sold must be sold first and bil ince legally recoverable minst be left unpuid

(1930) 1930 All 69 (71) 52 All 363 [See also O 21, R 30, Note 4 Foot note (1) 1 But this Rule is not applicable to

charge decrees 1 (1)35) 1935 All 411 (415) Charge created by operation of law-Charge holder is not disentitled from pursuing per sonal remedy

[See 120 (1935) 1935 Oudh 200 (202) ] [See (1933) 1933 Mad 83 (33) Main tenance decree making whole family property liable and creating charge on specific items-Charged items need not be proceeded against and calcusted before execution against other properties-inalogs of mort gage decrees not applicable ]

4 (1699) 16J9 111 W N 72 (72)

(1909) 4 Ind Cas 256 (257) (Bom) (1933) 1933 Oudh 520 (521)

[But see (1924) 1924 Lah 132 (135,

5 (1932) 62 Mad L Jour 170 (173 174) 1931 Notes 23 (a) (P C) Confirming 1929 Cul 397 (38J)

(1935) 1935 111 411 (413 414) Plaintiff clauming personal decree in plunt -Defendant not denying it nor Court mentio ring anything about it in decree—Subsequent application under O 31 R G is not barred by res judicata

(1933] 1933 Oudh 530 (o21) (1909] 4 Ind Cas 256 (257) (Bom)

(1889] 16 C<sub>3</sub>1 423 (42<sub>3</sub>) (1892] 14 All 313 (517) (1927] 1927 Mad 779 (780)

6 (1932) 62 Mad L Jour 170 (173, 174) 1931 Notes 23 (a) (P C ) Confirming 1929 Cal 387 (389)

It follows from what has been said above that the Rule contomplates a sepurate decree being passed for the bilance, a Court will be acting arregularly. therefore, in providing, in the decree for sile itself, that the mortgages may proceed personally ignust the mortgager for the bilines. On the other band the prelimingly decree should not ducet that properties not mort aged should not be proceeded against the question must be left for decision at the proper time 8 But where, it the time of the original decree a decision has been given as to the personal liability of the defendant, the question cannot be raised again on general principles of ice judi ata " I decree for sile, providing for execution thoreof personally against the mortaged in case of dehenency, though contrary to the provisions of R to 15 not void on that ground. No fresh supplementary decree under R 6 can be passed on is necessary in such a case," before enforcing the

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7 (1304) 31 ( )1 7 (2 ( )8 )
  (1853) 1853 All W N 143 (150%
  (1307) 30 Mil 4 4 14 11
  (1907) 31 Pom 244 (248)
  (1J23) 1923 Long 32 (32)
  (1912) 15 In U. H. (1913) (C.)
(1918) LUIS WELLIS (1110) 40 Med 957
  (1911) 11 Ind C 1 11 111 3 5 ml L R "1
          [But this d at apply to Sind where the from is I I roperty A t
          is not in force
          [See however (1333) 1333 Oudl: 353
          (300) J Luck of Suit on mort, ige
          executed by guardin-Relief of per onal decree grayed for among
          other reliels - Guardin allowing
          decree to be passed without contest
          -Preliminary decree continuing
          decres over in proper ]
8 (1914) 1914 Cal 214 (215)
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(1916) 1916 Nig 1 (3) 13 Nag L R 76 (1934) 1934 Cil "G4 (765) Decree for sile and personal decree without apple cation for latter schef though improjer is valid

(1933) 1J33 L di 829 (330)

T.

(1935) 1935 Oudh 11 (12) Preliminary decree containing provision that if sale proceeds are insufficient plaintiff would be at liferty to apply for per onal decree-Decree for sile Sale proceeds insufficient to pay durietal amount-Application under O 34 R 6 for personal decree cannot be barred by limitation

(1933) 1J33 Oudh 466 (469) J Luck 30 Com po ite decree combining lecreo for sale and personal de ree operates at future date when most juge dilts are not sitisfied by sale

(1933) 1933 Oudh 523 (531) 9 Luck 163 (Do)

(190J) 32 Mid 34 (535 530) (1,306) 28 411 30 (369)

(1930) 1J30 Oudli 378 (331) Sinastara J

dissenting (1923) 1923 Notes 33 (a) 124 I C 669 (Oudb) (1930) 1930 Oudh 10 (17) [But See (1325) 1925 Oudh 462 (464) ]

(See also (1918) 1918 Put 315 (316)

Where the original decree does not reserve such liberty the defendant is not estopied from disputing his hability 1 [See 11so (1933) 1933 Oudh 352 (854)

9 Luck 51 & 97 of the Code precludes the agitation of such a question ] 10 (1J12) 17 Ind C ts 263 (265) (Lal) A personal decree counct be passed under R 6 where the mortgage decree itself has granted personal remedy (Sec 13-0 (1332) 1382 (11 710 (778) Solen untli - Compos to thereou sucorporating personal dec reo on deficiency - Not invalid ]

[But see (1331) 1921 Pat 49 (51) 6 Pat L Jour 106 Application for personal decree under R 6 need not be dismissed ]

11 (1920) 1J20 Mal 479 (480) 49 Mad 421 (1834) 21 G (1 26 (25)

(18J0) 1890 All W V 142 (143)

(1)15) 1915 Ved 44J (401) (1J03) 7 Cel W N 744 (743) (1900) 15 Mad L Jour 6 (7) Construction of decree-De ree providing that per on of judgment debtor should not be proceeded igainst-Other pro perties liable

(1893) to All 334 (337) (1891) 13 311 60 (561)

(1891) 13 411 356 (356) (1887) J All 484 (495) (1,10,1) 23 All 12 (13)

(1J0t) 38 All Jol PJr) (1314) 1313 Med 1114 (1127 112a) 43 Ind

C19 > 1 (56 843)

(1018) 1018 71 11 601 (605) ) 2 Crt 213 (221)

(1.118) 1.318 P C 159 (160) 47 Crl 370 (P C) (13,0) 1320 Wid 4 3 (480) 43 Wid 421

(1911) LJ19 Cal 432 (444) Held on contruction of decree that it was not a composite decree granting personal relief is well as relief igain t mort

gaged property (1925) Lik 653 (tot)

(1J25) 1928 Mad 38 (39)

(1323) 1323 Sind 44 (45) Rights under a salid mortgage decree directing recovery of balance personally from

personal liability though execution cannot be issued until the mortgage property has been sold and the proceeds found insufficient to satisfy the mortage 12

213G

Similarly the mortgance is not entitled to proceed against the nonhypothecated properties under the original decree for sale without a personal decree under this Rule 1 2 But where execution is allowed against the non mort graed properties of the most son, without such a personal decree having been obtained and the most and fails to object to such procedure, ho will be estonged subsequently from objecting to the execution on the ground of the want of a nersonal decree 13

I personal decree under R 6 em only be based on a decree for sale under which the mortiaged property las feen sold. Thus where a person holds two mortgages over the same property and obtains two decrees upon them but sells the mortaned property under one of them he cannot apply for a decree under R 6 if the bilince of the sile proceeds after satisfying the decice under which the sile 16 held is not sufficient to satisfy the other mortgine 16 Similarly where a puisne mortgagee who has obtained a decree on his mortgage is joined as a party to a suit on a prior mortgige and the property is sold in execution of the decice on the mior mortage but the bilince of sile proceeds after satisfying the prior mortage is not sufficient to satisfy the puisse mortgage, the puispe mortgage caunct obtain a decree under R 6 for his amount 1. See also Note 10, Infra

The present Rule and exit clear that the plaintiff must apply for a decree under this Rule and that the Court cannot pass the decrees no moth The law was the same even before the imendment of the Rule in this respect by Act XXI of 1929 18 But the application need not be in writing not need it be signed 17

I decree under R & can be made only a must the defendants in the original

I personal decree under this Rule can be executed either against the person of the mortagon or by attachment and sale of his other properties 19 A

```
judgment deltor c nnot be deemed
     application under 0 34 R 6
(1911) 10 In 1 Cas 9,5 (9,6) 4 Sand L R
     244
(1911) 12 Ind Cas 184 (185) (Mad)
                                              (1913) 21 Ind Cas 283 (784) 16 Oudh Cas
(1911) 12 Ind Cas (69) (690) (Mad)
(1912) 15 Ind Cas 23 (24) (Cal) Personal
      decree for costs
(1914) 1914 Mad 1:0 (170)
(1915) 1915 Wad 402 (453) 38 Mad 67
(1915) 1915 Mad 414 (414)
(1914) 1914 Oudh 210 (215) 17 Oudh Cas
(1916) 1916 Lah 349 (349)
(1914) 1914 Ondh 333 (334) 18 Ondh Cas
(1924) 1924 Pat 262 (263) 2 Pat "96
     (See 1937 Cal 775 (778) The neces
                                                                                 (79)
      sity of segarate decree un der thus
      Rule in such cases depends on the
                                                                      w c s ouz (856
      terms of decree alreads passed ]
                                          857) 13 Nag L R (b
17 (1921) 1921 VII ($05)
           .
                                          (1925) 1975 All 352 (3.2) Decree against
                                                   Hindu widow - Other projecties
```

can be attached

[See (1901) 28 Cal 12 (16 17) Suit

decree under this Rule should not, therefore, direct the realisation of the amount from any specific property 20

Although a decree merely declares the amount due to be a charge on the mort, used property it should be construed as a mort, age decree for sale to which R to a upplicable "1

Although a mortaine is invalid a personal decree may be passed in the same suit a aust the mort agor on the bisis of the personal covenant in the mortgage deed 22 \ ner-onal decree obtained without informing the Court of a provious refusal by it to mint such a decree, eannot be set aside as frandulent 23

4 Personal hability of purchaser from mortgager

The word defendant in R 6 means the defendant mortgager and a personal decree cannot be passed under the Rule against a purchaser of the equity of redemption 1 This is so even if the purchaser has contracted with the mortgagor to pay off the mortgage and has retuned with himself a portion of the consideration for the purpose. The reason is that there is no privity of contract between himself and the mort-acte

5 Personal liability is a question of construction of the instrument

A personal liability to pay the mortgane amount is, in each case a question of the construction of the mort, we deed 1 But every simple mortgage2 and every English mortaged involves prima facu, a personal obligation to pay Similarly, titing facts there is no personal obligation to pay in a usufracturity mortgage or a mortgage by conditional sale 4 (See S 58 of the Transfer of Property Act) Where the time for payment fixed under the deeree niss was enlarged on condition

> on mortgage is brought not only upon the lien but also upon the per sound covenant )
> [See also O 21 R 'O and Note 4,
> Foot note (1) thereto )

20 (1899) 19 All W N 125 (126)

I.

21 (1916) 1916 Mad 756 (789) [See also (1939) 1932 Cal 775 (761) Solenniuth-Dource creating charge and incorporating personal liability

in case of deficiency - Even as charge holder is entitled to benefit of this rule ]

27 1 '1) 1331 Wad 124 (12s) (1 t l) 1313 Pat 305 (360)

(1909) 31 411 352 (358)

(1J a) 1J15 Lom 102 (101) 39 Bom 358 23, (1915) 1915 411 897 (400)

Note 4

1 (1909) 3 Ind Cie 35 (33) (111) (1913) 18 Ind Cts 747 (749) (Cal) (1916) 1916 Vist 763 (761) 30 Ind Cas 155 (195 18J)

(Sec (1924) 1924 AH 877 (578) Right to personal decice is different from the right given by covenant in deed to recover money by sale ] [Sec also (1933) 1933 Lah 329 (330) Sale of right of redemption and successful pre emption suit-Pro emptors defendants are not perso

nally liable in ab enco of contract to that effect ] 2. (1912) 13 Ind C is 204 (204) 34 411 63 39 Ind App 7 (P C)

(1916) 1916 All 232 (233) 38 All 200 (1923) 1923 P C 54 (o4) (P C)

1 (1909) 1 Ind Ca- 442 (443) (Cal) (1899) 16 Cal 540 (u44)

(1932) 4 11 3 (2) (1918) 1918 Vad 330 (630) (1929) 1922 Cot 52 (22 53) (1916) 1916 Vad 13 (14) (1932) 1932 Lah 164 (166 167) 13 Lah 259

In all mortgages personal covenant as presumed unless negatived by the

nature and terms thereof-In cut tain classes much more clearly im plied covenant is required than in others 2 (1900) 29 Wad 491 (40a)

(1934) 1934 Pat 433 (433) Ad hitomil sum paid by mortanges to care property from sile-Vortgiges has right to

decree under O 34 R 6

(190b) 4 Cal L Joar 246 (249 ind 253) (1907) 5 Cal L Joar 257 (259) (1909) 30 All 358 (330)

(1922) 1922 Nag 38 (99) 18 Nag L R 145

3 [Bnt see (1851) 7 Cal 594 (400) ] 4 (1300) 22 411 149 (159) 27 Ind 11 p 53 (P C)

[See also (1932) 19.2 Lah 164 (166, 167) 13 Lah 259 In usufructuary mortgages in the absence of express coverant a Much more clearly im thed covenant is required than in other forms of mortgage-On the terms of a bond assumed to be a uanfructuary morigage, leld, perso nal covenant was clearly implied )

of the mortgagor paying interest not provided for in the decree at was held that
the mortgagor was personally hable for the payment of such interest?

# 6 Personal decree against person not the mortgagor

The word defendant in the Rule means as has been seen in Noto 4 above the montgagor defendant? Where a mortgago bond was executed by the Court of Wards on bohalf of a ward a decree may be passed against the wird under this Rule for the balance of mortgago monoy due after the sale of the mortgagod property and appropriation of the sale proceeds. A personal decree against the managing member of a Hindu joint family binds the junior members of the family though they were not paties to the suit.

#### 7 Personal decree against the heirs of the mortgagor

Where mortgiged property is found to be insufficient to satisfy a mort-cage decree obtained against the hears of a mortgager a decree may be passed against them under this Rule to the extent of the as ets of the deceased in their lands? Where a decree index this Rule exempts the person and property of the sons of the mortgager who is the manager of a joint. Hindu finilly lust a decree is passed against them to the extent of the assets of the mortgager in their hands the assets received by the sons by survivorship on the death of the fither are hable under the decree? But when the sons share is exempted from the mort-cage decree against the father it is also exempt from a decree under the piecent Rule?

### 8 Personal remedy under compromise decree

The fact that the original decree was a compromise decree is no har to a personal decree being passed under this Rule. According to the High Comis of Bombay<sup>2</sup> and Calcutta. a compromise decree in a most age suit may be executed against the mortgager personally without any decree being passed under R 6.

5 (1893) 12 C P L R "8 (82) Note 6

1 (1904) 26 All 507 (508) (1910) 7 Ind Cas 84 ("Su) (Cai) (1916) 1916 Vand 763 (64) 30 Ind Cas 188

(188 189) [See also (1931) 1981 All 631 (632) 53 All 695 Persons not interested in

res is competent against puisne

tee 12 comference afternoon bareno

can be lassed agunst him in the suit—Suit dismissed 2 (1922) 1922 Nag 98 (100 101) IS Nag L R 145

3 (1901) 22 \11 408 (403 410) Note 7

1 (1912) 14 Ind Cas 55 (55) (111) (1915) 1915 Lah 3:4 (3:4)

(1931) 1931 All 368 (369) In this case it was leld that the property in question

was not such assets
(1909) I Ind Cas 4i2 (4i3) (Cal) Hindu joint
fam ly — Mortgage by the father—
Personal hability of sons confined

to nustia received
[See [194] 121 Pit 30 Iersona;
decrea against son a shate and most
age decree igunst father—Decre
under R G is necessa 3 to Irocced
urder R fisher so their properties—
Decree as it stands could be executed
against son a share)

2 (1910) 5 Ind Cas 14f (147) (Cal) 3 (1903) 23 All W N 41 (42)

## Note 8

1 (1932) 62 Mad L Jour 1:0 (173 174) 1931 Notes 23 (a) (1 C) Confirming 1329 Gal 387 (359)

(1933) 1933 Oudh 214 (215) Application for personal decice is not barred unless

excluded by compromise (1933) 1933 Oudh 520 (520) 9 Luck 211

(1933) 1933 Oudh 520 (520) 9 Luck (1909) 3 Ind Cra 443 (444) (Cal) (1926) 1926 Oudh 27 (28)

[See (1931) 1331 Oudh 422 (423 424) Compromise not contemplating ler sonal Inblity—Decice imbodying a clause for personal Inblity—Decree an onded by deleting the clause]

2 (1930) 1930 Lom 203 (20.1) 54 Bom 352 (Lut see (1920) 1.20 Bom .55 (46) In the case it was held that the compromise decree could not be executed against it! mortgagor personally?

3 (1928) 1928 Cal 668 (669) [See also (1932) 1932 Cal 414 (415

416]

although it does not expressly provide for personal relief. But the Patna High O Court has held that a decree under this Rule is necessary in such a case 4 Where the compromise decree itself expressly provides for personal relief a fresh decree under this Rule is not necessary 5

9 Right of mortgages to attach other properties of mortgagor before date fixed for payment of mortgage money

liter the preliminary decree in a mortgine suit and before the date fixed for the prement of the mortage money of there is reasonable probability of the mortgaged property not being sufficient to satisfy the mortgage debt the Court can order the attachment of the other properties of the mortgagor if it is satisfied as to the existence of the conditions laid down in O 38 R 5 The fact that under O 34 R 6 no personal decree can be obtained until the mortgaged properties are sold does not affect the plantiff's rights under O 38 R 51

10 Where net proceeds of any such sale are found insufficient

The opening words of the Rule male it clear that a decree under the Rule can only be pa ed after the mort-need property has been sold and it is found that the sale proceeds me not sufficient to satisfy the mortgage debt 1. But if a ner sonal deered is actually tassed before the sale and the mortgagor does not object. he is e topped from questioning the validity of such personal decreo later on 2 If the mort and it perty the ugh no fault of the mortgages has been destroyed by fire or otherwise ceased to exist or to be marlable for sale the plaintiff is not hound to go through the farce of bringing the property to sale before applying for decree under the Rule 'Thus where the mortgages is unable to sell a portion of

4 (1918) 1918 Pat 902 (203) 8 Pat L Jour 649 5 (1928) 1928 Oudh 490 (490) 3 Lncl 411 Note 9

1 (1010) 1919 Cal 258 (250) 46 Cal 215

I.

(1931) 1931 Bom 329 (329) [B e (1919) 1979 Lab 402 (403] Wort gage decree for sale allowing decree holder to proceed against judgment debtor personally if proceeds rosuffi cient-Court can aitich his other property under O 38 R Seven be

propert. fore sale] Note 10

2 (1924) 1924 All 225 (277) 46 All 37 (1933) 1933 Lah 831 (832) Suit to enforce

mortgage referred to urbitrationdecree holder choice of realizing amount from morigaged properly or any other immovable [rojerly of judgment debtor—Decree holder can validly proceed against projecty other than mortgaged or e

3 (1915) 1.)15 Mad 452 (452) 39 Mad 677 (1935) 1935 Lah 536 (531) Mortgaged pro perty held to be not saleable as being

Ancestral property (1934) 1934 Lal. 174 (175) 15 Lah 607 Mortgaged property and available or ing to claim of third party-Per

sonal decree can be pussed (1.33) 1933 Lah 92 (793) Mortgaged pro perties sold under a decree oo a prior mortgage-Sale proceeds not sufficient even to pay first mortgage-Puisoe morigagee can apily under this Rule without bringing the pro

perties to sale (1035) 1035 Oudh 260 (262)

(1311) 12 Ind Cas 439 (140) (Mad) Mortgagor having no saleable interest to the mortgaged property (1921) 1921 Pat 49 (51) 6 Pat L Jour 106

Mortgagee not allo ved to sell a por tion of the property

(1929] 1929 Cal 121 (173)

(1924) 1924 Cal 209 (210) 50 Cal 718 Por tion of projecty sold for acrears of lefit through no fault of the mort gagee (1928) 1929 Bom 323 (323) Projecty des

troved by fire

(1976) 1929 111 71 ( 2 "3) 50 111 921

(1919) 1919 Cal 951 (956) 45 Cal 702 [1919] 1919 Oudh 251 (251) 93 Oudh Cas

145 (190b) 33 Cul 800 (891 832)

(1999) 1929 Cal 121 (123)

(1911) 9 Ind Cas 403 (406) 14 Oudh Cas 217 No bidder forthcoming because

the mortgaged properties by teason of their boint situated in a Native State which will not execute the decree of a British Indian Court and the sale proceeds of the remaining portion of the properties are not sufficient to satisfy the mortgage, the decree-holder is entitled to a personal decree against the judgment-debtor. Similarly, where a mortgage of joint family property by the father of a Hindu joint family is found to be not for legal necessity, it has been held by the Madras High Court that a conditional decree may be passed against the father personally and the sons share in the joint family property for the recovery of the balance that may remain due to the mortgage after the sale of the father schare of the mortgaged property (without the son's shares being put to sale). Where a sale in execution of a decree on a mortgage is set aside on the ground that the mortgager has no saleable interest in the mortgage, property, a personal decree may be passed against the mortgager, because the mortgager, having been compelled to iclind the entire purchase money, the net sale proceeds are nil and therefore insufficient to satisfy the mortgaged obbt.

A personal decree should not be passed a unst the mortgager till the entire mortgaged property ordered to be sold has been sold and the proceeds are found insufficient to stusy the mortgage dobt? But it is open to the mortgage in the plaint to give up his claim against any portion of the mortgaged property and obtain a decree for sale in respect of the rest. If in such a case, the sale proceeds of the portion ordered to be sold are not sufficient to satisfy the mortgage dobt; the

plaintiff may obtain a personal decree against the mortgagor

saleable interest in the property
(1904) 26 All 25 (27) Third person establish
ing his right to a portion of the
mortgaged property—Sale of the re
maining not sufficient to priv off the
mortgage—Decree may be pissed
in local to

2440

line no sileable interest—Yet sale must precede application for per soual decree

soual decree [See also [1913] 20 Ind Cas 370 (321) (MI) Where the mortgages negligenth allows a third person to come in and sell a portion of the mortgaged property, he cannot afterwide come in undel O 34 R 6] [See also [1934] 1934 Mad 82 (82)

in under of shift and 82 (82)
Beeres for vile of four terms—Three sold and per ontil decree asked—Sub-sequent to mostgage fourth term sold to stranger representing to be unencumbered—Purchaser not purit to mortgage sub—Mortgage held entitled to personal dealer.

# (1921) 1921 Pt 14 9 [57] 6 Pat L Jor 106
o (1920) 1920 Vtd 479 (180 481) 55 Ind Cas
[S o the (1935) 1931 Lat 768 (770)
Wordgage of timit propert by
tither not for timity necessity
Wordgage can obtain personal de

Mortgage can obtain personal de cice against father and in execution bring entire family estate to sale unies debt is allegal or immorall 0 (1927) 1927 'Ul 395 (396) 49 41 506 But this rule is not applicable where there is no sale it all in consequence of the mortgage decree itself becoming insperative at the instance of a successful claimant to the mortgaged property [See [1932] 1982 411 475 [476] Mort ages getting final decree but no

stops for sale since mortgagor a title was negatived in a subsequent suit by third party ]

by third party ] (1932) 1932 111 358 (360) (Do) 7 (1900) 22 All 404 (404)

(1.06) 33 Cal 800 (802)
[But see (1007) 29 All 860 (871)
Mortgages decree holder may give
up in execution, his claim against a
portion of the mortgaged property
and apply for personal decree if sale
of rest of property levies a deficit ]

5 (1303) 25 All 79 (82) (1995) 2 All LJ 3 413 (414) 28 All 19 Sale of property ordered to be sold under S &J T P Act constitutes the only condition precedent for order under S 90 whether the order under S 90

S 90 whether the order under S 80 was passed rightly or wrongly (1917) 1917 Pat 5.5 (555) 42 Ind Cas 56 (56 57) 2 Pat L Jour 538

[See (1906) 23 M1 10 (20) Decree for ale—Mortgage relanguishing claim to portion of mortgaged property at the time of order absolute for sale—Sale of property directed to be sold insufficient—Mortgage may obtain personal decret [
[Contra (1920) 1920 Mad 221 (222) St Ind Cv8 54 (55)]

The sale of the mort, sad property need not be necessarily a judicial safe. It Rule covers its or privite site. Where the mortgaged lumself purchases the mortgaged property in execution of his mortgaged property in execution of his mortgaged groups with the leave of the Court, the leave to bid puts him in the same position as any other purchaser and he is bound to give credit only for the amount bid by him and may upply for a personal decree for the balance of the mortgage money remaining due after deducting such amount <sup>10</sup>

Where a portion of the mort<sub>o-le</sub>ed property was acquired by the Govern ment under the Land tequisation let it was held by the Mlahabid High Court that the mort, age is remedy was to bring to sale the rest of the property and then, if there is a balance due, to apply for a personal decree <sup>11</sup> But the Calcutta High Court has held that where the mortgaged property is compulsorally acquired by it is Government the mortgage hen is trusferred to the compensation money standing to the credit of the mortgager in the collections and the mortgager is entitled, in execution of a decree for the sale of the mortgaged property, to take out such more, without obtaining a further decree under the mosent Rule 1.

See a so Note 3 cup 1 r

T.

has left amount due is the amount for the recovery of which a decree for sale has leen previously passed. Costs awarded to the mortgage form an integral part of the amount due. A puisse mortgage paying oil a prior encumbiance is entitled to a personal decree for the deficit due to him having paid off the prior mortsage?

12 Legally recoverable

A personal decree cannot be passed in every suit for sale upon a moitgage, but only where the defendant by his contract or otherwise is under a personal

(Compare (1306) 28 All 674 (615) De cree passed against wrong property —Such property sold—Personal de

orce may be pas cd]
9 (1996) 2 411 L J 353 (355)

(1906) 28 AH 000 (664) (1 ut vo (1914) 1914 Mad 2st (2s2) 23 Ind Cas 544 (545) Mortgage decree against A and B—Private sale by 4

tione—B can insist on judicial sale being held before personal decree is passed against him]

10 (155)) 16 Cal 132 (136) (1636) 18 AH 31 (33)

(1855) 18 All 31 (33) (1855) 10 Cal 052 (092) 16 Ind App 107

(P C) (18J?) 1J Cal 4 (7)

[2004] All L. J 456 (487). Decree holder s
failure to proc the foll decretal
amount according to his undertal,
ing to the Court was held to be an
those of the process of the Court
though he was not therethy desabled
from applying for personal decree
[See also (1,132) 1932 11 "04 (706
707) 54 11 448 Decree holder be
coming once of the heres of one of the

Note 11 1 (1929) 1929 411 15 (10)

1 (1929) 1929 All 15 (16) 2 (1908) 11 Oudh Cas 377 (378)

(1909) 35 Cal 431 (433)

(1930) 1930 Oud): 398 (82J) (1916) 1916 I at 1 (1) 2 Pat L Jour 51

(Dut see (1887) 12 Cut 185 (185, 188). Costs may be recovered personally and (1932) 1932 Mtd 155 (186 187) 53 Mtd 135 Abottwithstanding small gatton into the mortgage money as one lump sum or heap costs can be personally recovered if tensaming due after sake of properties mortgaged, and (1931) 1301. Hang 157 (189) 1302 (1931) 1303 (1931) 1304 (1931) 1305 (1931) 13

time barred | (Sea also (1919) 1919 All 297 (298) 41 All 473 Costs of unsuccessful ap peal by mortgagor may at mort gages soption be added to mortgage money or be recovered personally

from mortg1gor] (1910) 5 Ind Cas 32 (33) (All) (1914) 1914 All 444 (445) 3 (1904) 26 All 93 (Jo) 2442 RECOVERY OF BALANCE DUE ON MORTGAGE IN SUIT FOR SALE SCH.

6, obligation to pay the mortgage debt¹ and the plaintiff's right to enforce the personal obligation is not barred by limitation at the date of the suit for sale²

For further information see Note 17, below.

13 Logally recoverable otherwise than out of the property sold

These words mean by way of illustration that the balance must be a balance which the mort-ages is not precluded by the terms of the mortgage from realisms, otherwise than out of the property sold or a balance the recovery of which is so thur of by limitation.

## 14 Prior and puisne mortgagees

A pulsae mort age is not a defendant against whom a per onal decree may be passed there being no privity of contract between him and the plaintiff 1

#### 15 Costs against puisne mortgagee

A prior moitgagee is not entitled to a person all decreo for costs against a puisse moitgagee 1. As seen in Note 6 above the word defendant in this Rule means only the reorly nor defendant and not necessarily those claiming utile under him

#### 16 Insolvency of mortgagor

Where pending a suit by a mortgage on his mortgage, the mortgager is declared in insolvent the phintiff can still proceed against the mortgaged property is not sufficient to pay the debt and the mort gager is personally liable under the mortgage the mortgage may prove for the balance in the insolvency proceedings along with the other creditors of the mort gager if the personal hability was not time barred at the date of the institution of the suit on the mortgage? But can the mortgage obtain a personal decree under this Rule in such a case? No according to the Alhahada High Court? Yes according to the Lahore High Court? and the Oudh Chief Court?

#### 17 Limitation

We have seen (Note 12) that a balance is not logally necessable if the personal remedy is barred by limitation at the date of the suit for sale. Article 132

Note 12
1 (1303) 23 Bom 630 (634)
2 (1895) 7 All 502 (505) 12 Ind App 12 (P C)
(1892) 14 All 513 (518)
(1893) 15 All 313 (332)
(1880) 12 Cal 389 (395 396)

(1910) 34 Born 540 (545) (1922) 1922 Born 237 (238) 46 Born 848 Note 13

1 (1892) 14 All 513 (518)

# Note 14

1 (1980) 1980 Lah 791 (792) (1912) 17 Ind Cas 927 (930) (Cal) Note 15

1 (1904) 20 All 507 (508 503) (1901) 23 All 439 (440)

23 til 439 (440) [See 41so (1932) 1932 Cai 775 [781] 59 Cai 1314 No p roonal hability against puson mottgage as such] [S c ho vever (1931) 1931 Rang 153 (159) 9 Rang 185 Prior mottgages 8 priority raised and found against—

-Subsequent mortgageo contesting

Defence found against Costs on conte ted sale against subsequent mortgages and ex parfe vite against mortgagor—I ersonal decree under this Ruie paved against mortgagor—Subsequent mortgages is liable per sonally for difference of costs between contested sale experte wiles since opersonal decree can be passed variet himl decree can be passed variet himl (See (1933) 1933 Lih 329 (320) In

Igae [193] 1933 Lah 329 (330) In this case personal decree for costs was assed against a non mortgagor de fendant for having rused false de fences to the suit;

Note 16 1 [See [1911] 12 Ind Cas 587 (588) 34 All 100] 2 [1911] 12 Ind Cas 587 (588) 34 All 106 (1925) 1925 Pat 438 (440) 4 Prt 128

(1930) 1930 Oudl. "0 (20) 3 (1911) [See 12 Ind Cas 587 (598) 34 All 106] [But see (1932) 1932 All 336 (334) 54 All 428 Sale and right to per sonal decree arising after discharge in the I P — Decree holder sentitled

to personal decree ]
4 (1921) 1921 Lah 2/0 (270) 2 Lah 95
5 (1930) 1930 Oudh 20 (26)

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of the Lumitation act is confined to suits to recover the mortgage money from the mortgaged property and does not apply to the personal semedy under a mostgage 1 The personal remedy is governed by the six years period of limitation in the ease of registered instruments" and by the three years period in the case of unionstered instruments and time runs from the date on which the most age amount becomes due 4 If the right to a personal decree is not harred at the date of the institution of the suit the plaintiff is entitled to such a decice in the case of a deficiency though the application for the personal decree as made at a time when a suit for the personal remedy would be birred 5 If a decree is birred under this Rule it is barred in its entirety and a personal decree cannot be passed for costs alone where the right is barred as ichilds principal and interest 6 But though the mortgagee's personal remedy may be barred as regards the principal he is entitled to a per sonal decree for interest accrued within six years from the suit for sile because so long as the mortgage debt is not time based the personal hability for the pay ment of interest continues. In achie wledgment by one co mortginor alone is not afficient to leep this a mortgage debt is a unst all the co mortgagors 8

The planning application for a personal decree has to be made under art 181 of the Limitation let within these certs from the date on which the night to apply for a personal decree sections? S 6 of the Limitation let does not

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Note 17
1 (15-55) 12 (-11 5-5) (355-3)(5)
(15'0) 13'20 1 (5'5) (-3'5) > Pit 5'5 > 3' Ind
App 134 (P C)
2 (1919) 1313 411 2.4' (2'') | 41 411 581
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1993) 1933 Cal \_08 (200) application is governed by Art 110 and not by Art 06 of the Limitation Act (1933) 1933 Lah 923 (3 0)

(1930) 1330 411 69 (71 °2) 52 411 363 (1928) 1928 \text{\text{otes}} 73(e) 114 I C 812 (Oudh) (1933) 1933 Cal 268 (269) 36 Cal W N 117

3 See Las stat on 1ct Art 115

1 [1890] 18 AM 3-1 [1-2]
(1934) 1934 31 [1 30 (400 404) 56 All 9-54
Vortsg.e uncunt to be paid in eight
vear—In défault of one pear soite
rest mortsgace having power to re
cover interest or to recover principal
and interest vithout regard to six
pulated puriod Default in paying
interest committed—Suit decreed—
14 [Beaton under 0 38 R G—re
14 round decree filed — L mistston
held began after stipulated period
held began after stipulated period

and not after extry of one year
(1933) 1933 Lah 292 (330)
(1921) 1921 Lora 43 (438 439) 45 Bom
1206 Time for suit on personal cover
nant in mortgage runs from expry
of mortgage term—But where mort

gagee enjoys the usufruct in hen of

interest time runs from last year

when he cupoys such usufract
(1926) 1926 Ould 198 (383) Two mortgages
he respect of the same property in
favour of the same person at duffer
ent times — Amount of the second
mortgage to be juid along with
Limitation for claim tinder second
mortgage unes from date when first

nortague minount becom en 197 bile (1803) 8 Val d. Jour 234 (130 230) (1803) 6 Odd Car 50 (139) (1 06) 10 Odd Car 50 (139) (1 10) 10 Odd Car 50 (1 10) 11 0 Odd Car 50 (1 1

(1893) 15 131 331 (332) (1885) 12 Cal 339 (395 396) 6 (1914) 1914 111 444 (445) 7 (1938) 1928 Lah 658 (654)

(1930) 1330 Lah 737 ( 37) 8 (1915) 1915 Cal 652 (653) (1933) 1933 Cal 268 (210)

9 (1918) 1918 All 105 (106) 40 All 551 (1933) 1933 Cal 251 (252) CO Cal 11 In the case of a Court sale time legins to run from the date of the order un der O 21 R 92

(193a) 193a Mad 640 (642 643) Appendiron
order dismissing all lication to et
aside sale—Time for application for
personal decree runs only from dite
of alpellite order and not from d te
of commutation of sale by lover

apply to such an application, in smuch as it is not an application for execution within that Section 14

Where a mortgage decree provides for the sale of the mortgaged property and for realisation of any deficiency from the other properties of the mortgage, the 12 years period under S 48 of the Codo for enforcing the personal hability runs from the date of the dicree and not from the date of the sale of the mortgaged property 11 A continuy view was taken in the following cases 12

The limitation for the execution of a personal decree runs from the date of the datum up of a formal decree and not from the making of no order for personal decree 14

#### 18 Succession certificate

A personal ducteo cannot be passed in favour of the heirs of a mortgages in the absence of a succession certificato moduced by them <sup>1</sup>. But a person who has succeeded to the estate of a deceased mortgages by the right of survivership need not produce a succession certificate before he can obtain a personal decree against the mortgager <sup>2</sup>

# 19 Netice

Where a decree holder applies for a personal decree against the judgment-debter under this Rule the proper procedure for the Court is to ssue notice to the judgment debter cilling upon him to show cause why the application should not be aranted and to hear his objection if any 1. But in the absence of fraud, a set does not he to set aside an expatte personal decree under the Rule, ou the atomic of failure to serve notice on the judgment debter? An order directing execution to issue a mainst the judgment debter personally without a supplemental decree under this Rule should not be passed without notice to the judgment-debter?

#### 20 Execution of personal decree

An executing Court cannot entertaio any question as to the validity of a personal decree which has become final <sup>1</sup> (See Notes to S 38, ante) A mortgage-decree until it reaches the stage shown by Transfer of Property Act, S 90 (O 34, plication for personal decree runs 12 (1918) 1918 Mad 607 (003)

from the date of setting is also of sale and not from date of dispossession (1)02) 1002 411 W N 50 (51) Under the peculiar circumstances of this case time was held to run from the date on which after the sale the decree for sale was amended

(1923) 1923 111 203 (704) Private sale of mortgaged property-Delvy in execution of sale deed — Nevertheless time for applications for presonal decree for binance does not begin to the control of the co

(1918) 1918 Mai 1187 (1100) 40 Mad 980 (See (1909) 25 All 541 (543) Combined decree under S. 80 and 90 T.P. Act cannot be treated as a decree for money within S. 250 (now S. 48) of the Code of 1882)

13 (1906) 3 Cal L Jour 291 (297) Note 18 1 (1908) 35 Cal 767 (712)

(1908) 12 Cal V N 145 (147, 148) (1904) 28 Bom 630 (634) 2 (1922) 1922 Pat 523 (531) 1 Pat 387

Note 19

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10 1020\

RECOVERY OF BALANCE DLI ON MORTGAGE IN SUIT FOR SALE

decree and appealable as such 1 11 ratorem Court fee as payable on an appeal from such an order is well as on an appeal from a decice under the Rule tion for a personal decice is not a plaint and in order returning it for pie entition o the proper Court is therefore not a pealable under O 43 R 13 Where the original mortgage suit was value 1 at less than Rs 5 000 an appeal from a personal decree in the suit hes under S 21 of the Bengal N W P (now Agra) and Assum Civil Courts Act (U P Act MI of 1887) to the District Judge and not to the High Court though the personal decree be for a sum oxceeding Rs o 000 4

In order refusing an application for a personal decree under the Rule is a

R 6) does not become a money decree to which S 209 of the Code of 1882 (now

# See Notes to S 96 22 Nature of proceedings under R 6

Proceedings for a personal decree under this Rule are not proceedings in execution but proceedings in suit and the provisions of O 9 are therefore applicable thereto

# 23 Miscellaneous

S 34) relates 2 21 Appeal

- (1) An application for a personal decree should be made to the Court which passed the decree for sale and not to the Court to which it was sent for execution 1
- (2) A decree directing realisation from the other properties of the mort alsor if the mortgaged properties which are to be proceeded against first are not sufficient is not a rioney decice for purposes
  - of registration (3) A simple mortgagee whose rights under the personal covenant base not been barred is a creditor of the mort agor within S 53 of the Transfer of Property Act and can suo to set uside an alienation
  - of the other properties 3 (4) Order 20, R 11 empowerios the Court to allow payment by instal. V
  - ments applies to an application for a personal decree under this
  - (a) A proceeding under this Rule is not governed by S 52 of the Trips for of Property Act because it is not a proceeding in which any

enit

2 (1900) 2 Bom L R 225 (226 227) Note 21 1 (1918) 1918 All 97 (97) 40 All 553 (1933) 1933 All 429 (431) Api lection under this Rule held not maintainable

order is decree (See also (1932) 1932 All 335 (337) ...4 111 428 All cal lies and no revision 18 competent ]

2 (1016) 1018 All 07 (01) 40 All 553 (1024) 1924 All 202 (203) (1012) 19 Ind Crs J71 (918) (Cal) (1918) 19 Ind Crs J71 (918) (Cal) (1915) 1915 Oudh 122 (123) 18 Oudh Crs

171

(1916) 1916 All 357 (558) (1331) 1941 All 192 (193)

4 (1)10) 1919 411 218 (219) 41 A11 384 Note 22 1 (1930) 1930 \11 841 (943) 52 411 939

(1932) 1932 411 466 (466) Application under this Rule is a proceeding in the [See (1908) 35 Cal :0 ("2) Ex garte decree under F 6 can be set a ide under inherent 10 er of Court ] [See also (1921) 13'1 Pat +91 (433) Ex parte decre passed b oversight under R G can be set a de ]

2445

Note 23 1 (1913) 1918 Wad 669 (6 0) 47 Ind Cas 903

(951 955) [See (1931) 1931 \| 197 (197 193) ]

2 (1909) 2 Ind Cas all (all) (Bom) For regis

- 2446 RECOVERY OF BALANCE BUE ON MORTGAGE IN SUIT FOR SALE
  - right to immoteable property is directly and specifically in
    - question 5

      (6) An assignment of the mortgage decree includes the supplemental

SCH

- R. 7. [Non Act IV of 1882, S 92] (1) In a suit for redemppreliminary decrees tion, if the plaintiff<sup>16</sup> succeeds, the Court shall pass a preliminary decree<sup>3</sup>—
- (u) ordoring that an account be taken of what was due to the detendant at the date of such degree for—
  - (i) principal and interest on the mortgago,

decree under this Rule 6

- (n) the costs6 of suit, if any, awaided to him, and
- (iii) other costs, charges and expenses properly meurred by him up to that date, in respect of his mortgage seemity together with interest thereon, or
  - (b) declaring the amount so due at that date, and
  - (c) directing—

7

(i) that, if the plaintiff pays into Court the amount so found or declared due on or before such date as the Court may fix within six months9 from the date on which the Court confirms and countersigns the account taken under clause (a) or from the date on which such amount is declared in Court under clause (b). as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses? as provided in Rule 10 together with subsequent interest on such sums respectively as provided in Rule 11,8 the defendant shall deliver up to the plaintiff, or to such person as the plaintiff appoints, all documents in his possession or power relating to the mortgaged property, and shall, it so required, retransfer the property to the plaintiff11 at his cost free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall also. it necessary, put the plaintiff in possession of the property, and

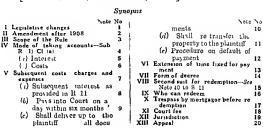
(ii) that, if payment of the amount found or declared due under or by the prehiminary decree is not made<sup>12</sup> on or before the date so fived, or the planntiff fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interests, the defendant shall be entitled to apply for a final decree—

(a) in the case of a mortgage other than a usufructuary mortgage, a mortgage by conditional sale, or an anomalous mortgage the terms of which provide for for celosure only and not for sale that the mortgaged property be sold, or

<sup>5 (1330) 1930</sup> Oudh 93 (95) 5 Luck 625 6. (19 0) 1920 Pat 462 (463)

- (b) in the case of a mertgage by conditional sale of such an anomalous mortgage as aforesaid, that the plaintiff be debarred from all right to determ the property
- (2) The Court may, on good cause shown and upon terms to be inved by the Court, from time to time, at any time before the passing of a mal deeree for forcelosure of sale as the case may be, extend the time fixed for the payment<sup>13</sup> of the amount tound or declared due under sub-rulo (1) or of the amount adjudged due in jespect of subsequent costs, charges, expenses and interest

[See Rt 2 and 4, ante and R 9, bolow ]



#### Other Topics

Co mortgagor a redemption—In applicability of Sub mortgagee See Note 4 Pt (a) the Rule See Note 3 1 t (b)

#### 1 Legislative changes

This Rule corresponds to S 93 of the Transfer of Property Act

#### 2 Amendments after 1908

The Rule has been mended by Act VI of 1929 The ceneral changes thus anticoduced are an time same times as in the case of Rr 2 and 4 for the same times as method as the mortgager in payment of the mortgage more within the prescribed time the old Rule provided for foreclosure except where the mortgage was simple or usuffectuary and for allo except where the mortgage was combined as in The present Rule has been amended to suit the changes in S 67 of the Transer of Property Act as amended by Act VX of 1929 see Notes under R 2 ante

# 3 Scope of the Rule

is this Rule corresponds to Rr. 2 and 4 anterin most particular: the Notes under Rr. 2 and 4 may be consulted under this Rule also. The decree under this Rule is peliminary and incapable of execution without a final decree being passed?

gage cuit must be followed by

Order 34 Rule 7—Note 3 1 (1920) 1920 U<sub>1</sub> p Bur 43 (44) 3 U B R 183 (1838) 22 Bom 771 (473) (1922) 1322 Bom 127 (125) 46 Bom 348

<sup>(1914) 1914</sup> Nag 8 (13) 10 Nag L R 150 Every preliminary decree in a mort gage out must be followed by a

The proceedings after a preliminary decree are proceedings in suit to which the provisions of O 22 will suply " O 34 contemplates only one preliminary decree being massed. Hence it is mie-ulu to first pass a decide for accounts and then again another pielimin is decree for redemption. Such a decree for accounts if passed will only have the effect of an interlocutory order for accounts 3 Where it is found that the money due to the mortgageo has already been paid, a final decree may be at once passed without any preliminary decree 4 (See R 9, infra which expressly provides for this) A docree for possession on condition of the plantiff's paying a certain sum within a certain time is not a preliminary decree within this Rule "

The Rule applies only to a soit for redemption against a mortgagee and not by one co mortgagor against another who has redeemed the entire mortgage, for rodemption of pluntiff's share of the mortgaged property A compromise decree in a relemption suit, which is itself capable of execution does not require a final decree 7 No application for a final decree can be made under this Rule and R & where a decree had been passed under S 92 of the Transfer of Property Let "

Ordinarily a suit for an account on a mortgage cannot be asked for unless the mortgagon asks for redemption also " The builden, in suits for redemption, is on the mortgagor of proving the existence of a mortgage to and the mere fact that the defendant denies the mortgage is no ground for decreeing possession without any payment by the mortgagor " A conditional decree for redemption on payment of the amount due may be passed even though the Court hads that the mortgage has not been satisfied out of the mortgaged property as alleged in the

A mortgagor counct redeem by application but only can do so by way of

4 Mode of taking accounts Sub Rule 1 Cl (a)

We have seen under R 2 ante that the object of the Legislature is that complete accounts of all amounts due by either party to the other in assect of the mortgage transaction should be taken in a mortgage suit, so as to avoid unnecessary litigation A mortgages in possession is bound to account for the rents and profits of the property (see Transfer of Property Act S 76), and the morten gor is entitled to deduct from the mortgage money all sums thus owed by the mortgages 1 Where the mortgages has been in possession of the mortgaged pro-

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2 (1915) 1915 411 88 (85) 37 AH 226
(1927) 1927 Oudh 156 (151) 2 Eucl 461
              O 22 does not apply after a decree has been pussed though it may be
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for a later stage in execution]

(1880 81) 5 Bom 604 (607) 10 (1,31) 1931 Oudh 378 (379) (1903] 37 Bom 271 (276) (1905) 2 All L J 62 (61)

[See also (1574) Lom P J 304 (306) Plaintiff need establish only a prima factecise-Then onus is shifted to defendant (o Bom H C R 159 Foll) and (1856) 1836 Bom P J 217 (Do))

11 (1869) 6 Bom H C R A C J 9 (12)

12 (1875 78) 1 All 524 (525) (1901) 24 Vad 408 (411) A mortgagor may

plead in the alternative that the mortgage money has been juid or that he is prepared to [4] any sum that may still be found due 13 (1875] 12 Bom H C R 160 (162) (1866) 12 Bom H C R 163 (164)

5 (1913) 19 Ind C18 836 (857) (Lth) (1921) 1924 Lth 635 (636) Decree is cap able of execution 15 1t to 6 (1923) 1923 Lah 129 (131] 11326) 1320 Mad 644 (644)

8 (1914) L314 \1 id 392 (392)

4 (1922) 1922 All 47J (479)

(1926) 1926 Mad 305 (306)

) (1850 81) 5 Bom 614 (616)

3

Note 4 1 (1866) 1 Mary HCR 132 (133) Mortgages not to be charged interest on income from perty, the burden is on him to prove that the mortgion has not been satisfied out of the undruct of the property? In a suit to redeem a pursue mortgages who has redeemed a prior mortgage, the mortgager is hable to ply the uncounts of both the mortgage.

Where a prior mortgiles suce on his mortlage without impleading the pursue martaigee and purchases the property in execution of his decree the pursue mortga-ee subscinently sung for redemption is bound to prive not the sum for which the property was sail but the imount due on the mortage up to the date on which the prior mortal co blained possession after the purchase 1 Court can in estimate accounts with a view to seeing whether the mortgage has been satisfied out of the usufruct even though in doing so it has to deal with questions relating to morerties lyin, outside its musdiction. In a suit for the nedemption of two distinct mortgages the accounts should be taken separately in respect of each mortgage 6 \ mortgages who refused a valid tender of the mortgage money doe not thereby ceuse to be a mostgages and the subsequent accounts between him and the mortagor should be included in the suit for redemption. In a suit for relemption of a mortaine t which the sub-mortainee also is joined as a party the decree should direct recounts to be taken of the mortgage as well as of the sub in it-le and shilld provide that out of the mortgage money, the sub mortga see shall be paid the amount due to him and the balance if any should be paid to the mitalee 1

In suits for redemption the accounts should be taken up to the date of

actual relemption or sale as the case may be "

perty-But the income should leducted from the interest due (181) F. Cal. 1 (7) 25 Ind App 241 (P.C.) Vertgages entitled to deduct from

income sum spent project; for tur etc (1-0) 14 Noo Ind app 443 (401) (P.C) I me fr in project to be fir t

1 Incted from interest due to mort
(1504) 75 W P 1( C R 207 (205 209)

(1- u) Suth W R 2 1 (276) The accounts toutd show the collections and the

(15 15 Suth W R G) (6) Surplus of use after deducting interest should beducted from principal

(1 ) 1 / All 71 (13) Rent preable by gee tut pud by mortgagor t be defineted from the mortgage.

(1914) 1314 Vad (61 (661 662) 21 Ind Cas

Tol (62) Mostgage is bund to

the mortgage for all

min aggreed to te juid by him but

vi ch he did not jiv [See (1.02) 76 Bor 973 (3.2) Judgi his to decide on the extrict of the accounts presented by the jarties] (1.18) 119. Mad See [ASS] Marteries

(1)(s) 1)15 Vial 5-7 (5-8) Viorteiges on los e sion liable to account for reals and profits even after fichiminary de ree

(1310) 3 Ind (23 414 (443) 13 Oudn Cis 39 to ounts should be settled though in tellumed by pluming

C P C 307 & 308

(1J27) 1927 Nag 302 (802) (See also (1924) 1327 Ondh 203 (208) Morigages to take part of usuffuct for interest and pay the balanco to mortgagor under the terms of the deed-Such lalance can lo claime l in the redemption suit] (See also (1937) 1J32 Oudle 2o5 (900) Mortgagea getting posession allo of properties exempt from mort gage - Obtaining decrees for just ients against mortgigor as tenant-Morigagee hable to account there for in suit for redemption But a eparate suit for means profits ac cruing after date fixed for Jayment and before delivery of no e ston is not barred) (See S 11 Note 40 Pt (J) R 9 Note 3 Pts (2) and (3) below and al othe

following cases (1326) 13-6 Oudh 113 (118) And (1910) 6 Ind C is 936 (338) (G d)) 2 (1983) 1883 All V N 90 (91)

3 (1305) 27 All 305 (310)

4 (1302) 24 ML IS3 (187) (1914) 1914 MI 42 (42) 30 ML 123

5 (1875 75) 1 411 431 (432 433)

6 (1890) 14 Born 13 (24) 7 (1904) 34 C-1 923 (27- 279)

S (1691) 1a Bom 692 (693)

(1317) 1917 Oudh 141 (143) 42 Ind Cas 66 (67)

(1906) 23 AH 638 (641) 9 (1905) 30 AH 36 (37) (1918) 1918 Viad 557 (588)

#### 5 Interest

In a suit for redemption, the mortgagee's maht to interest is not limited to that accoung during the six years preceding the suit 1 Where a mort agee who is entitled to possession obtains a decree for possession, he is not entitled to any interest between the date of the decree and the date of the delivery of possession 2

#### 6 Costs

In a suit for redemption, the most nace defendant is entitled to all costs unless he has refused a valid tender of the mortage money or his otherwise been guilty of misconduct 1 Such costs are part of the mortage money and in the absence of any express provision in the decree to the contrary are not personally recoverable from the mortgagor 3 Where the plaintiff mort igor has been awarded costs in such a suit he is entitled to set off the amount of his costs against the mostgage money payable by him 3

#### 7 Subsequent costs charges and expenses

The amendments introduced by the Ti unsfer of Property Act (Amendment) Sun lementary Act XXI of 1929 have made clear that the mortgamee is entitle! to charges and expenses properly meurical by him in respect of the mortgage security even subsequent to the preliminary decree Although the Rules were not so explicit before the above amendment as they are now on this point the law was recognised to be the same even under the old Rules 1

### 8 Subsequent interest as provided in R 11

R 7 Sub R (1) Cl (c) (i) provides for the payment by the most agor of interest subsequent to the date fixed for payment under the preliminary decree up to the date of the actual realisation of the mortgage money. This point was not conceded under the old Rules 1

### Pays into Court on a day within six months

A decree under this Rule should state a period within which the mortgage money should be paid 1 This period may be less than six months 2. In computing the period so fixed the date of the decree should be excluded 3

If the decree for redemption fives no period for payment it must be taken as an ordinary decree to which hit 182 of the Limitation het would apply 82

le and not morigageused costs

Act provides for account only up to date of surt-Thereafter this Rulo 'api bes] (1935) 1335 Bom 97 (98) (Do)

Note 5

- 1 (1914) 1914 Lab 344 (345) (18J0) 14 Bom 113 (115)
- o (188J) 1889 All W N 177 (177) Note 6

- 9 (19%)
- 3 (15"J) 4 Cal 742 (744) Notwithstanding any clum that the defendant , attorney might have against the defendant in respect of the defendant sco ts of the

SHILL (18J3) 17 Bom 83 (34) Note 7

- 1 (1918) 1918 Cal 1039 (1040) 44 Cal 448
- Note 8 1 (1926) 1976 Oudh 306 (307)
- Note 9
- 1 (1909) 1 Ind Cre 71 (~2) (Cal) (1913) 18 I C 48 (49) 1313 Pun Re No 69 [See also (1874) 1974 Born P J 7 (7)] 9 (1927) 1927 1 C 17 (1") (P C)
- 3 (1855) 1889 411 77 750 (81) 34 (1913) 19 Ind Cas 49 (43) 1913 Pun Re No. C3
- (1976) 1926 Mad 405 (406) Costs of mort gagee in redemption suit are discretionary where he mases questions denving mortgager stight to redeem (1934) 1924 Lom 172 (173) Mortgages con to t ng suit on the ground of transac

But where in sout for sile by a puishe mortance, the peliminary decree directed the plintuil to pix off the pixel mortance before bringing the mortanced property to sale, but fixed no herical within which the pixel mortance was to be pixel off, it was held this, in this respect the kence was a decree for redemption and the period dilow bile for pixel ment of the pixel mortance could not exceed six months. The Rule repaires the pixment to be made into the Court, we note that a pixel with the court of the court of the pixel with the court, we Note 14 to R 1 and 0.34, R 3.

# 10 Shall deliver up to the plaintiff the documents.

On prixing it the most, he most, the most, ago is entitled to the return of the most, he had been documents relating to the title to the lind. But where the mir have infendent his lost the title dock, the executing Court cannot, in the absence of the expression in the document that effect compel him to have security to the value of the property.

# 11 Shall re transfer the property to the plainliff

Them it, at the in a lempton to be trusted the property to the most, and for a nothern acts of the list of the lis

# 12 Procedure on default of payment

The Rule movides that on defuilt by the most-join in the psyment of the mortage money within the time allowed by the Court, the most-joine is entitled to apply for a final lecree for sile or forceles me. The present Rule provides for a dieric fee wife in the case of any mortage their than a undirectury mortgive, it mortages has conditional sile or in anomalous mostages which provides only for forcelessure. It provides for a dience for forcelessure in the case of a mortgive by conditional sale or an anomalous mortgive, by their provides only for forcelessure. In the the Rule as it was before the NI of 1929 a decree for sale was provided for in the case of any mortgive other than one by conditional sale. And a decree for fired same as a provided for in the case of any mortgive other than a simple or usufraction.

These changes are an conformity with the changes in S of a the Transfer of 1 pretty termide by terminal of 1928. See Notes under R. 3.

(Cil) Mortgigor entitled to possession on payment as for dicreesbut eight possession by mortgigon renders him hibbs for mesne pronisin subsequent suit by mortgigor] Note 12

1 [See (1901) 25 hom 10t (103) Omission to drew up proper decree under S 92 of the Transfer of Property Act did not

Redempt of decree—No the fixe 1— Payment within 3 years pen] 4 (1921) 1321 Ali 70 (55) 42 Ali 320 Note 10

1 (1926) 1326 VII 741 (743) 2 (1301) 12 VI d I Jour 64 (61)

Note 11 1 (1,00) 3 All L J al7 (513)

2 (1909) 3 Ind Co. 335 (213)

3 (1910) 23 Mad 71 (73) [See al o (1410) 6 In 1 Cas 226 (338)

be minor at time of execution of

ante for further information The undermentioned cases decided under the old Rule are now only of academic interest "

# 13 Extension of time fixed for payment

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The amendments in this Rule and in R 8 made hy Act XXI of 1929 make it clear that the Court can extend the time fixed for payment from time to time and that till a decree for foreclosure is netually passed or till the sale is confirmed, the mortgagor can redeem the property. The undermentioned cases1 de cided under the old rules have only an academic interest now. Time for priment may be extended though the period originally fixed may have expired 2. The use of the expression extend the time in the new Rule instead of the expression "nostpone the day which occurred in the proviso to old R 8 makes this clear Extension of time may be gianted in espective of the nature of the mortgage in question \* Even though a decree for redemption may have been passed by the appellate Court an application for extension of time should be made to the Court of first instance and not to the appellate Court " Where, in a partition suit, the alienation of a certain property belonging to the joint family was found to be binding only to a limited extent and a decice was passed for possession thereof on condition of a certain amount being paid to the alienes within a fixed date, it was held that this was in effect a decree for redemption and that the Court could extend the time fixed for payment 5 Time fixed by a compromise decree cannot be extended by the Coult S 138 of the Code does not apply to the extension of time fixed by a decree for redemption The limitation for an application for a

Amount not so paid-Mortgage is entitled to apply under O 34 R 7 for sale of properties'
[See also (1874) 1974 Bom P J 7 (\*) Procedure on default—To be provided for in the decree And (1931) 1931 Vid 50? (59) at Vid 70 Sub-equent mortgagee a redemp dant is a decree holder ind his transferee of the decree can apply for final decree on default of par ment? 2. (1899) 2 Oudh Cas 196 (198)

(1915) 1915 L B 100 (10I) (1902) 26 Bom 121 (127) (1923) 1928 Lah 355 (351) Note 13 J. (169, 1901) 2 U B R 592 (1893 1900) 18J3 1900 L B R 171 (1902) o Oudh Cas 82 (86 97) (1899) 1888 AH W N 119 (119) (1884) 1884 All W N 32J (330) (1904) 1 All L J 300 (1833) 16 Mad 214 (219)

(1897 1901) 2 U B R 514

(1889) 13 I om 106 (105 107 1 (1890) 13 Vrd 267 (263 269) (1896) 19 Vid 10 (57) (F L)

2 (1902) 24 All 470 (451) (1933) 1933 All 157 (155) (1933) 1933 Mad 762 (763 764) 57 Mad 395 Suit for declaration of mortgage 14 invalid and for possession—Portion of mortgage found to be valid and decree for possession conditional on certain period which was made charge on property Decree is re dempt on decree and Lourt has nower

SCH

under O 31 R 7 to exten I the time for payment (1906) 2 Nag L R 137 (143 144) (1909) 2 Ind Cas 467 (466) (411)

(1902) 26 Bom 121 (126) (1915) 1915 All 302 (307) (1927) 1927 Boin 175 (176) 3 (1553) 7 Bom 532 (531) The contrary view

(1891) 1a Born 644 (p46)

taken in this tire is not tenable under the present Rule 4 (1925) 1328 All 450 (4-1) 50 All 832 Mort

gage 1 conditional ale 5 (1909) 2 Ind Cas 220 (221) 31 111 325

(1917) 1917 Atl 2°9 (2°J) 33 All 936 (1916) 1916 Wrd 694 (635) 31 Ind Cas 240

(210) 3º Mad Sib

(1901) 23 431 63 (83) 6 (1920) 1920 Vad 99 (101) 43 Vad 357

[But compare (1,11a) 1915 Oudh 226 1227) 18 Oudh Cas as Power to cularge time can be exercised only in cases to which Rule strictly applies] [See also (1933) 1383 Mid 762 (763) of Wad 8931

7 (1J26) 1926 Nag 2-0 (731) 8 (1912) 14 Ind C to 240 (241) 84 411 358 T

mul decree for redemption tuns from the date of payment although the Court may have extended the period for payment originally fixed. Where a proliminary decree is simply confirmed in appeal, the period fixed runs only from the decree of the Court of britimstance unless the appellate. Court extends the period <sup>10</sup> See Note 9 to 5 148

# 14 Form of decree

For the form of a preliminary decree under this Rule see Appendix D, Forms 7, 7  $\lambda$  7 B and 7 C. The decree ought not to contain unnecessary declar ations  $^1$  It should not direct that the defendant should not be exceed till he has cut the crops sown by him  $^2$ 

# 15 Second suit for redemption Sec Note 40 to S 11

16 Who can redeem See S 91 of the Transfer of Property Act

If a party whose title is to some extent imperfect at the date of the institution of the suit seeks to redeem indis ablo to judge a perfect title at the hearing of the even he should have a decire for redemption. Plus if a purchaser in execution sile of the civity of redemption such for redemption before he has obtained a certificate; sile but obtains such certificate before the hearing, he should have a lettice for redemption. In a suit by a purchaser of the equity of redemption for redemption the month age example question the adequacy of the conference of the country of the such as th

#### 17 Trespass by mortgagor before redemption

Where a redemption decree was made but the mortgagor, without hiving made any payment, unlivially trespieses upon the property and dispossesses the mortgagee in possession the latter can sue to recover back possession.

#### 18 Court fee

See 5 7 Cl (ix) of the Court fees let No Court fee is payable on surplus profits decreed in fivour of a mortgagor in a redemption suit.

#### 19 Jurisdiction

In suits (at redemption, the value of the suit for purposes of junisdiction is the amount of the principal money seemed by the mortgage and not the value of the projectly mortgaged.

20 Appeal See Notes under Rr 2 to 6 seps a and also under S 97. See also the under that the oned  $c\tau_{\rm b}e^{1}$ 

10 (1897) 1. Viv.1 1 0 (1 2)
(1893) 1.5 Viv.1 0 (1 2)
(1893) 1.5 Viv.2 0 (1993)
(1893) 1.5 Viv.2 0 (1993)
(1893) 1.5 Viv.2 0 (1993)
(1894) 1.5 Viv.2 0 (1994)
(1894) 1.5 Viv.2 0 (1994)
(1894) 1.5 Viv.2 0 (1994)
(1894) 1.5 Viv.2 0 (1994) 1.5 Viv.2 0 (1994)
(1895) 1. Viv.2 0 (1895) 1. Viv.2 0 (1895)
(1895) 1. Viv.2 0 (1895) 1. Viv.2 0 (1895)
(1895) 1. Viv.2 0 (1895) 1. Viv.2 0 (1895)
(1895) 1. Viv.2 0 (1895) 1. Viv.2 0 (1895)
(1895) 1. Viv.2 0 (1895) 1. Viv.2 0 (1895)
(

Note 14

9 (197 ) 13 1 37 (4) 50 Bom "30

1 (1881 87) 9 In 1 \lambda \text{Ip 21 (26) (PC)} \tau \text{to form} \text{ and content of a redemption decree [\sec (1.02) 1 L B R 1 \sec (187 to 153)]

2 (1856) 8 11 502 (309 503)

#### Note 16

1 (1851 82) 6 Bom 139 (142 143) [See il o (1) 73] 1323 I on 77 (335) Court can take note of events hap Jening sul capent to suit and of Note 18 1 (1929) 1929 Nag 1 (2) 24 Nag L R 197 Note 19

1 (19%) 19% Oudh 346 (347)

13.01 13.2 Ondii 240 (24

#### Note 20

1 (1934) 1934 Pat 97 (99) Directions by Court
with regard to the mode in which
account is to be taken is not preli
minary decree and the order is not
appearable, as such >

moulding decrea record ngly ]

R. 8. [Neu, Act IV of 1882 S 93] (1) Where before a final decree debarring the plaintiff from all right to edeem the mortgaged property has been passed or before the confirmation of a sale held

passed or before the commutation of a sale held in pursuance of a final decree passed under sub-rule (3) of this Rule, the plaintiff makes payment into Court of all amounts due from him under sub-rule (1) of Rule 7, the Court shall, on application made by the plaintiff in this behalf, pass a final decree or, if such decree has been passed, an order—

(a) ordering the defendant to deliver up the documents

referred to in the preliminary decree

and, if necessary,---

(b) ordering him to retransfer at the cost of the plaintiff the mortgaged property as directed in the said decree,

and, also, if necessary,-

(c) ordering him to part the plaintiff in possession of the property.

(2) Where the mentgaged property of a part thereof has been sold in pursuance of a decree passed under subrulo (3) of this Rule the Court shall not pass an order under subrulo (1) of this Rule unless the plaintiff in addition to the amount mentioned in subrulo (1) deposits in Court for payment to the purchaser a sumequal to five per control of the amount of the purchase money paid into Court by the purchaser.

Where such deposit has been made, the purchaser shall be entitled to an order for 10-payment of the amount of the purchasemoney paid into Court by him, together with a sum equal to five

per cent thereof

(3) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the detendant in this behalf.—

(a) in the ease of a mentgage by conditional sale or of such an anomalous mortgage as is hereinbetone referred to in R. 7, pass a final decree declaring that the plaintiff and all persons claiming under him are debarred from all right to redeem the mentgaged property and, also, if necessary, ordering the plaintiff to put the defendant in possession of the mortgaged property; or

(b) in the case of any other mortgage, not being a insufruction mortgage, pass a final decree that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction theirfrom of the expenses of the sale) be paid into Court and applied in payment of what is found due to the detendant, and the balance, it any, be paid to the plaintiff or other persons entitled to receive the same

[See R1 3, 5 & 7 See also O 21, R 89]

0

#### Synorsi

1	Legislative changes	\ 1	v	Note Final decree for foreclosure or	
н	Amendments after 1908 Scope of the Rule	2		sale-Sub R (3)	6
v	Decree for redemption	4		Power to enlarge time Limitation	8
	(1) Re lemp tion after due date	5	VIII	Appeal	9

# Other Tomes

Court t w hall aton to lemade See Redemption By person interested in 1st Noco It (a) Note Its (v) and (3) See R 1 Note 6 F N (20 3)

Final decrete for the circumstance of the companion of the c

#### 1 Legislative changes

I

The Rule c rie | nds to S 93 of the Transfer of Property Act

#### 2 Amendments after 1908

The Rule was amended by the Transfer of Project, let (Amendment) Supplementary let NI of 1929 on the same lines as Ri 3 and 5 ante. The Horizon is the extension of time bus been transferred to R 7 1 tide Notes under Rr 3 and 7 ante. Unler the old Rule a decree for sale could not be passed only in the case of a mortgage by conditional sale. Under the present Rule no decree for sale can be presed even in the case of with such are mortgage.

# 3 Scope of the Rule

The decree under R 7 is only a preliminary decree and a finited decree under the tile ent. Rule is necessary to terminate a suit for redemption 1. As has been seen already in Note 4 to R 7 in a redemption suit there should be a complete settlement of all accounts between the parties in relation to the mortgage 2. (See also R 9 and 10 in 1/1 a which show that accounts should be taken right up to the date of actual payment of mortgage once and is tunisfer of possession).

#### 4 Decree for redemption

On layment of the mortgage mone, before a final decree for sale or fore closure to passel the mortgager is entitled to a final decree for redemption. A mortga, to can however excrete the right of redemption in the case of a decree for sale at any time before the sale is confirmed though the final decree for sale at any time before the sale is confirmed though the final decree for sale at any time before the sale is confirmed though the final decree for sale the mortgag, or will get an order for the delivery of the title deeds etc. as indicated in Sub R. (1). If the mortgage seeks to redeem the property after the sale indicated in Sub R. (1). If the mortgage is must exposit for payment to the auction purchases 5 fer event of the purchase money in addition to the mortgage money. Under Sub R. (1) all rights acquired by the mortgage ander the mortgage in possession need not vacato possession till he has received the full mortgage in possession need not vacato possession till he has received the full mortgage money.

1 monthogor is not disentitled to a decree for redemption simply because he has attached under his decree for costs against the mortgage the mortgage withdrawn withdrawn

3 portion of it 3

2456

The most ages is not entitled to notice of payment into the Court of the mortgage money under the preliminary decree . Nor is the mortgagor required to make an application to the Court before paying in the money " The refusal of the Treasury Officer to accept the mertage money though paid within the proper time does not amount to default by the judgment debtor " Where the mortganor has paid into the Court the sum ascertained by the first Court pending an appeal by the most ages as to the amount due, the mestages is entitled to credit for the amount paid though it lapsed to the Government through the failure of the mortgages to take the money out of Court Payment to an unauthoused person does not disclinive a mortage 8

5 Redemption after due date

The present Rule makes it clear that though a mortgagor mas fuled to redeem the mortgaged property within the time allowed by the Court he is entitled to do so at any time before a final decree for foreclosure is passed or a sale of the mortgaged property under a final decree for sale as combraned See Note 8 infia

6 Final decree for foreclosure or sale-Sub Rule (3)

The provision as to the passing of a final decree for foreclosure under the circumstances indicated in the Rule is imperative! I final decice for foreclosure or sale can only be passed on application by the mertargee decree for foreclosure cannot be passed in the case of a sample mortgage 3. The absence of any provision in the preliminary decice for the passing of a final decice for sale of foreclosure is no bar to the passing of such a decree in application for final decree should be made to the Court of first instance though the preliminary decree was modified in appeal. In the undermentioned case it was held that the mortgagor himself was entitled to apply for a final decree for sale, if he was not able to pay the mortgage money 6

7 Power to enlarge time

The provision as to the enlargement of time centained in the proviso to the old R 8 has now been transferred to the present R 7 by Act XI of 1929 I payment of the amount due within the time fixed entitles the mortanor to a final decree for redemption I But the time can be extended by the Court for making such payment under this Rule. The principles discussed in Note 18 of R 2 and in Note 9 to S 148 apply in general to an extension of time under this Rule Thus the time can be extended even though the time originally fixed has ex But no extension can be granted unless good cause as shown therefor

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8 (1901) 27 All 302 (394 395)
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decree does not provide ther for

5 (1900) 23 Vind J21 (572 593)

6 (1311) 12 Ind C 5 437 (489) 36 Mad 32

(1927) 1J? Oudh 596 (555) Fact that mort gagte lo e nothing by exter ion is

gool cau e (1903) 13 Vad I Jour 266 (96 ) I in file mi tike is good can e

<sup>4 (1)24) 1974</sup> Mal 102 (102)

<sup>5 (1925) 1975</sup> Oudh 255 (756) 98 Ondh Cas 46 6 (1929) 1329 411 851 (552)

<sup>7 (1912) 16</sup> Ind C 15 830 (831) (P C) 8 (1921) 1974 Lah 788 (710]

Note 6

<sup>1 (192 ) 1927 111 305 (305)</sup> 

<sup>9 (1913) 19</sup> Ind Cas S & (Soul (Lah) 3 (1913) 1915 L B 100 (101) 27 Ind Gus 706

<sup>(105)</sup> 4 (101) '2 Bott 101 (103) (1331) 13°1 All 427 (4 34) Sub equent mort

suit for redemption-liner north a ce defendant can get find lec ee for sale though pichinin ary

Nor is the mort, igor entitled to an extension as a matter of right 4

The power to extend time applies to all kinds of mortgages. Ordinarily a mortgage, who seeks to profit the money after the time fixed, must apply for extension. The application need not however, be in any nescribed form and even in application to profit money may itself be treated as an application for extension. But the application must be made to the Count of first instance seen though the decree may have been confirmed on appeal.

It was held in the undermentioned cases, that the power to enlarge time under this Rule applies to whit he strettly suits for redemption. But where in a pircition suit, it was found that in ahearition of joint family projectly was pirtially binding on the plaintiff and a decree was pissed for possession as instead the thence conditional on the pissment of a certain sum of money to him within a critiun time, it was held by the High Court of Madris that the decree was in effect one for redemption, and that the time fixed by it could be extended under this Rule."

Even if the time is not extended, the most view, as has been made clear by this Rule, can redeem the property at any time before a final decree for foreclosure is passed, or a sale of the property is contained by the Court and this with the practice followed oven before the amendment under  ${\rm Act} \ \Delta {\rm Mi}$  of 1929 was made  ${\rm ^{1-}}$  by to the decrees passed before the Transfer of Property act see the undermentoned case  ${\rm ^{12}}$ 

It has been held by the Chief Court of Oudh that even in the case of a compromise discretor identition, the Court, is entitled under this Rule to extend the time in proper cases.

## 8 Limitation

Article 181 of the Limitation Act applies to an application by the mortgages for a final decice under this Rule and time runs from the explit of the period fixed for payment by the mortgager. But a mortgage being entitled to pay the mortage money at my time before the final decice for foreclosure is massed or

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(1.12) 14 Ind Cs. 240 (241) 34 11 39s (De) (1.12) 15 Ind Cs. 14 (16) (11) (1.12) 15 Ind Cs. 14 (16) (11) (1.12) 15 Ind Cs. 14 (16) (11) (1.12) 15 Ind Cs. 15 (1.12) 15 Ind Cs. 15 Ind Cs.
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(240) 3) M od 676 3 (1917) 1317 All 233 (239) 33 All 296

11 2 (1822) 14 AH "20 (3 4) (1304) 1 Ind C in "0 (782) "6 Cul 122 (1803) 2.5 AH 231 (233) (1803) 2.5 AH 231 (233) (1804) 2.5 Oddh C in "2 (8") (1804) 2 Ind C in 616 (716) (Nud) (1806) 2 Cul L Dun 533 (836)

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(1900) 27 C11 70, (705)
(1927) 1927 Bom 32 (34) | 50 Pom 730
(1925) 1925 Oudh 649 (650) | 28 Oudh Cas
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261 [1911] J Ind Cay 337 (335) 14 Oudh Cas 10 [1915] J Ind S 41 302 (507) [1916] 1916 Oudh 139 (13J) 19 Oudh Cas 30 [1904] I All L J 400 (301)

(1J23) 1923 Oadh 36 (237) 26 Oudh Ca-66 Projecty can be rede med even after final decree

(1891) LJ All 200 (208) Sile could be worded by payment under S 201 of Code of 1852 (now O 21 R 63)

(1857) 10 AR 1 (4) (1305) 31 Und 351 (305) Sale could be et uside by deposit under S 310 A of Cole of 1852 (now Order 2), Rule

83) (but see (18-0) 13 Mad 267 (268-269) Decrea for redemption — Pryment to make the second of the second to the second of the s

cannot is male after the period fixel]

13 (1896) 20 Loin 27.) (280)

14 (1927) 1924 Oadh 556 (5~) Note 8 1 (1925) 1925 Oadh 25 (2.6) 29 Oadh Cas

16

before the sale of the motigated property is confirmed by the Courthiere is no period of limit turn applicable to a payment by lim of the mortgage mone. It has even been left that there is no period of limitation applicable to an application by the motigag if in final decree for redemption at being the duty of the Court to lass such a decree <sup>3</sup> But under the amendments of the Rule mide by let NM of 1929 even a mortgager has to apply for a final decree for redemption. Hence the view (alemin the above decision requires is consideration. Where there has been an appeal against the preliminary decree the period of limitation for an application for final decree commences not from the expirit of the time fixed for payment but from the date of the appellate decree <sup>4</sup>. An application for extension of time by a decree holder is a step in aid of execution within the meaning of L matation. Act last 182 in respect of a subsequent application for sale by him?

9 Appeal

In order refusin, to extend time is uppealable under O 13 R 1 (o) 1 But no appeal has against an order granting an extension of time? It is doubtful whether an order merely refusing to pass a final decree but leaving it open to the mortgage to apply again for such a decree is appealable as a decree.

R. S. A. [New] Where the net proceeds of any sale held under the last preceding Rule are found insufficient to pay the amount due to the defendant, the Court, on application by him, may, if the balance is legally recoverable from the plantiff otherwise the court to the moments and areas a dearest to the moments.

tiff otherwise than out of the property sold, pass a decree tor such balance

[Cf R 6 above]

Synotses

Scope of the Rule Note No I

# 1 Scope of the Rule

This Rule is new and was inserted by the Transfer of Property (Amendment Supplementary) Act NJ of 1929. The Rule provides for a personal decise being passed in a suit for it leviption against the mortage where the proceeds of a sale held on the default of the mortage to 1 ty the mortage money in time under decree for nedemption are not sufficient to satisfy the mortage debt. The Rule corresponds to R G ante which provides for a personal decree being passed in a suit for sale by the mortage.

The words the last preceding Rule refer to R 8 as a needed by bot \M of 1929 under which no decree for sale could be passed in the case of a neafround mortgage as was possible under the old Rule. Where therefore a decree for sale was passed in respect of a neaff neetway mortgage under the old Rule and a sale is held in pursuance thereof it was held that such a sale could not be sail to have been held under the last preceding Rule within the meaning of this Rule and that consequently no personal decree for the balance attending due could be passed under the Rule?

<sup>2 (1925) 1925</sup> Oudh 643 (6.0) 28 Oudh Las

Note 9

<sup>1 (1924) 1924</sup> Bom 93 (98) 4 Bom 9.6 2 (1,16] 1916 Mad 6.4 (695) 3.3 Mad 8 6 3 (1923) 1923 Lab 250 (3.6)

Order 34 Rule 8 A-Note 1 1 (1933) 1933 Oudh 40 (41).

R. 9. [New ] Notwithstanding anything hereinbefore contained, if it appears, upon taking the account referred to

Decree where neth and as I and due r "ilere i stragee nas teen men mi

I

in Rule 7, that nothing is due to the defendant or that he has been over paid, the Court shall pass a

decree directing the defendant, if so required, to re-transfer the property and to pay to the plaintiff the amount which may be found due to him; and the plaintiff shall, if necessary, be put in possession of the mortgaged property.

## Synopsis

\ote \o Note No Scope of the Rule Claim for over payments-Suit for if Deduction of costs payable to mort hes 2020r

Other Tonics

Dichii e of a rigige-No need for preh Immitation See Note 1 Pt (6) murry and final de rec See Note 1 Previous Liw and Practice See Note 1, Pr (3 Pts (1) and (2)

## 1 Scope of the Rule

This Rule is new and gives effect to the practice followed in cases arising under the Transfer of Property Act1 and in cases arising even previous thereto 2

If the Court finds that the most are has been discharged, a decree for redemption can be passed at once without the formality of a preliminary and final decree 3 A mortgagee who continues in possession of the mortgaged property after the mortgage has been satisfied is hable for all the receipts from the monerty with interest from the time when the debt was fully paid off \* Extra Court-fee in addition to the Court fee paid on the paperpal sum due need not be paid on the surplus profits that may be decreed to a mortgagor in a redemption suit." A claim by a mortgagor for recovery of over-payment received by the mortgages is a relief included in a suit for redemption to which Art 148 of the Limitation Act applies

## 2 Deduction of costs payable to mortgagor

The mortagor is entitled to set off the costs awarded to him against the anorthane money in preference to the clum of the defendant mortganee's attorney for his costs of the suit.2

#### 3 Claim for overpayments-Suit for if lies

The intention of the legislature being that a suit for redemption should include the entire accounts between the parties in relation to the mortgage, a separate suit for overpayments is barred under 5 11 and O 2, R 21 (See Note 40

Order 34 Rule 9-Note 1 4 (1929) 1929 Bom 837 (339) (See also (1663) 1 h % P H C R 111 (113 114) Montgreporentitled to excess profits with interest at the rate prosided for mostgage mones ] 5 (1931) 1931 Mad 479 (179) (1923) 1923 411 261 (262) 45 411 154 6 (1922) 1922 Cul 159 (190 101) Note 2. Re No 3. 1 (1893) 17 Bom 32 (34) mse 81 2 (1879) 4 Cal 742 (748, 744) 2 (1881) 6 Cal 377 (379) Note 3 (1672) 18 Suth W R 65 (66) 1 (1905) 30 411 86 (87) 3. (1922) 1922 All 479 (479) (1901) 25 Bom 11a (119)

to S 11 ) But mesne profits accruing after the date fixed for payment under the preliminary decree or after the date of payment under the decree a have been held to be recoverable by a separate suit. No such suit can however be brought for the profits accoung before such date

R. 10. [New Act IV of 1882, S 94] In finally adjusting the amount to be paid to a mortgagee in case of

Costs of mortgagee subsequent to decree

a foreelosure sale or redemption the Court shall unless in the ease of costs of the suit the conduct of the mortgagee has been such as to disentitle him thereto add to the mortgage-money such costs of the suit and other costs charges and expenses as have been properly anguired by him since the date of the preliminary decree for foreclosure

sale or redemption up to the time of actual payment [See Rt 2 to 8-A and S 35]

	Synopsis		
I Legislative changes II Amendments after 1908 III Mortizgee is ordinarily entitled to his costs (i) Such costs of suit as hive been properly in cuited	1 2 3	(b) Costs of appeal (c) Other costs charges and expenses Power of executing Court to add costs Costs awarded by decree mode of resheation	No 5 6 7 8

#### Other Topics

Mortgig es a conduct d entiting him to co to See Note 3 1 t (1) Sub equent sure for sins or recount pay

able in mortgage su ta See R J Note 3, also ee S 11 Note 40 and R / Note 4,

#### 1 Legislative changes

The Rule corresponds to S 94 of the Transfer of Property Act

#### 2 Amendments after 1908

(1.30 ) 31 Bom 57" (583 534)

The Rule was amended by Act XXI of 1929 The movision is to the payment of other costs charges and expenses is new

3 Mortgage" is ordinarily entitled to his costs In a sout for sile forcelosure or redemption, the mortaiged is or linguity

entitled to his costs unless his conduct has been such as to disentitle him thereto 1 For the scale on which costs are awarded see the under in micin be ille subject of a eparate

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(1883) 16 Cal Ga? (C9?) 16 Ind App 107
      (PC)
                                              (13%) 13% ill 36 (3 ) Quest on of all
(1904) 34 Cal 273 (703)
                                                    riesne profits is out de the scope
                                                    of the relemition ut-0 . R 2
(1370) 1970 Valu31 (337)
                                                    alonota bir to the int
(1305) 00 111 223 (721)
(156J) 6 Lont H C R (1 C) 97 (99)
                                                    teel on a da tinct ca e of action
                                              (1318) 1318 Wid 254 ( 34)
      [See alo (1307) 6 Long Gol (66)
                                            4 (190) s Oudh Cis 02 (303)
      Sep. rate suit for me ne profits by
      nortgi, held birred]
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' (1J10) 6 In 1 C is 330 ("37) (Cil) (1J 0) 1J 0 Lat 106 (107) 5 Pit L Joan 3 (13 6) 1326 Oudh 113 (114) Mes to 1 ofits secruing due after the dite of pay

Order 34 Rule 10-Note 3 1 (1932) 1J°2 Onth 1 1 (184) Cots lis allo cd in this er e

(1909) > Ind Cas 662 (Co3) (Cal) (157 ) 1 Ind Jur (\ S) Jo

mentionelerses 2

#### 4 Such costs of suit as have been properly incurred

The mort, you's Iribility in 1 mort, i.e. sufficient do enhanced by a final decree level of the point indicated in the preliminary decree except in so far as is provided for by the present Rule. It his been held by the Allahabad High Court that the Rule refers only to costs incurred between the preliminary decree and the "sil decree and not to the costs incurred subsequent to the final decree in execution proceedings." The Clincf Court of Oudh on the other band has all sentent in the result in this view and held that the Rule upplies to all costs incurred in connection with the suit in this time of actual purposed whether before or after the final decree. It is submitted that the Oudb view accords more with the Rule public of the Rule than the Malahabad view.

#### 5 Costs of appeal

There is a coullet of decisions as to whether the costs of in unsuccessful appeal by the most, and from the prehiumany decise in a most, ago suit can be added to the most, and more on should be recovered from the most, and in some cross, it has been held that such costs can be added to the most, a mone, a while in other case that the Rule refers primarily to cost-incurred in the Court which prepries the final decise and that it endors the cost appeal cannot be added to the mortga, o maney but should be recovered passonally from the mortga, or a local region of the undermentioned cases a however the question is one of construction of the appellite decise dismissing the appeal.

#### 6 Other costs charges and expenses

This expression has been newly inserted by Act NI of 1029 and gives offsect to the practice followed before the Act, of adding such costs charges and expenses, neutrod after the preliminary decree, to the mortugage money?

(1901) 74 Mid Si7 (3x6) 28 Ind App 46

(1913) 19 Ind Cas 474 (474) (Mad) (1910) 3. Mad 44 (40) Improper defence to a redemption shift is a ground for

rch ing costs
[See als of 1922) 1920 Mad 778 (773)
Re lemption sint — Decreed — Costs
clumed in second appel by mort
gage on ground of want of miscon
duct—Not rised in lower appellate
Court—Costs in tiral Court alone
illowed]

(1920) 1976 Wind 405 (406) Redemption unt—onsu trumble defences such a denual of right to redeem or claum for excess to improvem in the —

Co 1- in Court's discretion (1578) 3.1 m 202 (203) Where the largum

(1578) 3.1 m 703 (203) Where the bargain 15.1 minus the Court would decline to a viid or t

2 (1910) 37 Cil 907 (913) Co to on scale No 2 against mortgager who does not appear (1877)! It I Jur (N S) 222 Mortgage deed 1 oxiding for costs as letween uttor

n value for costs as letween attor n value chent—Such costs were a rd d (1851) 5 Cil L. Rep. 437 (438) Ordinards

ests letween purs and parts
of its letween purs and parts
a via led

- 1 (169 ) 19 All 186 (198) 2 (1926) 1926 All 68 (19) (1926) 1926 All 72 (722) 48 All 692 3 (1970) 1930 Ondh 328 (398)
- Note 5
  1 (1919) 1919 411 297 (299) 41 All 473
  (1319) 1918 Ondh 145 (445)
- (1319) 1018 Ondh 145 (145) (1931) 1924 All 104 (104) 45 All 630 (1J\_6) 1J26 All 313 (313) Though the final decree had been pissed before the
- di missal of the appeal 2 (1914) 22 Ind C is 42 (44) (411) (1013) 10 Ind Cas 384 (380) (All)
- (1914) 1914 411 190 (191) Pspecially where the final legice had been jas ed be

defendants only-Costs granted to

- fore the dismisil of the ipped 3 (1313) 13 Ind Cis 384 (380) (411) (134] 1334 411 89 (92) Appeal is some
  - mortgagee Outs appealing defendants are personally hable for such costs
  - (1313) 19 Ind C14 729 (780) (111) (1375) 1975 111 437 (438)
- Note 6

  (191') 1919 L B 136 (138) Arrears of
  Covernment revenue paid by the
  Lioritage, after preliminary decree
  to prevent sale of mortgaged fro

1

ι0. 7 Power of executing Court to add costs

Costs which should have been but have not been excluded in a final decree cannot be claimed in execution 1

8 Costs awarded by decree mode of realisation

Prima facie the costs waided in a mortgage suit asainst the mortgagor, should be added to the most see money and the most groot is not personally hable for them except when a decree can be passed a arnst him under R 6 ante 1 But under S 3) of the Code the Court has the power to make the mortgagor personally liable for the costs even in the first instance in which case the mortgager would be personally hable for the costs -

R. 11. [New ] In any decree passed in a suit for foreclosure. sale or redemption, where interest is legally Payment of interest recoverable the Court may order payment of interest to the mortgagee as follows, namely -

(a) interest up to the date on or before which payment of the amount found of declared due is under the preliminary decree to be made by the mortgagor or other person redeeming the mortgage-

(i) on the minerpal amount found or declared duo on the mortgage-at the rate payable on the principal, or where no such rate is fixed at such rate as the Comt deems reasonable.

(ii) on the amount of the costs of the suit awarded to the mortgagee-it such rate as the Court deems reasonable from the date of the preliminary decree and

(iii) on the amount adjudged due to the mertgagee for costs, charges and expenses properly menticed by the mortgagee in respect of the mortgage-security up to the date of the preliminning decree and added to the mortgage money -at the rate agreed between the parties, or, tailing such rate at the same rate as is payable on the principal, or failing both such rates, at mine per cent , per annum ; and

(b) subsequent interest up to the date of realization or actual payment at such rate as the Court deems reasonable-

perty can be added to mortgage money (1915) 1313 Cal 369 (370) Lego at made by

mortgraes to et i ide execution ale amount can be added to mortgage (1918) 1J19 Cal 1039 (1040) 44 Cul 148

(1891) 15 Bom 625 (633) Ordinards there no per onal ladd ty for such costs and charges

Note 7 1 (1922) 1922 411 97 (28) 44 411 0

Note 8 1 (1901) "O Nad 464 (462 466) (1914) 1314 411 444 (445)

(1318) 1313 411 366 (367) 43 Ind Cas 557 (J5J) 40 411 100 (1305) 37 Crt 131 [435] (1305) 27 Crt 131 [435] (1809) 2 Oudh Cas 103 (109) (1809) 2 C P L R J J (90 JS) Upon final dente for forcelosure mortgagor s

liability for costs also ceases 2 (1857) 14 Cil 18, (15h) (1307) 3 Nag L R Jr (100 101)

(1959) 10 111 1") (161) (1698) 10 111 127 (17)

(1313) 19 Ind Cas 773 (730) (All) Held on construction of decree that the costs

were recoverable personally

- (i) on the aggregate of the principal sums specified in ( clause (a) and of the interest thereon as calculated in accordance with that clause; and
- (ii) on the amount adjudged due to the mortgagee in respect of such further costs, charges and expenses as may be payable under Rule 10.

[Sec S. 34]

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Note No
1 Rule of damdupel

Note No.

# Interest in morigage suits 1 Amendments after 1908

Amendments after 1908

The present Rule is new. It was substituted for the old R 11 which was repealed by Act NI of 1929 and re-enacted as \$ 94 of the Transier of Troperty Act Prior to Act, XXI of 1929 there was no special statut as provision accurding interest in martin e suits corresponding to the present Rule

#### 2 Interest in mortgage suits

This Rule which was inserted in the Code by let \\f a 1 120 area effect to the previous ease-law bearing on the subject. This case his may be summa ri-eil as follows -

Interest prior to the suit -Interest could not be claimed in every case as a matter of course. No interest was recoverable unless there was in express or implied agreement to pay interest or unless it was recoverable under mercantile usage or under some statutory provision, such as the Interest Act 1839 (See Notes under 5 34) Where there was an agreement to pay interest, the Court should decree it at the agreed rate, however high it might be,2 unless it was

Order 34, Rule 11-Note 2

1 (1913) 40 Cal 514 (016) (1912) 16 Ind Cas (CO (561) (Mad) Held on construction that rent and not interest was

(1921) 132t 111 319 (920) 43 111 39 Interest payable on default in paying slipu

lated instalments-Waiter (1921) 1921 P C 100 (102) 23 Ondh Cu 150 (t' L) Held on construction that suterest became payable only after

the period fixed for redemption (15 / ) 1566 Pun Re No 64 Right to inter-

est-Water may be proved by non (1905) 7 Bom L R 772 (790) Bond providing for simple interest onty and no

rest .- Only sample interest can be awarded (190t) 8 Cil W N 216 (218) Mortgigee not

entitled to interest for the day on which the money was advanced as also for the day on which the money was repud (t561) Suth W R Gip No 157 (157) In ab-

sence of express provision for interest, interest need not be paid (1913) 35 41t 302 (306) Labitity of Handu

[See (1901) 4 Oudh Cas 33 (35)

Lithility of Hinlin son under decica on mortgage again t father)

(1915) 1915 Lah 125 (126) 1915 Pan Re No as Decree for redemption ill we l to become brited -I rish sutfile demotion-Intere t should be crien

> (13.2) 1932 Cit 659 (630) a) Cit 721

(1933) 1933 Lah 652 (644) (1596) 20 Bom 744 (745) 41590) 14 Bom 111 (111)

(1853) J Cil 303 (314) (16J6) t3 Cal 164 (150) 17 Ind App 201 (P C)

(15J3) 20 Ctl 300 (361)

(15J3) 20 Cil Soun (362)

(1834) 21 Cut son (374) 21 Ind App 1 ir c)

(1591) 24 Cat 699 (703) (F B) (1904) 3t Cat 233 (240)

(1904) 31 Cal 332 (33%): 31 Jud App 57

(1631) 3 Vad 125 (126)

(1910) 5 Ind Cas 916 (916) (Mad) (t882) 1842 I'm Re No 40, page 118. penal,3 or the rate of interest was excessive and the transaction was substantially unfair see (Usurious Louis Act, 1918), in either of which cases, the Court nught decree what it considered a reasonable rate of interest 35 A stipulation for the pay ment of compound interest was held to be not necessialy penal . Not did the mere fact that the rate of interest was excessive give rise to a presumption of undue influence where it was not proved that the lender was in a position to dominate the will of the debtor ' The interest deciced was a charge on the mortgaged property "

Where the mortgages was in possession of the mortgaged property, the meame from the property should be applied in discharge of the interest payable to him? But a mortgagee who was entitled to possession in lieu of interest could not clum any interest for the period for which he failed to obtiny possession on account of his own laches 5

The present Rule and S 72 of the Transfer of Property Act make it clear that interest is payable on the costs and charges and expenses properly incurred by the mortgiges in respect of the mortgige security "

Post diem interest or interest after the date fixed in the mortgage deed for the naument of the mortgage money - There was a conflict of decisions as to the nower of the Court to decree interest after the due date for payment under the mortgage deed. In some cases it was held that, in the absence of any specific

(1949) 1889 Pun Re \u22130 185 12ge 46f (1308) 1903 Pun Re \u2213 0 110 12ge 508 (1310) 1910 Cal 796 (799) 42 Cal 6a2 (661

(1 01) 28 Bon 371 (37 ) (See at 0 2 His 644 and (1909) 2 Ind Can 27 (24 21) 5 Nag L R 37 Con truct rate r be given even though interest is pivalie only on default of payment of instilments]

3 (1915) 1915 Cal 796 (793) 42 Cal 6.2 [See also (1310) 5 Ind C is 600 (665) 32 411 448 Stipulation for higher rate of interest with a provision for lower rate in case of punctual par ments-Not penal]

34 [See (1912) 13 Ind Cas 5 (5) 34 411 126] (1933) 1933 411 150 (184) Contract at 24 per cent compound intere t with sta monthly rest-Security ample-in terest reduced to 15 per cent smille

(1933)

was allowed (1912) 13 Ind C1- 401 (402) (L1b) Voriginge by Hindu father of joint family 1 to perty- vece my of barrowing it excessive rate of intere t not proved. Interest may be re luced

5 (1924) 1924 P G 60 (Go) 51 Ind 1pp 101 3 Pat 279 (P C)

(1927) 1927 Ali 598 (58b) 6 (1921) 1921 Pat 403 (40c) But interest 13 dimages is not a chinge on the pro-

40 (1 514) (1914) 1914 Lah 350 (352) 22 Ind Cas 837 (539) 1914 Pun Re No 94 Interest is not a change on the properts unless it is specifically made no

7 (1902) 21 All 521 (531) 23 Ind hp 148

(1J07) 2 1nd Cas 221 (222) 31 111 325 (1326) 1926 All 665 (666 667) Morthagor to discharge debt due on pos essory

morigage in Jeth-Not taking any steps-Is not entitled to interest after sult for redemption (1875) 7 N W P H C R 57 (55)

(1906) 9 Oudh Cas 144 (145)

[Ser also (1889) 1883 All W N 17. (177) Mortgages not executing his decree for possession- tot entitled to interest in sub equent suit for redemption)

Punpl where the Transfer of Pro tert) Act does not apply a different tion was taken

211 compound inter- 13 (See (1581) 3 All 610 (C28) (F P) ]

223)

stipulation for the payment of such interest, it could not be decreed 9 But in a O great many cases it was held that an intention to pay interest subsequent to the period fived for redemption at the same rate as before might be implied in the absence of any agreement to the contrary 10 Even of there was no intention to pay such interest, the Court could award it by way of damages for the breach of the contract to pay the mortgane money at the stipulated time 11 contrict rate of interest was ordinarily taken as the measure of damages 12 though the Court could vary it if it considered it necessary 13

Post diem interest at a reasonable rate might also be decreed under the

J (1J13) 21 Ind Cas 2u3 (2o4) 35 411 534 10 (1-1-) 20 111 171 (180) 25 Ind App 9 (P C) (1933) 1933 Mad 171 (171) Lut compound interest cannot be awarded unless specially agreed to (193a) 133a Oudh 213 (216) (1637) 19 All 33 (43, 50) 23 Ind App 138 (180s) 23 Bom 107 (110) (1995) 23 Cal 246 (249 250) (16J0) 22 Mrd 33J (340) (1897) 20 Mrd 149 (151) (16J7) 20 Mrd 371 (37o) (1900) 23 Mad 534 (535) (1312) 16 Ind Cas 216 (217) (All) (1914) 1314 Oadh 137 (133) 23 Ind Cas

871 (872) (1914) 1914 411 171 (172) (1915) 1910 Mad 398 (338) 26 Ind Cas 124 (174) I ost diem compound interest not recoverable unless expressly pro vided for

(191a) 1915 Vad 1161 (1162) (1916) 1916 Lah 3.9 (359) 32 Ind Cas 521 (822) 1J16 Pun Re No 5 (1916) 1916 Oudh 313 (314) 19 Oudh Cas 166 (1916) 1916 Oudh 199 (202)

1918 Pnn Re

(1918) 1918 Lah 89 (89) No 31

(1921) 1921 Lah 351 (352)

(PC) Express agreement to pay post lien interest [See also (1932) 1932 Nag 39 (40 41) 25 Nug L R 1 Terms of deed pro viding interest and payment by instalments-No provision nor in dications as to interest after whole amount becomes 1 ayable-Presump

tion is plyment at reasonable rate

11 (18Jo) 17 4H 511 (517) 23 Ind App 100 (1933) 1933 Mad 171 (171) (1888) 10 11 85 (90) (1883) 11 All 416 (419) (1686) 8 411 486 (490)

Principle is of com pensation for breach of contract and not implied contract to pay post deem interest (1880) 2 All 617 (619)

(1876 77) 2 Cal 41 (44) (1876) 25 Suth W R 189 (190) (1890) 18 Mad 331 (331) (1923) 1923 Lah 632 (633, 684) 4 Lah 406 (Sce(1915) 1915 Lab 302 (309) 27 Ind

Cvs 616 (617) ] (1917) 1317 Pat 510 (511) (1922) 1922 Lah 254 (257) 3 Lah 200 (FB) (1866) 1866 Pun Re No 93 page 145

(1872 1892) L B R 570 12 (1656) 8 All 486 (489) (1933) 1933 Wad 171 (171) (1875 79) 1 All CO3 (CO7)

(16"8 80) 2 All 617 (619) (1 J22) 1922 Lah 254 (2J7) 3 Lah 200

13 (1895) 17 All 511 (517) 22 Ind App 199

(1915) 1915 Mad 1161 (1162) (1919) 1313 Mad 186 (186) 52 Ind Cas 313 (313) Lyen intention to pay 10st diers compound interest may be im

1 hed (1919) 1J19 Lah 279 (279) 1 Lah L Jour 116 (120) (1917) 1317 Cil 537 (541)

(1832) 1832 Pun Re No 28 page 113 Post diem interest is charge on property (1894) 4 Mad L Jour \_60 (\_63) (Do) (1J\_2) 1J22 O idh 122 (122) 25 Ondh Cis 36 (1993) 15 AH 88J (^52) 20 Ind App 116 C. P. C. 309 & 310

(PC) (1896) 8 AH 480 (489 490) (15,8 79) 3 Bom 131 (133) (1678 60) 2 411 617 (619) (1876 77) 2 Cd 41 (43 44) (1876) 25 Suth W R 189 (190) (1635) 18 Wrd 218 (cEaf) (LJ29) 19...J Lah Jaa (355) (1869) 11 Suth W R 68 (63) 1575) 14 Suth W R 4.0 (450)

(1871) 14 Suth W R 284 (285) (1871) 15 Suth W R 284 (285) (1876) 25 Suth W R 318 (318) (1872) 1872 Pun Re No 42 page 87 (1872) 1872 Pun Re No 73 page 265 (16J3) 6 C P L R 11 (12)

(1902) 1 162 Pun L R No 90 page 365

1. Interest Act of 1839 though there might be no agreement to pay such interest Such interest awarded either as damages, for under the Interest Act, for was held not to constitute a charge on the mortgaged property though a contrary view also was held in the undermonitioned cases. It was also held that post diem interest claimed as damages for breach of contract could be recovered only for the period prescribed by the Limitation Act for a suit for compensation for such breach, for and that a claim for such damages would fail unless the mortgage suit was brought within the period of limitation for a suit for damages for breach of the contract. But the Privy Council observed in the undermentioned case that the claim was a recurring one and so long as the principal itself was not barrod post diem interest could be recovered for the six years (or three years, as the case may be), preceding the suit on the mortgage.

Interest from institution of suit to the date fixed sinder the preliminary decree for the payment of the mortgage money.—The same rules which guided the Court with reference to interest accounting prior to the suit applied also till the date fixed under the decree for the payment of the mortgage money. Hence, where there was a stipulated rate of interest, the Court was held bound to decire interest at that rate till the date fixed for payment of the decretal amount, however high it might be, unless it was penal or was excessive and the transaction was substantially unfair? Where the period originally fixed for payment was extended by the

14 (1894) 21 Cal 274 (278) (1897) 24 Cal 699 (703) (F B) (1895) 18 Mad 388n (338n)

(1891) 18 All 830 (330) (1892) 19 Cal 19 (24) (1895) 18 Mad 257 (261) (1894) 1894 Pun Re No 114 page 437 (1805) 0 F LR 22 (28) 18 (1895) 17 All 581 (588 589) F B) 17 (1894) 21 Cal 274 (278) Post disem: interest awarded under Interest Act (1895) 18 Mad 248 (290)

awarded under Interest Act
(1805) 18 Mad 248 (250)
(1902) 1902 Pun Re No 95 page 427
(See also (1805) 17 All 511 (517)
(See also (1805) 17 All

19 Halsbury p 101, Marshfield v Hutchings! (1903) 1903 Pun L R No 33 There is no limitation to a mortgagee's claim for interest in a suit for redemption 21 (1927) 1927 PC 1 (2) 54 Ind App 1, 54 (1910) 5 Ind Cas 654 (656) (Cal) (1909) 4 Ind Cas 55 (67) (Cal) (1920) 1920 Cal 886 (888) GI Ind Cas 241 (241 242) Any other arrangement is inadmissible under S 02 of the Evi dence Act

dence Act (1906) 39 Mad 55 (67) (1897) 21 Mad 364 (865) (1911) 12 Ind Cas 18 (20) (Rang) (1928) 1028 Lah 90 (37) (1928) 1928 Lah 102 (192) (1927) 1927 Lah 435 (147) 8 Lah 721

reduced as being penal-Reduced in

annellate Court or etherwise, the contract rate of interest was payable till the O 3 extended period 22 Though the mertgagor paid into the Court the decretal amount before the date fixed in the decree for payment he was bound to pay interest for the entire period fixed 23

The words "principal amount found due or declared due on the moitgage" mean only the principal amount due under the mortgage without interest till date of suit Therefore, a mortgages is entitled to interest from the date of suit to the date fixed for payment at the contract rate only ou the principal amount due under the mortgage and not on the total amount due on the date of suit 232

Interest from date fixed in the decree for payment till realisation -The Court could decree interest even for the period subsequent to the date fixed for payment in the decree till realisation 24 The following cases which held to the contrary243 were obsolete even prior to the engetment of the piesent Rule

cacee s misconduct) [See also (1913) 18 Ind Cas 909 (911) 37 Bom 326, 40 Ind App 68 (P C) Interest after suit not provided for in decree must be deemed to have been refused [See 3150 (1900) 1900 Pun Re No 3

eince he did not ask for more (1922) 65 Ind Cas 700 (710) (Cat) During proceedings to set aside ex parts de

cree suit pending and interest at contract raie allowable (1931) 1931 Nag 161 (163 to 165) 27 Nag L R 312 Such interest is bound by the law of damdupat and S 34 is

1025) 1925 P C 280 (287) 52 Ind 1pp 418 5 Pat 135 (P C) Trial Court grant ing interest after suit on amount of personal decree and not on mort gage amount and directing taking of accounts-Successor has no power to award interest on morigage amount after suil The following cases holding that such

interest was not payable till date fixed for payment must be regarded as obsolete -(1925) 1925 Lom 862 (362)

(1909) 10 Cal L Jour 203 (207) 3 Ind Cas

(1886) 12 Cal 569 (579) (F B)

(1873 4) 12 Beng L R 451 (468 482) [See also (1899) 12 OP LR 78 (82) Court granting extension of time on condition of mortgagor paying inte-rest on decretal amount-Such interest does not form part of the mort-

gage money (1921) 1921 P C 100 (102) Where the Privy Council disallowed interest from de cree of trial Court till the Pray Council judgment, in view of the mortgagee's persistence in ascertaining an unwarrantable claim [Sce (1935) 1935 Oudh 263 (263)

Interest on costs can be awarded only from date of preliminary decreel (But see (1935) 1935 Pat 98 (98) Interest on principal amount from date of suit to date of decree is in the discretion of the Court - Tha

word used in this Rule is 'may ] 22 (1930) 1930 Pat 380 (352)

cretionary]

(1932) 1932 Outh 268 (269) (1932) 1932 Outh 268 (269) (1935) 1935 All 313 (314) (1937) 1937 P O 1 (2) 54 Ind App 1 54 Cal 161 (P C) Six months' period of redemption will be counted from the date of appellate decree where tha first Court's decree is varied (See however (1982) 1982 Pat 332 (384) After amendment of 1929, interest at bond rate till period of graca is dis

decree to be included in valuation

under S 110, C P Code]. (But see (1881) 7 Cal L Rep 206 (214)] (1881) 7 Cal L Rop 267 (208) These cases were decided prior to the Transfer of

Property 1ct and hence are obsolete 23a (1933) 1933 Oudh 128 (129) 8 Lucl 315 (1935) 1935 Oudh 263 (263)

24 (1906) 23 A11 223 (224) (P C)

(1901) 23 All 181 (193) 28 Ind App 35 (P C) [1899] 21 AH 361 (373) (F B) (1897) 24 Cal 766 (773)

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scheme of the Code being that after the date fixed in the decree for payment the relationship between the parties passed from the domain of contract into that of judgment the Court was not bound to award interest after such date at the con tract rate but might award such interest at any rate that it considers reason able 25 The undermentioned cases "5" which held that the Court was bound to award the contract rate till payment are not good law

Future interest after the date fixed for payment is to be paid on the aggregate of the principal interest and costs awarded by the decree 26 The pie sent Rule makes it clear that such future interest forms part of the mortgago money and is not a simple money claim "7 The proper stage for decreeing future interest is at the time of passing the final decree 28 Subsequent interest not mentioned in the final decree must be taken as refused .9 But an agreement between the parties for the payment of future interest may be given effect to though the final decree does not provide for it 30 When future interest is decreed it must be paid till the confirmation of the sale 31

Rule of Damdupet -See Note 16 to S 31

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      fused in certain circumstances
(1933) 1933 Oudh 123 (129) 8 Luck 315 With
      regard to luture interest Court has
      a discretion—Discretion exercised by
      trial Court will not be interfered
      with unless there are sufficient
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grounds (1935) 1935 Pat 98 (98) 14 Pat 400 (1904) 31 Cal 188 (141)

(1900) 23 Mad 637 (642) (1906) 29 Mad 170 (171) (1909) 3 Ind Cas 289 (200) (Cal)

(1911) 10 Ind Cas 695 (696 697) 7 Nag L R 14 Despite a provision to the con trary in the mortgage bond (1913) 18 Ind Cas 362 (363) (Mad)

(1915) 1915 Cal 679 (679) (1918) 1918 Cal 151 (153)

(1910) 1919 Mad 231 (232) 42 Mad 465

(1J22) 1922 Pat 886 (887) G Pat L Jour 676 (1925) 1920 Pat 455 (459)

(1900) 2 Bom L R 225 (227)

(1902) 6 Cal W N 769 (771)

(191a) 1915 Oudh 31 (42 43)

(1901) 34 Cal 150 (161) 34 Ind App 9 (P C) (1886) 12 Mad 485 (486) (1915) 1915 Lah 113 (114 115) 1915 Pnn Re

No 22

(1900) 3 Oudh Cas 130 (155) (1901) 5 Cal W N 653 (654)

(1918) 1918 Oudh 274 (224) (1913) 18 Ind Cas 535 (542) (Cal) Future

interest may even be refused (1932) 1932 Cal 689 (690 691) 59 Cal 722

(Do) (1914) 1914 Oudh 289 (290) [See (1907) 34 Cal 150 (161) 34 Ind

'PP ) (PC) Dite of realisation means date fixed by the decree for 1 33 mentl (See also (1935) 1935 Oudh 263 (265)

Interest subsequent to date fixed for payment is ordinarily calculated at 6 per cont]

251 (1901) 11 Mad L Jone 7 (9) (1911) 10 Ind Cas 846 (817) (Lah) (1903) 30 Cal 958 (900)

[Ses (1910) 5 Ind Cas 61 (62) (Cal)]

26 (1909) 3 Ind Cas 201 (300) (Cal) (1909) 3 Ind Cas 280 (290) (Cal) (1926) 1026 All 110 (120) (1923) 1923 Oudh 241 (241) 26 Oudh Cas

(1921) 1921 UB 5 (8) 4 UBR 1 Interest at 9 per cent allowed (1912) 16 Ind Cas 374 (375) (Cal) If there

wes a valid tender of the mortgage money interest thereon would cease though the appellate decres after wards enhanced the amount found

[See however (1932) 1932 Oudh 255 (263) Trial Court a discretion to award future interest on the princi pal sum alone not interfered with in appeal]

27 The contrary view in (1894) 16 All 269 (270)

is no longer good law

28 (1921) 1971 Pat 352 (352) 5 Pat L Jour 598 (1918) 1918 Cal 151 (153)

(1921) 1921 Pat 352 (352) 5 Pat L Jour 593 (1917) 1317 Pat 582 (583 584) Final decree

awarding future interest cannot be questioned in execution

29 (1921) 1921 Pat 352 (352) 5 Pat L Jour J3 [But seo (1891) 16 All 2 0 (273)] (1931) 1931 Oudh 47 (48) Preliminary de

cree providing for future interest-Mortgagee is entitled to such interest though final decree does not provide for 1t

30 (1912) 17 Ind Cas 986 (940) (Cal) (1901) 29 Bons 333 (897)

31 (1906) 33 Cal 846 (848) (1919) 1919 \11 253 (254) 41 111 526 (528)

# R. 12. [New; Act IV of 1882, S 96] Where any property of the sale of which is directed under this Order is subject to a prior property in the Court were with

So e of property wide subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.

[See S 73 Sub-S (1) Cl (b) ]

## Sunonsis.

	Note No		Note No
Transfer of Property Act S 96 Scope of the Rule	,1	Sale free from prior mortgage	5 mm
Sale of property subject to the	e prior	Where a prior mortgage is a usultuary one	4
mortgage	2	Sale by the Court subject to a char	ge 5

## Other Topics

Sale without express reservation of prior morigages slights-Effect | See Note 3 Pt (1a)

## 1 Transfer of Property Act S 96

The present Rule corresponds to the old S 96 of the Transfer of Property (to f 1882 which was repealed in 1993 Under the Transfer of Property (timendment) Act NX of 1929 a new S 96 has been inserted in the Transfer of Property Act which deals with a different subject

## la Scope of the Rule

Ŧ.

This Rule confers upon the Court the power of directing a sale free from the prior mortgage subject to two conditions namely, that the property must be one of which the sale is directed under this Older and there must be consent of the prior mortgage. When these conditions are satisfied, the Court has full power in its discretion to direct the sale free from the prior mortgage? The Rule does not require the consent of the plaintiff or of anybody cless besides that of the plaintiff decree holder. The Court can exercise the power under this Rule is not confined to the plaintiff decree holder. The Court can exercise the power under this Rule on the ripplication of anybody or even of its own motion?

# 2 Sale of property subject to prior mortgage

The explanation to O 34 R 1 makes it clear that the prior mortgagee is not a necessary party to a suit for a sale on puisno mortgage. Hence a puisno mortgagee can bring the mortgaged property to sale under his own decree subject to a prior mortgage. The contrary view, taken in the undermentioned cases

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Order 34 Rule 12~Note 1a
(1935) 1335 Vad 453 (454)
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<sup>1 (1935) 1330</sup> Nad 453 (451) 2 (1935) 1330 Nad 453 (454) 3 (1935) 1335 Mad 453 (454)

<sup>(</sup>See however (1335) 1935 Mad 660 (663) Decree holder alone has the

right to apply ]
Note 2

<sup>1 (1695) 22</sup> Cal 33 (46)

<sup>(1</sup>J34) 1934 VII 73 (75) Prior mortgageo not impleading subsequent mort gagee—Sale in execution—Purchaser made party to subsequent mort

gageos suit — He can claim under O 31 R 12 to sell property free from nucumbrance and that he should be paid in first instance or may redeem subsequent mortgage

<sup>(1896) 23</sup> Cal 795 (795) (1907) 29 All 205 (206)

<sup>[</sup>See also (135) 1935 Lah 218 (221)
Defeudant having pror and subsequent mortgage rights impleaded in suit in the capacity of subsequent mortgage—He can claim the benefit of this Rule in execution on the basis of his prior mortgage.

2, decided under the Transfer of Property Act, is obsolete 2

As to whether a person having two mortgages on the same property can sue on his puisne mortgage, reserving his rights under the first mortgage see Note 40 to S 11 He cannot, however, in any case, sell the property twice under his two mortgages 3 But if the prior mortgage is a usufructuary one and the mortgages is therefore unable to bring the property to sale under that mortgage, there is nothing to prevent his bringing the property to sale under his later simple mortgage subject to the prior usufructuary mortgage 4

#### 3 Sale free from prior mortgage,

The Rule clearly implies that without the prior mortgages s consent pro perty cannot be sold free of his mortgage in execution of a decree for sale on a subsequent mortgage 1 In the absence of such consent the sale under a decree on a puisne mortgage can only be subject to the prior mortgage though there may be no express reservation of the pilor mortgagees lights 12 Although the prior mortgagee may he joined as a party to the suit on the puisne mortgage, it is not incumbent on him to assert and prove his priority where his mortgage or his priority is not impugned (See Note 40 to S 11) The priority therefore cannot be lost merely because the prior mortgagee does not establish it in such a case? See also the undermontioned case 3

## 4 Where prior mortgage is a usufructuary one

(a) Sale free of prior mortgage - A usufructuary mortgagee as such, cannot sue for sale on his mortgage. There is therefore a conflict of opinion as to whether a prior usufructuary mortgageo with whose consent the property is sold under this Rule in execution of a decree on a puisne mortgage is entitled to share in the sale proceeds. The High Court of Madras has held that he can, on the ground that this Rule applies to all mortgages whether simple or usufructuary or whether the mortgages are in favour of the same person or different persons 1 The High Court of Allahahad, on the other hand has held that he cannot do so 2 It has, however held that, where a puisne mortgagee nedeems a prior usufructuary mortgagee he can bring the mortgaged projecty to sale for the amounts due under both the mostgrees 8

(b) Sale subject to prior mortgage -As to sale of mortgaged property subject to a prior usufructuary mortgago see Note 2 supra

## 5 Sale by the Court subject to a charge

A statement in a certificate of sale that the sale is subject to a charge is not conclusive against the purchaser when it is sought to enforce the charge by a suit 1

2 (1831) 13 All 432 (439 453) (1900) 22 All 212 (214)	[See (1908) 31 Vad 425 (429) No implication that puisne mortgagee
3 (1898) 20 A11 322 (324 325)	not required to redeem when prior
4 (1908) 31 Mad 530 (530 531)	mortgagee is a party ]
(1916) 1916 Int 113 (114) 2 Pat L Jour	(1929) 1929 Oudh 463 (466) 4 Luck 250
118	But if the priority is attacked the
Note 3	1 rior mort gages who has been made
1 (1000) 1020 P.C. 81 (83) 47 Cal 662 47	a jarty must establish it

1 (1920) 1920 P C 81 (83) 47 Cal 662 47

3 (1592) 14 11 500 (511 512) I rior mortgagee appropriating portion of sale pro ceeds is estor ped from alleging want of con ent Note 4 11 (1906) 29 Mad 84 (86) 1 (1907) 30 Mad 408 (410)

2 (1920) 1920 P C Si (S3) 47 Cal 662 47 Ind App 11 (P C) (10°0) 1330 Lah 1063 (1063) I rior mort gagee a assignee (1915) 1315 Cal 570 (571)

2 (1904) 26 All 14 (17 18) 3 (1901) 26 All 14 (17 18) 1 (1893) 16 Mad 207 (213) Ì.

A person who solls property subject to an encumbrance which has been recognized O by the Court cannot clum a resalo on the ground that the encumbrance has been found to be void <sup>3</sup> Mortgages noted in the proclamation of sale as claimed upon the property sold should not necessarily be entered in the certificate of sale or be computed as part of the purchase money, unless the existence of the mortgage bas been either admitted by the parties or established by a decree or declared under O. 21, R. 62. <sup>3</sup> When a sale is subject to occumbrances, the vendor is no longer hable for their satisfaction nor is he entitled to any benefit that the vendee might obtain therefrom <sup>4</sup>

R. 13. [New; Act IV of 1882, S 97] (1) O.

Such proceeds shall be brought into Court and applied as follows:—

first, in payment of all expenses incident to the sale or properly incurred in any attempted sale;

secondly, in payment of whatever is due to the prior mortgages on account of the prior mortgage, and of costs, properly incurred in connection therewith;

thirdly, in payment of all interest due on account of the

mortuage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made; fourtilly, in nament of the mining! moved the on ac-

fourthly, in payment of the principal money due on account of that mortgage; and

lastly, the residuc (if any) shall be paid to the person proving himself to be interested in the property sold, or if there are more such persons than one, then to such persons according to their respecture interests therein or upon their joint receipt.

(2) Nothing in this Rule or in R. 12 shall be deemed to affect the powers conferred by S. 57 of the Transfer of Property Act. 1882.

[Cf. S 73, sub-s. (1), Cl. (c).]

Synopsis

Transfer of Property Act S 97 1 2 gagee " Sagee " Person proving himself to be interested in the property sold" 4

## Other Topics

Prior mortgage being usufructuary See R 12, Note 4

Rights of persons having two or more mortgages Sco Note 4, Pt (4)
Subsequent mortgages at time tarred rights
not enforceable See Note 4, Pt (3)

I Transfer of Property Act, S 97.

The present Rule corresponds to S 97 of the Transfer of Property Act.

<sup>2 (1699) 23</sup> Bom 750 (700, 761) Semble — He may suo for declaration 203 . 31 All 583 (P C) 3 (1894) 18 Bom 175 (176, 177)

## 2 Application of proceeds

Compare S 73, ante R 13 in terms applies only when the sale is ordered under R 12, i.e., when the sale is free of the prior mortgage. But the principle of the Rule applies to other cases also. Hence, even in sales subject to a prior mortgage, the proceeds should first be applied towards the interest and costs of the mortgage under which the sale is held and then only towards the principal. This Rule is intended to regulate the position as botween the mortgager and the mortgage. It does not apply to a case of suctishin 1 is

Where a sale is held in enforcement of a prior mortgage, a puisne mostgages receiving an amount from out of the surplus sale proceeds by sixtue of his security is bound to apply them only in satisfaction of his mortgage debt though the mostgager may have paid the money towards other debts.

## 3 Whatever is due to the prior mortgagee"

Each of the prior encumbrancers is entitled to interest at the contract rate up to the date of the confirmation of the sale, that being the earliest date when the mones really becomes available for distribution.

## 4 ' Person proving himself to be interested in the property sold"

This expression includes a subsequent encumbrancer, but not if the existence or validity of the subsequent encumbrance is challenged by the moitagage? A subsequent mortgage who has obtained a decree on his mortgage but has allowed it to become time barred is not a person interested in the property sold? It was held in the case cited below that the holder of two successive moitages on the same property, who failed to include the second mortgage in his suit on the first mortgage ould claim the surplus sale proceeds under this Rule is a puisse opcumbrance; That position, will, it is conceived, be different in cases governed by S 67 A of the Tiansfer of Property Act which has been nowly introduced by Act XX of 1929 A mere unsecured creditor is not a prison "interested in the property sold" But after the subsequent encumbrances are satisfied, he can proceed against the balance, if any, payable to the moit-factor."

R. 14. [New; Act IV of 1882, S. 991] (1) Where a morting and property of money in satisfaction of a claim arising mortgaged property to make the mortgage, he shall not be entitled to thing the mortage of property to the property to sale otherwise.

sale bring the mortgaged properly to sale otherwise than by instituting a suit for sale in entercement of the mortgage, and he may institute such suit notwithstanding anything

contained in Order II, R. 2.13

Order 34 Rule 13—Note 2 1 (1913) 21 Ind Cas 691 (693) (Mad)

<sup>(1931) 1931</sup> Rung 153 (157, 158) 9 Rang 186 (1932) 1932 Mad 155 (156 157) 55 Mad 332

<sup>(1935) 1935</sup> Lah 331 (335) Contract by surely for payment of interest. Rule does not apply as claim for interest due by surely is claim aprit from claim upon morifgage and is so particle cause of action. Sale proceeds cunnot therefore to deemed to have

been appropriated towards interest. 2 (1903) 30 Cal 953 (953, 959) Note 3

<sup>1 (1910) 8</sup> Ind Cas 4 (6) (Cal)

Note 4 1 (1926) 1926 Mad 101 (105)

<sup>(1894) 18</sup> Lom 684 (658)

# Synopsis

I.

lf	Transfer of Property Act S 99 Scope and object of the Rule Applicability of the Rule to the enforcement of a charge	No 1 2 3		(b) Attachment of the property is not prohibited (c) Transferce of money decree	9 9
۲۷ ۷	Applicability of the Rule to the enforcement of security bonds Mortgagee meaning of under	4		from mortgagee if bound by the restrictions against the mortgagee	fO
۸ŧ	this Rule  Decree for the payment of money in satisfaction of a claim	5	IX	Otherwise than by instituting a suit Sale of mortgaged property for	f f
Vſſ	arising under the mortgage Effect of sale in contravention of	6		claim unconnected with the mortgage	12
	the Rule (a) Position of jurchs er at such sale See Note 7 sugra	7 8	X XI XII	Order 2 Rule 2 Consent decree Decree	13 14 f5

## Other Tonics

Applicability niv if mortgage i enforceable. See Note 6 I t. (3) valid and

Applicability to Revenue Courts See Note 2 Pt (6) Inapplicability to a mortgage created by the

decree itself and not existing prior there to See Note 6 Pt (2)

Inapplicability to judicial sales before Trans-fer of Property Act See Note ? Pt (5)

Mortgagee himself purchasing contrary to this

Rule - Effect See Note 7 Pts (8) and (9) Purchase in a sale in enforcement of money decrees of third persons See Note 12,

Pts (3) and (4) Sale under Public Demands Recovery Act-What passes See Note 11 F N (1)

Sales prior to Transfer of Property Act—What interest passed See Note 7, Pt (12) Sub R (2) See Note 2 Pts (4) and (5)

## 1 Transfer of Property Act S 99

This Rule corresponds to S 99 of the Transfer of Property Act with this difference 114 -that while S 99 applied even to cases in which the mortgages had obtained a money decree on a claim unconnected with the mortgage, R 14 is expressly confined to eases where a money deeree has been obtained on a claim urising under the mortgage See Note 11 below

## 2 Scope and object of the Rule

As has been seen in Noto 19 to R 5, ante a sale in execution of a decree on a mortgane passes the interests of both the mortgagor and the mortganes, while a sale in execution of a money decree conveys only the interest of the mortganor, namely the equity of redemption. The object of the present Rule is to prevent the mort, ages from bringing to sale the bare equity of redemption in execution of a money decree which he may obtain in respect of a claim arising under the mortgage. Thus where a mortgagee obtained a simple money decree for the interest that has accrued due on the mortgage or obtains a money decree for the mortgage debt under S 68 of the Transfer of Property Act, he cannot attach and sell the mortgaged properties in execution of the said decree though he can proceed against the person or other properties of the mortagor. If he wants to proceed against the mortgaged properties he is bound to bring a suit for sale again, and such a suit will not be barred by the provisions of O 2 R 2

The reason of the Rule is the avoidance of several evils which are likely to result if a mortgagee is allowed to bring the mortgaged properties to sale in

execution of a money decree which be has obtained on a claim arising under the mortgage 1 Such a sale would deprive the mortgager summarily of the right of redemption without giving him any of the facilities which an ordinary suit for sale ensures Being sphiect to the unascertained claim of the mort gagee, the property would not fetch a fair value at the sale and the mortgagee would be enabled to purchase it at an unduly low price. If a stranger pur chased it at the sale without notice of the mortgage he would be subjected to great hardship unless the mortgagee could he held to be estopped from asserting his rights under the mortgage against such a purchaser 2

The Rule is retrospective in effect being a rule of procedure and applies to decrees passed even prior to its coming into force 3

The Rule does not apply to the Punjah, the Transfer of Property Act not having been extended thereto See Sub R 2 See also the undermentioned cases

Under S 99 of the Transfer of Property Act, it was held that it applied to Civil Courts and Revenue Courts It was also held that the Section applied to mortgages created before the Transfer of Property Act,7 but not to judicial sales held and perfected before the date of the Act 8

The Rulo prevents only a sale of the mortgaged property under a money decree in respect of a claim arising under the mortgage. It does not prevent the attachment of the mortgaged property under such a decree See Note 8, infraSee also the undermentioned case 9

3 Applicability of the Rule to enforcement of a charge

By force of R 15 infra, this Rule applies to charges as well as to mortgages 1 It applies however only to a charge which exists prior to the decree for money and not one which is created for the first time by the decree as in the latter case the decree cannot be eard to be obtained in satisfaction of a claim arising under the mortgage (See Note 6 anfra) In such a case, therefore, the charge can be

(1929) 1929 Pat 439 (440) Rule does not apply to Sonthal Pargannas as the

2 (1911) 9 Ind Cas 1034 (1036 1037) (Cal)

(1919) 1919 Lab 439 (439) 1918 Pnn Re No 88 In view of Snb R (1) even the principle of R 14 does not apply in Punjab (See also (1931) 1931 Lah 834 (485) 13 Lah 143 Decree for sale not a ne ceasary preliminary to sale of equity of redemption]
5 (1911) 11 Ind Cas 192 (195) 5 Sind L R 71
1 rior to extension of Transfer of

did not apply to Sind

I roperty Act to Sind in 1915 R 14

Regis ing sale of mortgaged property does not militate against R 14 Note 3

1 (1899) 12 C P L R 26 (27) (1805) 1 Nag L R 117 (113) (1895) 22 Ca1 659 (863) (1920) 1920 Mad 183 (186) 43 Mad 786 (1920) 1920 Pat 521 (522) 5 Pat L Jour 248 Mortgagee scharge on mortgaged property for Government revenue paid by him (1918) 1918 Cal 705 (706 707) [See (1915) 1915 All 3 (4) Flag

of Pragwals at confluence of Ganges and Jumna can be subject of a charge for the jayment of an annuity out of the contributions of prigrims]

enforced in execution without any fresh suit for sale being filed 2

Thus where in a suit for maintenance by a Hindu widow the maintenance decreed is made a charge on certain property the widow can enferce the charge by applying for sale of the property in execution and cannot be compelled to file a suit for sale 3

#### 4 Applicability of the Rule to the enforcement of security bends

Under S 145 of the Code the hability of a surety for a judgment debtor can be enforced summarily in execution proceedings in so far as the surety has made him-elf personally hable. But, suppose besides making himself personally liable he mortgages some property as security, can the property be sold in execu tion without a suit for sale? On this question there is a conflict of decisions It has been held by the High Courts of Allahabad, 1 Bombay 2 Madras and Patna that this Rule does not apply to such a case as there is no decree for money against the surety within the meaning of the Rule But the High Court of Calcutta has held that the Rule applies and is an absolute bar to the sale of the mortgaged property without a regular suit for salo

Where the security bend is given to the Court and not to any named person. there is no mortgage, the Court not being a juridical person and the moper procedure to enforce the eccurity is by a summary order for the sale of the property covered by the bend, unless the surety pays the amount of security within a

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2 (1919) 1919 Bom 56 (57 99) 43 Bom 631
   (1934) 1934 All 524 (524)
  (1934) 1934 Bom 241 (242)
(1934) 1934 Cal 327 (327) 60 Cal 1467
Money decree creating charge
           Separate suit to enforce charge is not
           muntainable in view of S 47-This
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Charge created on certain properties -Decree can be executed by sale of charged properties without suit under

(1933) 1933 Pat 306 (401) Decree creating charge for future maintenance can be

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(1901) 24 Mad 689 (694)
(1892) 19 Cal 139 (146) (F B)
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(1926) 1926 Pat 31 (31 32) 4 Pat 693 (But see (1895) 22 Cul 903 (909)]

(1907) 17 Mad L Jour 217 Cases decided under Transfer of 1 reperty Act S 90 (See also (1899) 20 Cal 441 (448) To avoid difficulty in executing decree for maintenance the better course would be to appoint a Receiver with power to sell in case of default by the judgment debtor]

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Note 4
1 (1895) 17 All 90 (101 102)
  (1878 SO) 2 All GO1 (607)
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(1916) 1916 All 57 (59 60) 38 All 327 2 (1888) 12 Bom 411 (414)

[See also (1926) 1926 Bom 219 (280) 50 Bom 339 Where decree holder gives up the mortgage he can enforce the personal liability by attaching and selling the property)

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3 (1890) 13 Mad 1 (3 4)
        (1976) 1926 Mad 194 (196 19"
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4 (1917) 1917 Pat 596 (596) 2 Pat L Jour 197 [Sec (1917) 1917 Pat 489 (483)] [See however (1916) 1916 Pat 61 (62) 37 1nd Cas 397 (398 399) Com promise in money suit-Referring to mortgage already executed - Pro

perty cannot be sold otherwise than b) suit for sale]
5 (1905) 32 Cal 494 (496)
(1915) 1915 Cal 533 (533)

(1895) 22 Cal % (28) (1888) 15 Cal 497 (50°)

[Rut see (1913) 18 Ind Cas 900 (904) (Cal) Case under S 99 Transfer of Property Act-In view of its peculiar facts held S 99 did not apply]

this question (1925) 1925 Mad 1101 (1103) (1925) 1928 Lah 209 (212)

(1937) 1932 All 439 (440) Compromise charg ing projecty for payment - Sub sequent decree on compromise -Charge held to be prior to decree-

Obster 3 (1972) 1927 Cul 35 (37)

(1916) 1916 Pat 252 (254) 2 Pat L Jour 55 (1916) 1918 Mad 669 (668) (1919) 1919 Mad 894 (856)

specified date <sup>6</sup>

Mortgagee meaning of, under this Rule

Mortgagee includes the holder of a charge See Note 3, supra

Decree for the payment of money in satisfaction of a claim arising under the mortgage

S 99 of the Transfer of Property Act applied though the claim on which the money decree was obtained was totally unconnected with the mortgage. The present Rule applies only to cases in which a money decree is obtained on a claim arising under the mortgage 1 (For further information on this aspect of the subject see Note 11, infia)

It follows from the language of the Rule that the mortgage should be one existing pilor to the decree and not one created by the decree itself (See Note 3, supra) The Rule also pre supposes that the mortgage is rated and enforceable at the time of the passing of the money decree If the mortgage is invalid or has become unenforceable through the efflux of time or any other reason, the Rule does not apply and is no bar to the sale of the property under the money decree \$

7 Effect of sale in contravention of the Rule

A sale in contravention of the Rule can be presented by objection being taken at any time before the sale takes place 1 But if it does actually take place, it is not void but is only voidable at the instance of the mortgagor or of any other person having an interest in the equity of redemption 2 The contrary view held 6 (1919) 1913 P C 55 (59) 22 Oudh Uns 212 42

All 158 46 Ind App 228 (PC) (189a) 17 All 99 (101)

(1 103) 30 Cal 1060 (1063 1063)

(1920) 1996 Cal 889 (892) (8so (18J9) 26 Cal 246 (249) Security bond given to Registrir was held to const tuis mortgage and require the formalities of a mortgage]

Note 6

1 (1916) 1916 Pat 252 (203) 2 Pat L Jour 55 2 (1929) 1929 Pat 439 (440) (1934) 1934 411 594 (524) As per decree le

fendant executing security bond for due payment by instalments-On failure decree holder applying for sale in execution-Rule does not

apply (1934) 1934 Boin 241 (242)

(1330) 1330 Nag 123 (130) Charge created in decree on specified properties for payment of decretal amount Decree can be excented and charged property can be sold-No separata buit is necessary

(1926) 1920 Mad 194 (136 197) (1916) 1916 Pat 252 (253) 2 Pat L Jour 50

(1922) 1922 (31 35 (37)

(1909) 4 Ind Cas 606 (60s) 3 Sind L R 120 Even under S 99 Transfer of Pro perty 1ct same was the rule] 3 (1921) 1921 Mad 477 (478)

(1930) 1335 \11 507 (503) Sust on mort gage of joint family property exe cuted by father-Morigage found to be invalid to certain extent and sumple money decree for such

amount passed against lather-Cre

ditor can attach and sell mortgaged property in execution of simple

money decres (1920) 1920 All 165 (105) 42 Ml 566 (1917) 1317 All 470 (473) 89 All 86 (1922) 1929 All 560 (581)

(1921) 1921 All 131 (133) 49 All 67, (1929) 1979 Nots 12 (d) 115 Ind Cas 820 (Mad) In this case the principle was

applied to a case where the mort

80)

not 2101 the DrB

cedent had not been fulfilled (1930) 1930 Mrd 138 (141) 53 Mrd G.O [Sust on mortgage-Finding that the mortgagor had no title to the property at the time of the mort gage-Voney decree lassed-Judg ment debtor subsequently acquiring interest in the property by inheri tince-Held that the decree holder

could sell the property Note 7 1 (1906) 8 Lom L R 576 (577) (1307) 4 ML L J 767 (769) (1905) 2 ML L J 356 (357)

(1915) 1918 Cal 70a (\*06) 41 I C 73 (46) 45 Cal 530 2 (1917) 1317 Pat 608 (609 611) 2 Pit L

Jour 597 (1920) 1920 Cal 363 (366) 47 Cal 377 (1905) 8 Ondh Cas 327 (331) (1910) 6 1md Cas 47 (49) (Cal)

in the undermentioned eises cannot be considered to be good law. The proper C remedy to set uside a sale held in contravention of the Rule is by an application under S 47 of the Code and not by a separate suit. The application should be made before the confirmation of the sale. After the sale has been confirmed at cannot be set uside unless owing to fraud or other reasons the mortgagor was kept in ignorance of the sile proceedings prior to the sale." Where the sale is held after due notice to the judgment debtor he eagnot subsequently question its salidity 6

Once the sale is confirmed the purchaser gets a good title to the property and is not liable to be redeemed subsequently by the mertgreen 7. The fact that the mortgages himself has purchased the property with the leave of the Court makes no difference. In the undermentioned eases, however, it was held that if the mortgages lumself is the purchaser the mortgagor's right of redemption is not affected 9 It is submitted that the latter view is not correct for two reasons -

- (1) S 60 of the Transfer of Property Act accognises the possibility of the extinguishment of the equity of redemption by its becoming vested in the mortgagee and
- (2) a decree holder who buys with the leve of the Court is in the same position as any other purchases

sale proceedings and therefore such persons can object to the sale by a separate suit

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(See cases cited in Foot note 8 supra and also O 21, R 72)
        S 47 and O 21 R 92 do not apply to persons who are not parties to the
even subsequent to its confirmation 10
        A sale of the mortgaged property in execution of a money decree is subject
   (1904) 30 Mad 313 (315)
(1907) 90 Mad 362 (365)
(1899) 22 Mad 347 (348)
                                                                                                   802
   (1,0%) 30 Cal 61 (GG) (F B)
   (190a) 32 Cal 236 (316) 32 Ind App 23 (PC)
                                                                                                   96.
                                                              1097) (Mad)
                                                     8 (1916) 1916 Lah 196 (198) 1916 Lun Re
          7420
 3 (1859) 12 Mad 32 , (929)
                                                               No 18
    (1899) 22 Mad 241 (245)
                                                        (1923) 1923 Cal 121 (126)
                                                        (1926) 1920 Lah 490 (491 499)
    (1831) 14 Mad 74 ( G)
    (1993) 16 Wad 436 (49 )
                                                        (1907) 30 Mad 362 (366)
                                                        (1905) 1908 All W V 48 (48) Purchase by
    (1906) 33 Cal 113 (115)
    (1906) 33 Cal 293 (296)
                                                              assignee of mortgagee
   (1903) 30 Cal 4: 3 (4Ga 466)
(1839) 26 Cal 164 (166)
                                                        (1889) 16 Cal 682 (692) 16 Ind \pp 107
                                                              (P C)
   (1019) 1019 Cal 1009 (1009)
                                                        (1892) 19 Cs1 4 (7)
 4 (190 ) 30 Mad 313 (315) Though the pro-
perty may have been bought by a
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<sup>(1907) 4</sup> All L J 787 (789)

SCH

to the encumbrances covering the property at the time inasmuch as only the mortgagor's interest passes at such a sale 11 (Compare the under mentioned cases 12 decided prior to the Transfer of Property Act in which it was held that the mortgagee s interest also passed at such a sale )

But a mortgagee decree holder who while bringing the mortgaged property to sale under a money decree fails to disclose his mortgage is estopped from asser ting his rights under the mortgage against an innocent auction purchaser 13

An application for sale made in contravention of R 14 is not one in accordance with the law within the meaning of Art 182 of the Limitation Act 14

8 Position of purchaser at such sale - See Note 7 supra

## 9 Attachment of the property is not prohibited

The Rule prohibits only the sale of the mortgaged property under a money decree for the mortgage debt The Rulo does not preclude the mere attachment of the property in execution of such a decree 1

10 Transferce of money decree from mortgages of bound by the restrictions against the mortgagee

Under S 49 of the Code a transferred of a decree in respect of a claim arising under the mortgage holds it subject to the equities which the judgment debtor might have enforced against the decree holder Hence the transferee of a money decree obtained by the mortgagee is bound by the restrictions imposed by this Rule against the mortgagee 1

The transferoe of a money decree not in respect of the mortgage obtained by the mortgagee against his mortgagor is not barred, under this Rule from selling the judgment debtor's causty of redemption 2 Sec Note 11, infra

## Otherwise than by instituting a suit

As has been seen in Note 2 ante the effect of this Rule is that where a mortgagee has obtained a simple money decree on his mortgage he cannot bring the mortgaged proporty to sale in execution of such decree but must file a separate suit for sale in onforcement of the mortgage and such a suit would not be barred despite the provisions of O 2 R 21 A decree in a suit on the mortgage bond which does not provide for the sale of the mortgaged property is only a simple money decree though it may declare the existence of a lien on the property covered

- 11 (1901) 14 C P L R 17 (90) (1862) 4 Mad 1 (37 38) (1875 78) 1 All 240 (242 243)
- 12 (1879 80) 4 Bom 57 (63) (1881) 7 Cal 677 (680 681) (18°6 78) 1 Cal 338 (353) (1875) 23 Suth W R 187 (192) (1878 SO) 2 Mad 108 (112)
- 13 (1906) 2 Nag L R 106 (109)
- 14 (1800) 12 \11 61 (66)

(1905) 32 Cal 494 (497)

[See (1895) 22 Cal 813 (816)] 2 (1904) 27 All 450 (451 452)

Note 11

1 (1931) 1931 All 65 (68) 52 All 964 (1930) 1935 Lah 672 (675) 16 Lah 6.0 (1897) 1 Cal W N 80 (91) Landlord taking

(1887) 10 Mad 129 (130 131) Decree for arrears of interest-Mortgaged pro perty cannot be sold without suit for sale]

(1898) 2 Col W N 320 (321) (1902) 29 Cal 537 (512) Sen ble -Attach ment and sale under Bengal Public Demands Recovery tot (3 of 1913) does not confer on the jurchaser the teorigages interest of the Gov

(1008) 31 \( ad 33 (34)

by the bond 2 On the other hand, a decree on a mortgage hond which, though O not drawn up in the form prescribed for a decree for sale, yet provides for the sale of the property in case of default by the mortgagor is not a simple money decree and R 14 is no har to the sale of the mortgaged property in execution thereof 3

The Rule applies also to usufructuary mortgages. When the mortgagee has obtained a money decree for the mortgage amount in such a case, he cannot bring the meitgiged property to sale in execution of the decree. He must bring a suit for sale for that purpose He can bring such a suit though, if he had not obtained a money decree for the mortgage amount, he could not have done so on account of the mortgane being a usufructuary one

Where a mortgageo has given up all his rights under the mortgage, the Rule is no har to the sale of the mortgaged property in execution of a money decree for the mortgage debt 5 (See Note 6, supra. foot note 3)

It has been held by the Calcutta High Court that the Rule does not apply to a suit for contribution brought by a co mortgagor who has redeemed the entire mortgage and claims a charge on the shares of the other co sharers for the proportionate amounts due by them The reason given is that such a suit is not mere suit for money but a development of the suit on the mortgage 8

Under O 33 R 13 and S 47 the charge which the Government bas on the subject matter of the suit for the Court fee payable in cases where the plaintiff has been allowed to suo as a pauper is onforceable by proceedings in execution and not by separate suit 7

12 Sale of mortgaged property for claim unconnected with the mortgage

S 99 of the Transfer of Property Act, probabited a sale of the mortgaged property in execution of a money decree obtained by the mortgagee although the decree was upon a claim unconnected with the mortgage 1 The present Rule applies only if the decree for money is in satisfaction of a claim arising under the

Such interest can pass only to a purchaser of sale under a decree under S G7 of the Transfer of Property Act (See (18J2) 2 Mad L Jonr 188 (190) Holder of two mortgages on same property-Rule is no bar to sale of property in execution of decree on second mortgage subject to the first mor carel (18.2)

(See also (1931) 1931 AH 350 (351)

Rang 792 Morigages s rights are not extinguished even though in a snit ave up

page indicate that in their opinion the principle of S 99 need not be 4. mortgage and not to a decree on a claim unconnected with the mortgage? A fortion there is no har to the sale of the mortgaged property in execution of a money decree obtained by a third person or to the mortgagee purchasing the property at such a sale? In en S 99 of the Transfer of Property Act was no bar to such a sale or purchase?

The following are cases showing what are and what are not "claims arising under the mortgage" —

- (1) Where a usufructuary mortginee grants a lease of the property to the mortgagor, a claim for rent accoung under the lease is not a claim arising under the mortgago, under the lease formed part of the
  - mottage transaction. (2) Where a mortgage holds two distinct mortgages on two different properties of the sume mortgagor, he can bring to sile one of the properties in execution of a monoy decree which he has obtained on the mortgage of the other property?
  - (3) A claim for costs awarded to a usufructuary mortgageo in a suit for possession against the mortgager is not a claim arising under the mortgage but one arising by virtue of the decree made by the Court in the suit for possession.
  - (4) Subsequent to a usufructuary mortgage of the right to receive certain offerings at a temple, the parties agreed between themselves that the mortgager should pay to the mortgage a certain sum of mocey annually in heu of the offerings a decree was thee obtained by the mortgage, on the hasis of this agreement, for the aircais of the annual payments, and it was held that the annual payments formed an essential pirt of the mortgage money and that hence the decree came within the mischef of R 14.9
    - (5) A mortgagee who has obtained a mortgage decree, as well as a money decree on an independent claim, can sell the property for the consolidated sum and realise, from the sale proceeds, the amount of a decree he has for the mortgage dobt. 19

applied to claims unconnected with

(1894) 16 Åll 415 (116, 417) 2 (1913) 20 Ind Cas 523 (525) 7 Sind L R 11 (1915) 1915 Cal 427 (427) 42 Cal 780 (1916) 1916 Lah 196 (198) 1916 Pun Re No 18

1900) 7 Bom L R 816 (818) Trinsteree of

. . . . .

(1905) 7 Bom L R 816 (818) Transferes of money bond from mortgages was not subject to the restrictions imposed by 2 00 411 399 As the claim cannot be said to be unconnected with the most-gage the claim arises under the

(1925) 1925 Mad 127 (128) (1927) 1927 Ct 1884 (885) 55 Ct 1 104 7 (1925) 1925 Bom 293 (210) 49 Bom 208 (See however (1909) 4 Ind Cas 1126 (1125) (Mad) S 99, T P tct, applied to casts where there is, more than

purchase equity of redemplion by agreements subsequent to and independent of, the original mortgage

.

#### 13 Order 2. Rule 2

This Rule expressly provides that O 2 R 2 shall not be a bar to a second suit for sale on a mortgine when the mortgage has merely obtained a money decree on his mortgage, under which he cannot bring the mortgaged property to sale by virtue of this Rule 1 There was a conflict of decisions on this question prior to the Transfer of Property let See the undermentioned cases 3

Even after the execution of the decree for money has become time barred the most, uses can suc for sale under this Rule 3

If however the prior decree was a decree moviding for sale of the mort cased property though not strictly drawn up in the form prescribed for a decree for sale, this Rule does not apply and a second suit for sale is barred by res judicata ' (See Note 11, supra foot notes 2 and 3) Similarly if the mortgagee sues for sale hut is content to take only a simple money decree he cannot subse quently sue main for sale Such a suit will also be barred by res judicata. Tho exemption in this Rule is only from O 2, R 2 and not from S 11 "

Further this Rule icheves the mortganee only from the restrictions imposed by O 2 R 2 on the splitting of remedies The restriction as to splitting of claims is not affected by it 6 Thus a suit for interest alone brought at a time when the principal ils; hid become lue is a bir to a subsequent suit for the principal

#### 14 Consent decree

This Rule does not apply to cases in which a decree for money is passed acquest the mortingor by consent. The rogson is that the bonefit under the Rule is intialed only for the mortgagor and so he can mane it by consenting to a money decree being passed for the mort-age imponnt 1

#### 15 Decree

An order directing a surety for a judgment debtor to pay the imount secured is not a decree for the payment of money within the meaning of this Rule, and hence the Rule does not preclude the sile of the property covered by the (1922) 1922 Bom 237 (237) 46 Fom 848

(1 10) 1 In | Cap 162 (163) 31 All 114

#### Note 13

1 (1JQ4) 7 Oudh C+> 314 (317) (1334) 1934 Cal 73 ("6) GO Cal 11 1, (1530) 3 C P L R 170 (172) (1 ) 1) 1021 Mal 183 (191) 44 Mad 301

> ) Stut n the jersonal covenant on the mortgage-bub-equent suit on the county itself not birred [But see (1 193) 1933 Bom 51 (at 5a) Charge on moveables-Per on il de cied ilone got-O 2 R 2 birs sibe ment suit to enforce the chinge since O 34 applies only to immove illes-Bit pleas and rights in de fence are not harred ]

2 (1551) 3 411 297 (302 303) (1851) 7 Cil (8 (81)

(1683) J Cal 651 (155) (1878 60) 2 311 593 (887) (1891) 7 Cal (11 (716) (1 11) 3 Cal 361, Over

ruled 3 (1581) ) 411 23 (25 26)

4 (1937) 21 Cul 173 (468) C. P C 311 & 312 (1909) 31 411 19 (20)
 (1306) 33 Cal 843 (852)

(1 L3) 1333 Rang 153 (159 160) Plaintiff can have the same properties to tuched and sold in execution—This Rule is no bir as there is no existing mortgage on account of the fact that the relief is to sale is refu ed in the first suit

6 (1,01) 2, Bom 161 (108)

7 (1,309) 2 Ind C 15 265 (200) (Cal) (See (1930) 1930 Lah 148 (143) In terest alone can be claused where the principal has not become due]

#### Note 14

1 (1.110) . Ind Cas 419 (420) 32 All 377 ( >0) (1935) 1935 Nag 199 (180) (1901) 31 Cil 922 (921)

(1321) 1374 Cal 645 (646)

(19.2) 1312 Cal 35 (38) (1911) J Ind Cas 933 (939) (Mad). (But see (1932) 1933 All 439 (440)

Sunt on 1 ro note-Compromise decree charging properties specified-Com ron me silent as to mode of enforcement-Held this Rule applies, j

5

Note No.

security bond, by proceedings in execution without a suit for sale being filed 1 (See Note 4, supra) Although a decree providing for the sale of the equity of redemption for arrears of interest due under the mortgago is contrary to the provisions of S 99 of the Transfer of Property Act it cannot be objected to in execution 2 (See Note 7, supra)

[New] All the provisions contained in this Order which apply to a simple mortgage shall, so far Mortgages by the as may be, apply to a mortgage by deposit of deposit of title deeds title-deeds" within the meaning of Section 58, and charges and to a charge3 within the meaning of

Section 100 of the Transfer of Property Act, 1882

[Cf, S 96 of Act IV of 1882]

## Local Amendment

OUDH

Read the present R 15 as R 15 (1) and add as sub rule (2) the following -Where a decree ordere payment of money and charges it on immoveable property on default of payment the amount can be realised by sale of that property in execution of that very decree

(e) Invalid most same

# Synopsis Note No.

ıi m	Scape of the Rulo Charge of the Rulo Charge of the Rulo (a) Greation of charge by operation (b) Greation of charge by act of patties (c) Charge under Rent Act (d) Priority between rent decree and mortgage decree	2 3 4 5 6 7	charge (f) Right of maintonance (g) Claim for dower (y) Mortgoge by deposit of title deeds V Charges enforcashlo by sele VI Charge on the surplus sale proceeds of sale for arrears of revenue or rent	9 10- 12- 12-	
Parties Company of the Company of th					

Other Topics

Chargo distinguished from mortgage Seo Decreo for chargo final by itself-No fresh final decree needed See Noto 2 Pt (2) Note 3 Pts (1) and (2)

1 Amendments after 1908

I Amendment after 1908

The Rule has been substituted for old R 15 by the Transfer of Property Act (Amendment Supplementary) Act WI of 1929 The main changes effected in the Rule are

for the words as to the sale or redemption of the mortgaged property

(2) The words ' mertgage by deposit of title deeds within the meaning of S 58 are new

(1) The words "which apply to a simple mortgage have been substituted

2 Scope of the Rule

By force of this Rule O 34 R 6 applies also to suits to enforce charges 1 The Rule makes the provisions of the Code apply only so far as may be Hence, Order 34 Rule 15-Note 2

Note 15

1 (191") 1917 Pat 489 (489) 1 (1930) 1930 Oudh 10 (10) (1917) 1917 Pat 596 (596) 2 Pat L Jour 197

2 (1964) 31 Cal 922 (927)

(1905) 2 All L J 3"9 (385) (1932) 1932 Cal 775 (780 781) 59 Cal 1314

where a charge is declated by a decree, which in its terms is final, no fresh final Q decree is necessary.

3 Charge

I.

A charge is defined in S 100 of the Transfer of Property Act as follows —
"Where immersable property of one person is by act of parties or operation of law made security for the payment of money to another,
and the transaction does not amount to a mortiage, the latter
person is said to have a charge on the moresty

The distinction between a simple mortgage and a charge is often a question of great nicety, but there is a well-marked distinction between the two, viz, that a mortgage dues and a chirge does not, involve a transfer of an interest in immoveable property. The Transfer of Property Act, S 100, now makes it clour that a charge is not enforceable agunst a bena fide transferee of the property for value without notice, while a mortgage is so enforceable? A document purporting to create a charge in future in the event of non payment of the debt does not create any charge within S 100 of the Transfer of Property Act. That section also says that all the provisions of the Transfer of Property Act applicable to simple mortgages apply also to charges. As to limitation for suits to enforce charges, see the undermentioned cases.

4 Creation of charge by operation of law

According to S 100 of the Transfer of Property Act, a charge may be created by operation of hive or by act of parties. Thus, under S 55 of that Act the voador of immoreable property has a charge on it for the unpaid purchase money. A puisno mortgage who is impleaded as a party to a suit by a prior mortgage to enforce his mortgage is entitled to a charge on the surplus sale proceeds of the property remaining after satisfaction of the prior mortgage. Under S 95 of that Act one of several co mortgagors who redeems the whole mortgage is entitled to a charge on the shares of the other co mortgagors for their respective portions of the mortgage deht. Under the Section as amended by Act XX of 1999 the redeeming co mortgagor is subrogated to the rights of the mortgage. It has been held by the Madras High Court, that where one of several co-sharers of property pays the entire Government revenue due on the land, in order to provent its sale for arrears of revenue he is entitled to a charge on the shares of the others, for their

2 (13°0) 1930 Nag 17 (19) Nate 3

1 (1301) 25 Mad 220 (237) (1300) 33 Cai 985 (992) (1887) 10 Mad \*0.1 (513) (1891) 13 Ali 25 (44)

2 The contrary view indicated in (1889) 12 Mad 69 (71) is clearly not good law now (1914) 1914 Oudh 349 (351) Chargo cleated by will

(1887) 14 Cal 730 (738, 739) Distinction

between mortgage and charge drawn

Note 4 1 (1907) 30 Mad 524 (525) Uppaid vendor's lien is non possessory (1898) 21 Mad 141 (142) Limitation applicable to suit to enforce lien

(1905) 2 All L J 379 (382) Unpaid vendor s hen also gives a personal remedy (1904) 31 Cal 57 (72) 30 Ind App 238 (P C)

(1904) 31 Cal 57 (72) 80 Ind App 238 (P C)
Unpaid vendor s lien under S 55 is
different from similar lien in English
liw

2 (1966) 33 Cal 92 (99) 3 (1969) 31 All 166 (168) (1966) 4 Cul L Jour 79 (84)

(1901) 26 All 227 (232) (1906) 28 All 482 (487) 33 Ind 1pp 81 (P C)

(1904) 26 411 407 (416) (F B) But not where only a portion of the mortgage money was puid

[See (1905) 9 C41 W N 865 (867)]. 4 (1903) 26 Mad 686 (701) (F B)

(See (1837) 11 Bom 313 (319) Rule not applicable where the co-sharer who has paid the Government rerespective portions of the amount due But the Culcutta High Court has taken a different view 5 See also the undermentioned ease 6

#### 5 Creation of charge by act of parties

No formal words are necessary to create a charge, of the intention to do so is clear from the document read as a whole 1 Thus where a Handu executed a docu ment agreeing to pay to his sister and after her death to her daughter Rs 10 per mensem from the produce of an estate, held that a charge was created on the profits of the estate for the payment of the amount 2 A charge may be created for reli gious purposes and in such cases the property descends to the hears or other repre sent itives of the donor subject to the charge for the purposes mentioned 3 Similarly a testator may make a charge on his properties for the payment of his debts 4

#### 6 Charge under Rent Act

I charge for the payment of rent under the Bengal Tenancy Act or the Madias Estates Land Act is not such a charge as is covered by S 100 of the Transfer of Property Act.

## 7 Priority between rent decree and mortgage decree

It has been held by the Calcutta High Court that a purchaser in ovecution of a rout docree has pilotity over the purchaser in execution of a mortgage decree 1 But according to the High Court of Madias a sale for aircais of rent unlike a sile for arrears of revenue is not free of prior encumbrances? Even where property is sold for arroars of Government rovenue if the property is purchased by the mortangor himself the mortangee is entitled to have the property sold for the satisfaction of his mortrago debt. This is on the principle that a mortragor cannot set up against a mortgagee an incumbrance created by hunself 3

#### 8 Invalid mortgage if creates a charge

An instrument which is intended to create a mortgage but which is invalid and fails to take effect as it does not fulfil the requirements of the law does not croate a charge 1

## 9 Right of maintenance

A right to maintenance is not a charge on the property out of which the muntenance is payable. But the right may be made a charge by act of parties or by a decree of Court 1 As to the procedure for recovering maintenance charged on

property by a decree of Court see Notes under R 14 supra venue has excluded the others from charge for rent payable in money ] the joint property ] Note 7

5 (1898) 2a Cal 565 (570)

(1887) 14 Cal 809 (825) (F B) 6 (1920) 1920 Pat 571 (532) 5 Pat L Jour 248

Note 5 1 (190a) 9 Cal W N 1001 (1002) (1905) 32 Bom 386 (390)

2 (1884) 7 Mad 23 (24) 3 (1905) 32 Cal 129 (141) 31 Inl App 203

4 (1001) Note 6

the property

(190a) 20 Mad 54 (56)

1 (1909) 1 Ind Cas 35 (35) (Cal) (1903) 6 Cil W N 534 (835)

3 (1903) 25 411 371 (374 375)1

(1697) 1 Cal W N S1 (83) (190s) 31 Mad 337 (337, 338)

2 (1885) 8 Wad 273 (575)

1 (189J) 26 Cal 78 (81) (1905) 32 Cal 729 (732) (1J06) 33 Cal 985 (393)

[1894] 7 31 td 31 (36)

The Rule applies to enforcement of a

Note 9 1 (1909) 1 Ind Cas 761 (761) 31 Att 161 The right may be enforced against the property in the hands of a transferee who collusively takes a transfer of

Note 8

(1919) 1918 P C 156 (157) 42 Ma 1 581 46 In I \pci(PC)

10 Claim for dower

I.

A claim for dower by a Muhammedan widow is not a charge on the estate in the hands of the heirs of the deceased husband but only ranks with ordinary debts 1 But her decree for dower is entitled to priority over a decree against the heir for the latter's personal debt 2

11 Mortgage by deposit of title deeds

See Transfer of Property 1et So 58 and 96 S 96 makes the provisions of the Transfer of Property Act is to simple mortgines applicable to mortgages by deposit of title deeds Similarly the present Rule makes the provisions of O 34 which are applicable to simple mortgages applicable also to mortgages by deposit of title deeds

12 Charges enforceable by sale

As the remedy of a simple mortanee is only to sue for sale of the mortgaged projecty so the chance holders remedy is also to sue for sale. But if the sile proceeds of the property charged are not sufficient to satisfy the charge and if the balince is legally recoverable from the debtors other properties or from him personally then a personal decree may be obtained under R 6 supra See Note 2 foot note 1 surva

13 Charge on the surplus sale proceeds of sale for arrears of revenue or rent Under 5 73 of the Transfer of Property Act where the mortgaged property is sold for arrears of icvenue or rent the mortgage charge is transferred to the surplus sale proceeds and the mortgagee is entitled to have his mortgage debt satisfied out of such proceeds in preference to other creditors of the mortgagor 1 But if the sale was due to the mortgages oun default he is not entitled to suo for his mortgage money 3

# ORDER XXXV

## INTERPLEADEL

Plaint in site plea le suits

R. 1. [S 471] In every suit of inter- 0: pleader the plaint shall, in addition to the other statements necessary for plaints, state-

(a) that the plaintiff claims no interest in the subject-matter in dispute other than for charges or costs,

(b) the claims made by the defendants severally; and (c) that there is no collusion between the plaintiff and any

of the defendants

[1877-S 471; R S C, O 57, R. 2-A See S 88, C P. C]

1 Plaint in interpleader suits - See Notes to S 68 ante

Note 10 1 (1871) 14 Suth W R 739 (246)

(1909) 25 Mad 658 (65J) 2 (1904) 26 411 28 (36)

Note 13

1 (1906) 3 Cal L Jour 52 (55) (1J04) 8 Cal W > 332 (336) (1900) 27 Cal 160 (163) (1893] 20 Gal 241 (244) (1881) 6 Cal 142 (147)

(1888] 15 Cal 546 (553) (1961) 5 Cal W \ 326 (359) (1871) 16 Suth W R 722 (223) (1966) 33 Cal o 78 (880)

2 (1906) 3 Cal L Jour 220 (921, 922)

1

2 R. 2. [S. 472] Where the thing claimed is capable of being paid into Court or placed in the custody of the Court, the plaintiff may be required to so pay or place it before he can be entitled to

any order in the suit.

[1877—S. 472.]

Synopsis.

"May be required to so pay or place Payment to one of the contestants on security

I 'May be required to so pay or place at "

Where the subject-matter of the dispute is a chose in action its disposition as the Court may direct is a sufficient compliance with the Rule <sup>1</sup>. The Court has a discretion to make such orders as regards the subject-matter in dispute and the party is bound to obey the order before be can ask for any robef in the suit. This is a further condition that will be imposed upon the party to test his bona fider or disinterestedness. If he is not ready to pay or deliver the property to need the defendants but disputes his title, the suit is not an interpleader suit. But if the plaintiff complies with the order of the Court he is fully discharged from liability. Thus where the plaintiff pays the amount in dispute into Court for payment to the right person, but the Court pays it to the wrong person the plaintiff cannot be made responsible for the mistake of the Court but is fully discharged from hability.

2 Payment to one of the contestants on security

The monoy paid into Court cannot be handed over to one of the partner pending the suit even on security after the original plaintiff is discharged and one of the rival defendants to the interpleader suit is made a plaintiff. It must be kept under the control of the Court available for payment at any time to the successful partner.

R. 3. [S. 476.] Where any of the defendants in an interpleader suit is actually suing the plaintiff in Procedure where respect of the subject-matter of such suit, the

Procedure where defendant is suing plaintiff

3

respect of the subject-matter of such sut, the Court in which the suit against the plaintiff is pending shall, on being informed by the Court

in which the interpleader suit has been instituted, stay the proceedings as against him; and his costs in the suit so stayed may be provided for in such suit; but if, and in so far as, they are not provided for in that suit, they may be added to his costs incurred in the interpleader suit.

[Cf. R. S. C., O. 57. R 6.]

Order 35, Rule 2-Note 1 1 (1890) 24 Q L D 275 (279), Robinson v Jen-

<sup>2 (1922) 1922</sup> Cal 138 (189) [See also (1894) 18 Born 231 (236) In the case of a Railway company.

the claim for wharfage and demurrage was disallowed ] 3 (1889) 2 G P L R 9 (14)

Note 2

<sup>1 (1913) 19</sup> Ind Cas 219 (219) (Mad)

Legislative changes

7

Synopsis Note No | Anneal.

Note No

suit 1

1 Legislative changes -Under the old Code proceedings in another suit by the defendant against the plaintiff could be stayed only after a decree in the interpleader suit. Under the present Rule such proceedings could be staved even on the institution of the interpleader

2 Appeal

An appeal hes from an order under this Rule Sec O 43 R 1 (p)

R. 4. [S. 473] (1) At the first hearing the Procedure at first hearing Court may-

(a) declare that the plaintiff is discharged from all hability te the defendants in respect of the thing claimed, award him his costs and dismiss him from the suit: or

(b) if it thinks that justice or convenience so require, retain all parties until the final disposal of the suit

(2) Where the Court finds that the admissions of the parties or other evidence enable it to do so, it may adjudicate the fitle to the thing claimed

(3) Where the admissions of the parties do not enable the Court so to adjudicate, it may direct—

(a) that an issue or issues between the parties be framed and tried, and

(b) that any elarmant be made a plaintiff in lieu of or in addition to the original plaintiff,

and shall moceed to try the suit in the ordinary manner

[1877—8 473 Cf R S. C. O 57, R. 7]

Sunonsis

Legislative changes Non appearance of claimants

1 Legislative changes -Sub S (3) s new It has been adopted from the Lughah Rule of the Supreme Court, O 57 R 7 and sni stituted for Cl (d) of the old S 473 The change expressly authorises a Court to make one of the claimants a plaintiff in lieu of or in addit on to the original plaintiff

The question whether a party to an interpleader issue shall be treated as plaintiff or defendant must be decided by the real ments of the case and not by the mere form of the issue itself 1 As to the power of a Court to add a party claiming to be interested in an intereleuder suit upon his own application see the undermentioned case 2

2 Non appearance of claimants

On the non appearance of claimants in a properly instituted interpleader

son (Per Lindley L J )-Referred to an 1919 Cal 71J 46 Cal 156

3

- suit the proper course for the Court is laid down under sub-rule (1) It is compe tent to the Court-
  - (1) to discharge the plaintiff from all liability to the claimants defendants in respect of the subject matter in dispute and dismiss him from the suit
  - (2) to direct the plaintiff to pay the amount into Court to the credit of the proper claim int after deducting his costs
    - (3) to direct the clumants defendants to apply for payment and when they appear, pake ooe of them a plaintiff and laise an issue and
    - (4) to restrain by immedian either defendant in a proper case from
  - taking any mocceding against the plaintiff 1

# 3 Appeal

An appeal hes from an order under this Rule Sec O 43 R 1, Cl (p) An order dismissing the interpleader suit itself! or an adjudication upon the claims of the defendants in the interpleader suit will however be a decree and appealable as such under S 96 of the Code

## 4 Court fee

A memorandum of appeal from an order under this Rule is chargeable with a Court fee of one tupes under Art 11 Sch II of the Court fees Act VII of 1870

A suit or a memorandum of appeal against a decree declaring the right of one defendant as against another to the money held by the plaintiff is chargeable with Court fees under Art 17 of Seh II and not under S 7 Cl (12) (c) of the Court fees Act VII of 1870 1

Agents and tenants may not institute interpleader suits

[S 474] Nothing in this Order shall be deemed to enable agents to sue their principals, or tenants to sue then landioids, for the purpose of com pelling them to interplead with any persons other than persons making claim through such principals or landlords

#### Illustrations

- (a) A deposits a box of 30 vels with B as 1 is agent. C alloges that the 10 vels v 0 0 wrongfully obtained from him by A and claims them from B. B cannot institute an interpleader suit against A and C
- (b) A deposits a box of jevels with B as his agent. He then writes to C for the negrouse a code of precision of the making the pewels a security for a dot due from himself to C afterwards alleges that C s debt is satisfied and C alleges the contrary. Both claim the powels from B may institute an interpleder suit against A and C[1877—S. 474]

Sunopsis Note Vo Note No 2 | Interpleader suits by tenants Interpleader suits by railway company

Other Topics

Apreal See Note 3 F N (3) I Interpleader suits by agents

This Rule declares a p clubition and its concluding part Provides an Note 2

Interpleader suits by agents

2 (1908) 30 (11 22 (23 24) 1 (1919) 1919 Bom 15 (16) Note 4

Note 3 1 (1909) 4 Ind Cas 319 (320) 33 Wal 220 1 (1921) 1º21 Pat 305 (306)

exception The reason for the Rule seems to be that an aceut cannot ordinarily dispute the title of his principal. The illustrations to the Rule explain the Rule so far as the agent is concerned. In Illustration (a) C claims idversely to A but not through 4 whereis in Illustration (b) C claims through 4 mition of agent and principal see S 182 of the Indian Contract Act

## 2 Interpleader suits by Railway Company

A Railway Company by accepting goods for carriage does not become the agent of the cousignor. It merely enters into an independent contract with the consignor. It can therefore file in interpleader suit igainst the consignor and another party claiming adversely to the consignor 1

## 3 Interpleader suits by tenants

The prohibition that a tenant cannot file an interpleader proceeding against his landlord is based in the principle that he cannot dispute the title of his land lord during the subsistence of the teniney in A tenint cannot therefore bing, a suit against his landlord for the purpose of compelling him to interplete with any person other than a person malin, claim through such landlord 1 Thus where i tenant passed two hal iliats in fivour of two persons in respect of the same land and then long threatened by suits is both of them, instituted a suit praying that the Court may be pleased to declare which defendant has what make in which of the disputed land and in what right the plaintiff holds which of the said lands under whom it was held by the High Court of Cilcutta that the suit was not muntainable

Where I leases certain lands to B and on I death two leasons claim tent fr in B namely 1 shear on the one hand and a person who allege, that I was only a benumidar for A whose heir ho is it has been held that the latter must be regarded as claiming through i and that therefore B can file in interpleader suit comnelling the two claimants to interplead with each other 3

Where a mortgagee does not deny an assignment by him of his rights under the bond to I but only contends that it is a voidable one the moitganor may ticat the assignee as entitled to the money and is not bound to bring an inter pleader suit compelling the mortgagee and \ to interplead with each other "

R. 6. [5 475] Where the suit is properly instituted the O Court may provide tor the costs of the original plaintiff by giving him a charge on the thing Charge plain

tiff s costs claimed or in some other effectual way

[Cf R S C O 57, R 151

Sunonus

Note No | Appeal Scope of the Rule

1 Scope of the Rule This Rule provides for the twird of costs to the original plaintiff. Such

Order 35 Rule 5 Note 2 1 (1.11 ) 1 ) 1 > Bom 29 (28) Note 3

la Se 5 116 of the Fr le ce let (See also (1896) 18 AH 379 (331) ] (1898) 92 Born 498 (430)

1 (1919) 1919 Cal 913 (914) 48 Ind Cas 433 (735)

(1899) 9 Cal W N 61 (62 63) [See ho vever 5 Cal W N 34n] 9 (1910) J Ind Cas 3 7 (5 8) (1912) 13 Ind Cas 40 (41) (Cal) 3 (1909) 4 Ind Cas 319 (321)

33 Vad 220 Order dismissing the suit is a decree ithin the meaning of S. 2 and

therefore appealable 4 (1914) 1914 Mad 674 (620)

1

6, costs when awarded will be deducted from the fund on its being brought to Court or will be a first charge upon the fund or subject-matter 1 But the plaintiff will not be entitled to costs which have been unnecessarily incurred 2

2 Appeal

An appeal lies from an order under this Rule. See O. 43, R. 1 (p).

## ORDER XXXVI.

## SPECIAL CASE.

R. 1. [S. 527.] (1) Parties claiming to be interested in the decision of any question of fact or law may Power to state case enter into an agreement in writing stating such for Court s opinion question in the form of a case for the opinion of the Court, and providing that, upon the finding of the Court with respect to such question .-

(a) a sum of money fixed by the parties or to be determined by the Court shall be paid by one of the parties to the other of them; or

(b) some property moveable or immoveable, specified in the agreement, shall be delivered by one of the parties to the other of them; or

(c) one or more of the parties shall do, or refrain from doing, some other particular act specified in the agreement.

(2) Every case stated under this Rule shall be divided

into consecutively numbered paragraphs, and shall concisely state such facts and specify such documents as may he necessary to enable the Court to decide the question raised thereby

[1877-S 527, 1859-S 328; R S. C., O. 34, Rr. 1, 6 and 9.

See S. 90. C. P. C.1

Synopsis

# Special case - Note No I

## Other Topics

"Agreement in writing " See Note 1, Pt (1)

1 Special case

This Order lays down the rules of procedure in respect of the statement of special case, its hearing, and other matters connected therewith and generally referred to in S 90 of the Code Rr 1 and 2 prescribe the form and contents of an agreement to state a case. So far as possible, facts should be stated in a chronological order and in the form of a narrative Material documents should be referred to, and their effect or contents stated The statement must conclude

Searce v Mathews (1893) 18 Bom 231 (236) Co & Steele

(1864) 9 L T 677, Scottish Union Insurance

<sup>(1864) 1</sup> Mad H C R 360 (361) Order 35. Rule 6-Note 1 2 (1842) 1 Hare 436 (444), Crauford v 1 (1883) 1883 W N 176 19 Q B D 77s.

with a formulation of the question to be decided by the Court and must be signed by the parties and their coursed if any 1 Where the agroement is duly entered into and filed in the Court having jurisdiction, the proceeding will be registered as a suit and heard and disposed of as such See Rr 2 to 5

Rule 5 enacts that the Court hearing a special case must be satisfied on

three points —

1 That the parties have a hour fide interest in the question stated —

The right to state a case for the opinion of the Court is not, therefore intended to enable parties to refer to the Court any hymothetical questions or matters of

mere academic interest involving no substantial interest to the parties. The Court will not, therefore, interface in a case where the parties have not provided in the agreement for an underlaking for payment of monoy, delivery of property, or the done or the refruintial from doing of any particular act in the event

of a finding by the Court as required by R 13

That the case is fit to be decided—A case is not fit to be decided unless the successful party will be the other to occur the decree or based a suit upon the decree passed in it. Where there are special tribunds to try the question between the parties is for example a question relating, to the adequate provision by a municipal coporation for the supply of water and for the protection against fire as regards an extre owned by a Port Trust, a special case cannot be streted for the opinion of the Court. Nor will a mere declaration of the rights involved in such a case be a fit point for a special case. So also a question which the Court is not competent to decide in an ordinary sign cannot be stated as a special case.

For instances of questions that can be strited as a special case, see the

undermentioned cases 6

As to the 1c opening of a decided special case see S 90 Note 2 and the undermentioned cases?

The provisions of this Order govern the procedure in regard to any dispute between two or more Government Wards referred to a Court for decision See the Bombay Court of Wards Act (1 of 1905) These provisions do not apply to preceedings under the Agna Tonanoy Act (III of 1926) See Sch II,

Last I of the Act
Order 36 Rule 1-Note 1
1 Sc A + 1 Practice 1930 Fdn p 529

2 (1310) 1 110 A C 203 (204) Glasgow Natiga t | Co \ Iron Ore Co | See also (1930) 1930 Bom 202 (204

235) 4 Bom 825] (1876) 4 Ch D 189 (136 197) Bright

Tyndail Question as to what would be the rights of parties who were not in existence in circumstances which might never arise

3 (1930) 1930 Bom 232 (273) 54 Bom 82-3a (130) 1930 Bom 232 (231 935) 54 Bom 82-4 (1330) 1330 Bom 272 (231 23-) 54 Bom 82-5 Specul remedy by an applies tion to the Governor beneral in Council to act under Ss 518 and 520 Vinneigal Act Bomba)

5 (1892) 9 Q B D 518 (521 522) Bezles Local Board v West Rent Main Sewerage Board [See also (1930) 1930 Bum 232 (235)

54 Born 825 ]
6 (1881 82) 6 Born 42 (48 49) The validity
of a trust deed by a Sunni Vaho
medun
(1866) 10 Born 415 (417 420) Powers of

shareholders of a trading corporation to interfere with directors discretion with declaration of dividend (1907) 31 Born 472 (475 477) Effect of a

tion with declaration of dividend (1907) 31 Born 472 (475 477) Effect of a will by a Parsi upon a deed of settle ment of a subsequent date

(1890) 17 Cat 750 (203) Whether subscribers to a general fumity pension
fund are a company association or
partnership for the purpose of carrying on business other than that of
banking and whether they form a
company under S 4 of the Indian
Commune Act. 1822

7 (1884) Solicitors Journal 478, Hamilton

2 Wiere value of sub sect matter must be stated

R. 2. [S 528] Where the agreement is for the delivery of any property, or for the doing, or the refraining from doing, any particular act, the estimated value of the property to be delivered, or to which the act specified has reference, shall be stated in the agreement

[1877—S. 528, 1859—S 328]

Agreement to be filed and registered as

3

4

ι 5

R. 3. [S 529] (1) The agreement, if framed in accordance with the Rules hereinbefore contained may be filed in the Court which would have jurisdiction to entertain a suit, the amount or value of the subject-matter of which is the same as the amount or value of the subject matter of the agreement

(2) The agreement, when so filed, shall be numbered and registered as a suit between one or more of the parties claiming to be interested as plaintiff or plaintiffs, and the other or the others of them as defendant or defendants, and notice shall be given to all the parties to the agreement, other than the party or parties by whom it was presented

[1877—S 529, 1859—S 329 ]

Parties to be sub ject to Court's juris diction

R. 4. [S 530] Where the agreement has been filed, the parties to it shall be subject to the jurisdiction of the Court and shall be bound by the statements contained therein

[1877-S 530, 1859-S 3301

R. 5, [8 531] (1) The case shall be set down for hearing

as a sint instituted in the ordinary manner, and Hearing and dis the provisions of this Code shall apply to such posal of case suits so far as the same are applicable

(2) Where the Court is satisfied, after examination of the parties, or after taking such evidence as it thinks fit,-

(a) that the agreement was duly executed by them

(b) that they have a bona fide interest in the question stated therein, and

(c) that the same is fit to be decided it shall proceed to piononnee judgment thereon in the same way as in an ordinary suit, and upon the judgment so monounced a

decree shall follow [1877—S 531, 1859—S 331]

## Sunonsis

Note No

Note No

O

Hearing and disposal of case

1 Hearing and disposal of case See also Note 1 to R 1 This Rule exacts that the provisions of the Code -o far as may be applicable shall apply to a special case registered as a suit. An infinit born after a siccial case is set down for hearing must be added as a party 1

Appeal

I.

The decree presed upon a special case is open to appeal under S 96 C P C But if in a pending suit the parties inten to abide by the decision of the Court ard refer the mitters in dispute to the Court the decree cannot be appealed a ainst as it is in the nature of in arbitration award 1

## ORDER XXXVII

SUMMARY PROCEDURE ON NEGOTIABLE INSTRUMENTS

Application of

R. 1. [S 538] This Order shall apply o

only to-(a) the High Courts of Judicature at Fort William, Madia.

and Bombay:

(b) the Chief Court of Lower Burma;

(c) the Court of the Judicial Commissioner of Sind; and (d) any other Court to which sections 532 to 537 of the Code

of Civil Procedure, 1882, have been already applied

### Local Amendments

ALLAHABAD

4dd the following Cl (e) -

(e) any Court in the province of Agra exercising the powers of a Small Cruse Court

CALCUTTA

(a) In clause (c) the word and shall be or estel

(b) After clau e (c) the following clause shall be inserted namely

ice) all civil Courts (except Courts of Small Causes) in the districts of Chritingong Dacci Litniand 24 Paresnas and

LAHORE

The word and and no v C1 (e) were a lled -

(e) the Courts of the D signt Judge and Subordinate Judges of the First Class of the Della Province and the Courts of the District Judges and the Subordia ate Judges of the first class in the Civil Districts of Labore and Amritage in the Leo tince of the Punish

Order 36 Rule 5-Note 1 1 [Se also (18"0) L R 11 Lq 363 (369) Larnaby v Larsell 1 oru a few days

before but omitted by accident (1671) I R 11 La 264 (264) Satage . Snell [But see (1871) 13 kg 250 (254)

Note 2 1 (1899) 23 bom 752 (755) (1896) 1896 4 C 136 (138) Burges v Morton -Referred to sn (1906) 10 Cal W N 835 (839)

Palmer v blower

# Sunoners

egislative changes  cope and applicability of the Rule Courts of Small Causes Courts in which suits on negotiable  Clause (c)—Lahore High Court	oto N See	4
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I Legislative changes -

1 The words the Courts of Small Causes in Calenti; Vadrys and Bomba) which occurred in Cl () of the old S 588 have been consisted as their appropriate place will be in Rules under the Presidency Towns Small Cause Courts Act, 1832 (Report of the Select Committee).

2 The words the Court of the Judge of harachi which occurred in Ci (d) of the old section have been contact and the words The Court of the Judicial Commissioner of Sind 's have been newly added as Ci (d) to the present Rule.

3 Cl (e) and the last three paragraphs of the old section have been omitted and the present Cl (d) newly added

2 Scope and applicability of the Rule

The provisions of this Order are merely rules of precedure to be applied after the plaint is admitted. They do not alter in any way the nature of the suit of the jurisdiction of Courts <sup>1</sup> Consequently, suite can only be filed in the Courts which have jurisdiction to try them <sup>1a</sup> If they do not happen to be Courts to which the provisions of this Order have been applied under Cl. (a) of this Rule, the suit will have to be tried in the ordinary manner <sup>2</sup>

Section 192, Cl (a) of the Madras Estates Land Act, 1908, excludes the applicability of this Order to suits appeals and other proceedings under that Act

3 Courts of Small Causes

By virtue of O 51 infra this Order will not apply to Prosidency Small Cause Centra save as other use provided by the Presidency Small Cause Centra Act XV of 1882 Under S 9 of the latter Act the High Court may, from time to time, presentle the procedure to be followed by the Small Cause Court and may, there fore, extend the Rules of this Order also to such Courts As regards the Provincial Small Cause Courts Act IX of 1887 read with O 50 of this Cede, makes it clear that this Order will apply to such Courts it the conditions mentioned in this Rule are satisfied. In other words, if a Provincial Small Cause Courts as Court is a Court country within Cl (d) of this Rule, it can follow the procedure provided by this Order but not otherwise.

Where a Small Cause Court has exclusive jurisdiction in a smit, the fact that the Court has no power under this Order to try it summarily will not enable the suit being filed in some other Court which has such power. The only proper course

is to file the suit in the ordinary way in that Small Cause Court 1

A Subordinate Judge who is presiding over an ordinary Sub Court but who is excressing Small Cause powers cannot at that time he taken to be exercising his original jurisdiction and cannot, therefore, try suits summarily on the ground of his being a Subordinate Judge <sup>2</sup>

4 Courts in which suits on negotiable instruments should be instituted -See Note 2,

2 (1912) 13 Ind Crs 244 (246, 219) 5 Sand Court of Small Causes L R 155

Nota 3 1 (1912) 13 Ind Cas 214 (249) 5 Sind L B 5 Clause (e)-Lahere High Court

Clause (e) added to this Rule by the Liliore High Court is not ultra vires notwithstanding that it is not one of the Courts mentioned in Cl (a) of this Rule 1

R. 2. [S 5321 (1) All suits upon bills of exchange hundles of

of promissory notes may, in easo the plaintiff Institution of sum desires to proceed hereunder, be instituted by mary suits upon hills pre-enting a plaint in the form prescribed, but the summons shall be in Form No 4 in Appen

of exchange etc dix B or in such other form as may be from time to time pres crihed

- (2) In any case in which the plaint and summons are in such forms, respectively, the defendant shall not appear or defend the suit unless he obtains leave from a Judge as hereinafter mouded so to appear and defend, and, in default of his obtaining such leave or of his appearance and detence in pursuance thereof. the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled to a deeree
- (a) for the principal sum due on the instrument and for interest calculated in accordance with the provisions of section 79 or section SO, as the case may bo, of the Negotiable Instruments Act. 1981, up to the date of the institution of the suit, or for the sum montioned in the summons, whichever is less and for inter est up-to-dato of the decree at the same late of at such other late as the Court thinks fit, and
- (b) for such subsequent interest, if any, as the Court may order under section 34 of this Code, and
  - (c) for such sum for costs as may be prescribed

Provided that, if the plaintiff claims more than such fixed sum for costs, the costs shall be ascertained in the ordinary way

(3) A decree passed under this Rule may be executed forthwith

[1877-S 532]

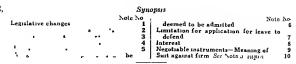
## Local Amendments

BOMBAY In sub rule 1 after the words promissory notes the following words shall be suserted numely -

and all suits in which the plaintiff seeks only to recover a debt or liquidated de mand in money payable by the defendant with or w thout interest arising on a contract express or implied or on an enactment where the sum sought to be recovered is a fixed sum of money of in the nature of a debt other than a penalty, or on a guarantee where the claim against the principal is in respect of a debt or a liquidated demand only

RANGOON In sub rule (2) the following shall be a serted after the words pursuance thereof -

Or of his applying for such leave within ten days from the service of the sum mons on him and on proof that the summons was duly served on him more than ten days before



### Other Topics Score and object See Note 2

### 1 Legislative changes

- 1 The words In any Court to which this section applies and the words High Court
  - which occurred in the first paragraph of S 32 of the old Code have been omitted 9 The words The allegations in the plaint shall be deemed to have been admitted have been newly added in substitution of the caplangion annexed to the old section and the words by a Rule of the High Court' which occurred in the old section have been omitted
    - 3 The provision for immediate execution of decree at the end of the second paragraph of S 532 has been incorporated in sub-rulo (3) with the word executed suish tuted for the word enforced
    - 4 The third paragraph of the old section has been omitted

2 Summary Suits and Ordinary Suits

The Rule is only an enabling provision. A plaintiff wishing to enforce a bill of exchange a hundr or a promissory note may at his option bring a summary suit under this Order or a suit under the ordinary Diocedure A summary suit. however can only be brought in the Courts mentioned in R 1 and within one year from the date when the debt becomes due 1. But the corresponding advantage to the plaintiff choosing this procedure is that the defendant is not entitled as of right to be heard in defence. He must apply for leave within 10 days of the service of summons upon him2 and if he does not apply for such leave or if the leave is refused the plaintiff is entitled to a decree

Suits under the Madias Littles Lind Act (I of 1908) are not soverned by Sec S 192 A of the Act this Order

3 Form of summons in summary suit

See Form No 4 of Appendix B infra Where the High Court of Madias framed Rules under S 9 of the Presidency S nall Cause Courts Act XV of 1882 prescribing the form of summons in summary suits under that Act, it was hold that the fixing of 3 days thereon as the time within which the defendant should apply for leave to defend was unreasonable and ultra vires 1

The summons under this Rule should be served in the same intiner as is

provided for the service of ordinary summons under O > 3

4 Limitation for summary suits

Art 5 of the Limitation Act 1877 prescribed a period of 6 months for suits on ne jourable instruments instituted under Chapter 39 of the Old Code (correspond ing to O 37) There was no specific provision for other summary suits such as those specified in S 128 of this Code When this latter section was newly intro duced in the present Code in 1908 Art 5 was also amended by the Limitation Act of 1908 by providing a period of 6 mooths for suits under the summary procedure referred to in S 128 (2) (f) of the Code of Civil Procedure 1908 the intention of the Le, islature obviously being to provide for all summary suits under the Code It was however held by the High Court of Calcutta in the undermentioned Note 3

Order 37 Rule 2-Note 2

1 trt 5 f Sch I of the Limitation let as
a culet by let XXX of 1925
9 trl 1 J of Sch I of the Limitation let 1 (1)21 1924 Mad 46 (17 48) 46 Mad 81 2 [See (1866) 1 Ind Jour NS 293 Case unler Act 1 of 1966.]

case, that the words "summary procedure referred to in S 128 (2) (f), Code of Civil Procedure 'did not include suits under O 37 Art 5 has, in view of this, been again amended by ict, XXX of 1925, so as to include suits under this Order The period of 6 months has also been increased to one year. At present, therefore, a summary suit whether under this Order or under S 128 of the Code should be filed within one year from the date when the debt becomes payable or when the property becomes recoverable 2

SUMMARY PROCEDURE ON NEGOTIABLE INSTRUMENTS

5 'Unless he obtains leave

I.

The High Court of Bombay has held that a defendant who has obtained no leave to appear and defend the snit under this Rule, cannot be allowed to participate in the trial of the suit and that, therefore, he cannot appear at tho hearing and ask the Court to make the decree amount payable in instalments 1 But the High Court of Rangoon has taken a contrary view that the defendant is entitled to be heard on such a question whether or not he has obtained leave to appear or to defend the suit 10

Where in a summary suit against a firm under O 30 of the Code a partner enters appearance he should obtain leave to defend as required by this Rule 2 Before granting a decree under this Rule the Court should be satisfied that the defendant has had full opportunity to obtain leave to defond 3

6 Allegations in the plaint shall be deemed to be admitted

This clause is new and has been substituted for the explanation contained in the old section. It embedies an exception to the fundamental principle that a plaintiff must prove the case with which he comes to Court and dispenses with such proof in view of the special nature of the documents mentioned in the Rule 1

The effect of this provision is that in the special class of suits under consideration, where leave is not applied for or is applied for and refused the plaintiff gets a decree without adducing any evidence but on mere proof of sorvice of summons? The admission as regards the allegations in the plaint mentioned in this Rule does not apply to interest as to which there is a specific provision in suh rule 2. clause (a) 3 Thus, where in a summary suit on a hundi, which did not contain any agreement for interest the plaintiff claimed in the plaint interest at the rate of 33 1/3 per cent per annum it was held that the interest claimed could not be deemed to have been admitted and the Court could award interest only at the rate of 6 per cent per annum under S 80 of the Negotiable

7 Limitation for application for leave to defend

In application for leave to defend should be made within 10 days of the date of service of summons on the defendant 1. This period which is fixed by the Limitation Act cannot be extended by the Court under the provisions of S 148 Note 4

Instruments Act 4

1 Art 139 of S h I of the Limitation Act 1303

(189a) 23 Cal 5"3 (5.5) In determining any question as to limitation arising on in application under this Rule the date shown in the cheriff s return as the date of service should only be

<sup>1 (1925) 1925</sup> Cul 781 (782) 52 Cul 954 2 (1927) 1927 Sind 90 (92) 21 S nd L R 257

<sup>1 (1926) 1926</sup> Bom 250 (251) 50 Bom 26? The only was ofen to such a defendant is to apply for instalments either under O 20 R 11 (2) or under O 37

R 4 of the Civil Procedure Code 1a (1933) 1933 Rang 245 (246 247) 11 Rang

<sup>2 (1926) 1926</sup> Bom 555 (558) 50 Bom 665 3 (1866) 1 Ind Jur > S 39a

C P C 313 & 314

<sup>1 (1917) 1917</sup> Cal 269(2:2) 43 Cal 1001 (F L) 2 (See (18"6) 1 Cal 130 (132) 1

<sup>3 (1</sup>J33) 1933 Mad 299 (300) 56 Mad 598 4 (1J33) 1933 Mad 299 (300) 56 Mad 398

of the Cede 2 The High Court, may, however under its rule making powers, extend S 5 of the Limitation 1ct to applications under this Rule, and where it has been so extended, the Court may, for sufficient cause crouse the delay in making the application. The Bomby, High Court has so extended S 5 of the Limitation Act to ipplications under this Rule. It has also been held by the same High Court that under R 193 of the High Court Rules, a discretion is vested in the Chimber Judge in a fit case, to extend the period of 10 days allowed under that Rule in cases to which this Order is applicable 3

Where an ex rarte decree is passed in a summiny but and the defendant shows sufficient cause for his mability to appear and apply in time for leave to defend the extrate decree will be set ande

8 Interest

Before the amendment of this Rule by lot \AA of 1926 interest was awardable at the rate specified, if any, up to the date of the decree Under the present Rule is imended by let XXX of 1926 interest is to be invaded as follows -

(a) Up to the institution of the suit in accordance with the previsions of S 79 or S 80 of the Negotiable Instruments 1ct, 1881, 1e, at the late specified in the document of where no rate is so specified. at 6 per cent per annum 1

(b) From the institution of the suit up to the date of the decree at the same rate as mentioned above or such other rate as the Court

(c) kiom the date of the decice up to date of realisation as the Court may order under S 34 of the Cole

9 Negotiable Instrument-Meaning of

See S 13 of the Negotiahla Instruments Act 1881 and the undermentioned cases 1 For the definition of a promissory note and a bill of exchange see Ss 4 and 5 of the said Act

10 Suit against firm - Sec Note a surra

[S 533] (1) The Court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which disclose Defendant showing defence on merits to such facts as would make it incumbent on the have leave to appear holder to prove consideration, or such other

tacts as the Court may deem sufficient to support the application

referred to (1903) 7 Cal W N 252 2 (1901) 5 Cal W N 259 (267) (1896) 23 Cal 573 (275) (But see (1877 78) 3 Cil 539 (539) which is a case under the Lode of 1877] (1866) 1 Ind Jur N S 39a

3 (1926) 1926 Bom 5"8 (5,8) 4 (1911) 11 Ind Cas 433 (484) (Lah) (107 ( 78) 2 Bom 644 (647 648) Case under \ct \ of 1866

Note 8 1 (192) 1322 Cal al3 (514) 43 Cal 716 No rate specified-Only six per cent can be granted notwithstanding oral agreement to the contrars

(1933) 1938 Mad 999 (300) of Mad 398 Summary suit on Hundi-Interest not mentione 1-1 lamtiff is not en titled to interest asked for in plaint but only is provided in \$ 50 of Vegot able Instruments act [Sce also (1903) 30 Cal 446 (448) ] [See also (18,0-71) 6 Mad H C R 257 (957) }

#### Note 9

1 (1863) 13 Born 669 (6 0) (1892) If Bon (8) ((9)) (1834) 17 Mad 85 (86) (1900) 23 Vind Laf a (1904) 27 Mad 1 (3) (F B) (1866) 1 Ind Jur \ S 217

(2) Leave to defend may be given unconditionally or subject O to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Court thinks fit.

[1877—S. 533].

### Local Amendments

BOMBAY. The following Sub rule (S) shall be inserted -

(3) The provisions of S 5 of the Indian Limitation Act, 1308 shall apply to applications mader Sub R (1)

LAHORE. The following Sub Ruk was added -

'(3) The provisions of 5 3 of the Indian Limitation 4ct 1905 shall apply to applications under Sub R (1)

Sunopsis

Note	10		Note No
Legislative changes The affidavit must disclose a defence Leave when granted conditionally	1 2	Sub rule (2) Limitation See Note 7 to R 2 segment Appeal	1 4 5

f Legislative Changes

1 The words upon the defendant piving into Court the sain mentioned in the nummons or which occurred in the old \$ 333 have been omitted be to the effect of this omission see Note 2 infea

I The words and on such terms as to security, framing and recording issues, of therwise is the Court thinks he which occurred at the end of the old section have been consisted and the present sub-rule (2) has been substituted in them place See Note & infra

2 The affidavit must disclose a defence

The application for leave to defend must be supported by an affidavit dis closing a defence 1 If the affid wit discloses a triable issue, that is, a plea which is at least plausible then leave should be grunted, whether the defence is a legal or an equitable one and even though it may not ultimately turn out to be a good defence ' On the other hand, if no lamble issue is disclosed by the libdavit leave should be refused "

Leave to defend was granted in the following cases -

(a) Where the claim was based on an endorsed promissery note and the defendant pleaded that the endersement was a forgery "

(/) Where a suit was instituted against a member of a joint Hindu family m a hunds drawn by the manager thereof, and the defendant

pleaded that no notice of dishonour was given to the drawer (c) Where the defendant professed a cross claim for damages for wrongful

arrest before judgment in the very suit instituted against him " Order 37 Rule 3-Note 2 [See also (1935) 1935 Vad 43 (45) 58

1. (1919) 1919 Sand 58 (83) 12 Sand L R 70

Mad 116 At the time of granting leave it is not open to the Court to go mto the merits and discover whe 11 ther the case is a true one] ha\_ 5 (1925) 1928 Cal 123 (121) (1.333) 1933 Lah 440 (441) On defendant s

own showing that suit hundi was

not without consideration, leave re-

defend-If triable is no is rused by defendant, only trial Judge can go into merits and discour whether that case is a true one (1935) 1935 Vlad 302 (303)

3 (1696) 19 Mad 368 (375) 4. (1871) 6 Beng L R App 64 (64, 65). [1905] 32 Cal 793 (515) (1996) 20 Lom 488 (490)

fu-ad 6 11JCO) 24 Bom 65 (73)

4 [1894] 19 Lora 717 (720).

Leave to defend was refused in the following cases -

- (a) Where the defendant s plea was that the plaintiff was only a benamidar for another 9
  - (b) Where the defendant pleaded partial fulure of consideration which was not ascertainable in money without collateral enquiry 10
    - (c) Where the defendant pleaded that the note sued on formed part of an account of the mutual dealings between bim the plaintiff and other parties 11
    - (d) Where the defendant pleaded a collateral agreement to discharge a promissory note not inconsistent with the note which contained an absolute promise to pay 12
    - (e) Where the defendant made a counter claim for damages caused by the fulure of the plaintiff to supply goods of the right sort 13
- (f) See also the following case 14 3 Leave when granted conditionally-Sub Rule 2

The Court has a discretion in the matter of attaching conditions to the grant of leave to defend As a rule where a valid defence or triable issue is disclosed. the leave should be granted unconditionally I It is only in cases where there appears to be so grave a suspicion that the Court comes to the conclusion that the defence is put in only to obtain further time, conditions should be attached to the grant of the leave? In such cases the propor course is to giant the leave on the defendant depositing the mone; into Court 3

In cases where money is deposited as a condition to obtaining leave th defend the decretal amount will be a change on such deposit \$

4 Limitation -See Note 7 to Rule 2 supra

5 Appeal

The High Court of Bombay has held that an order by a Judge in Chambers granting leave on a condition which the defendant is not able to comply with is a judgment within the meaning of Cl 15 of the Letters Patent and hence appealable under that clause 1 But the High Courts of Calcutta2 and Rangoon3 have held that a conditional order granting leave under this Rule is not a judgment and bence not a pnealable (1935) 1935 Wad 302 (302)

47

liquidate the amount due by fort nightly consignments was a col lateral undertaking consistent with the existence of the note containing an absolute promise to pay-Such collateral agreement was no answer to the suit on the promissory note and the plaintiffs were entitled to a decree 13 (1929) 1929 Notes 25 (c) 120 Ind Cas 529

Sindl 14 (1929) 1929 Sind 172 (172) 23 Sind L R 479

Note 3

1 (1929) 1929 Mad 841 (841) (1935) 193 Mad 13 (45) 58 Mad 116 2 (1924) 1924 Mad 612 (618 614) (1927) 1927 Sind 60 (61) 3 (1920) 1920 Vad 969 (9 0) (1871) 6 Ben L R App 64 (65) 4 (1918) 1918 Mad 1158 (1153) [See also (1920) 1920 Cal 525 (526) An order charging the property of

an insolvent debtor for the repay ment of plaintiffs claim on condition of granting permission to defend has cuit is a germanent charge till regarment of claim]

1 (1932) 1932 Born 163 (165) 6 Pom 263 [See also (1930) 1 J30 I om 364 (864 265)]

2 (1915) 1915 Cal 771 (771) 42 Cal 785 can be canvas ed

3 (1935) 1935 Rang 245 (740) 13 Rang 239 In appeal from the decret validity of order grunting conditional leave R. 4. [S 534] After decree, the Court may, under special O

encumstances, set aside the decree, and it necessany stay or set aside execution, and may give leave to the detendant to appear to the summons

and to defend the suit, it it seems reasonable to the Court so to do, and on such terms as the Court thinks ht

[1877—S 534]

Power to set aside

decree

### Sunopsis

Power to set aside decree Note No 1

1 Power to set aude decree

A defendant who has not obtained leave to defend will not be allowed to appear at the hearing of the suit. In such cases a decree should follow Thereafter the remedy of the defendant is to apply under O 20 R 11 or to apply under this Rule to set aside the decree I If on such application the defendant satisfies the Court about his being prevented by sufficient cause from appearing in time and getting leave to defend the decree against him will be set aside and he will be allowed to contest the claim 3

R. 5. [5 535] In any proceeding under this Order the Court may order the bill, hunds or note on which the Power to order bill suit is founded to be forthwith deposited with etc to be deposited an officer of the Court, and may further order with officer of Court

that all proceedings shall be stayed until the plaintiff myes security for the costs thereof

R. 6. [S 536] The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses

Recovery of cost of noting non accep tance of dishonoured bill or note

incurred in noting the same for non acceptance or non-payment or otherwise by reason of such dishonour, as he has under this Order for the recovery of the

amount of such bill or note

[1877—S 536]

R. 7. [8 537] Save as provided by this Order, the procedure in suits hercunder shall be the same as the Procedure in suits procedure in suits instituted in the ordinary

manner

### Sinopsis Procedure in Suits Note to 1

- Order 37 R 4 Note 1 1 (1926) 1J26 Born 250 (251) 50 Born 262 (1,01) 5 Cal W N 259 (260) (1,11) 11 Ind Cas 433 (434) (Lah) (1872) 18 Suth W R 424 (198)
- 2 (1311) 11 Ind Cas 433 (484) (Lah) (1501) 3 Leng L R O C S3 (S1) (1856) 23 Cal 573 (575) The question as to

what took like upon the occasion of the service of summons by the

Sheriff 1 one which may properly be taken into consideration on an ipplication unde this section to set aside the decree

(1869) 3 Beng L R App 7 (5) But irregular service of summons on two out of three defendants to au action brought on a 10 nt promissory note does not give the defendant properly served any ground to question the decree pas ed against him.

7

1

1 Procedure in suits

The Court has power, under O 6 R 17 of the Code to amend the plunt filed under this Order so as te connect it with an ordinary suit 1

## ORDER XXXVIII

## ALLEST AND ATTACHNEST BEFORE JUDGMENT

Arrest before Judgment

Where defendant and be called upon to furnish securify for appearance R. 1. [Ss 477, 478] Where at any stage of a suit other than a suit of the nature referred to in section 16, clauses (a) to (d), the Court is satisfied, by affidant or otherwise,—

(a) that the defendant with intent to delay the plaintiff, or to avoid my process of the Court or to obstruct or delay the execution of any decree that may be passed against him.—

(1) has absconded or left the local limits of the jurisdic-

tion of the Court or

(11) is about to abscord or leave the local limits of the purisdiction of the Court, or

(111) has disposed of or removed from the local limits of the purisdiction of the Court his property or any part thereof, or

(b) that the defendant is about to leave British India under encumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit.

the Court may issue a warrant to ariest the defendant and bring him before the Court to show cause why he should not tue mish

scenrity for his appearance

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim, and such sum shall be held in deposit by the Court until the suit is disposed of or until the further order of the Court

[1877—Ss 477, 478, 1859—Ss 74, 75 See S- 94 and 95]

Synopsis Note No Note No V Suit must be bona fide
VI To show cause why he should
not furnish security for his ap I Legislative changes II Scope of the Rule and of the Order 2 III Distinction between Cls pearance VII Consequences of arrest on insuffi and (b) (a) Affor ling rea onable 1 robat cient grounds-See Notes to hty -See Note 3 above S % arte VIII Form-Se Apled ıν Is satisfied by affidavit atherwise

Money delo sted -- If liable to rateable Instribution See S 73 Note 4 Pt (95)

1

1 Legislative changes The following are the material changes note duced 11 the Rule -

I The words other than 1 mit for the 10 e sion of the namoveable property which occurred in the old Section have been sub-tituted by the words, other than a suit of the nature referred to in S 16 Cl (1) to (1)

2 The provi o to the Rule is new and is similar to R 38 of O 21

The provision for the examination of the unbleant which occurred 115 4 8 of the old Code has been quutted See Note a Lelow

### 2 Scope of the Rule and of the Order

The normal temedy available to a creditor having a demand aprinst his debtor is to first obtain a decree a minst him and then to affect him of to attach his property in execution of that deerer under the provisions of O 21 Under special circumstances however which he specified in this Bule and R > infia, the creditor can take out airest or attachment against his debter oven before judg The object of such a provision is to prevent inviatempt on the part of the defendant to defeat the realisation of the decree that may be passed against him

Before the creditor can resort to the extraordinary procedure provided by this Rule he must show that there is good ierson to believe that the debtor is about to deput from the musdiction of the Court of to male away with his pro-(See Note a infra) The Rule will not enable him to take out arrest before judgment merely because it would seems easy execution of the decree 1

### 3 Distinction between Cls (a) and (b)

In order to apply Cl (a) it is necessary to show that the defending has committed on is about to commit in of the acts specified therein with intent to delay the plaintiff or to avoid the process of the Court or to obstruct or delay the execution of any decree that may be passed against him! No such intention need be proved in cases coming under Cl (h) It is only necessity to show that the circumstances under which the defendant is about to leave British India afford a reasonable probability that the plaintiff will be obstituted or delived in realism, his decree 2

### Affording reasonable probability > ( \ 1 3 abox

Is satisfied by affidavit or otherwise Unler 5 178 of the old Code the Comit could assue a will int to urest the defendant before undersent where after any remember applicant and making such further investigation as it thinks fit it is satisfied that the defendant has commit ted or is about to commit any of the acts specified in Cls (a) and (b) 1. This provision has now been constited and the Court can without any such examination or investigation act under this Rule if it is satisfied by affidavit or otherwise of the existence of the circumstances specified in those clauses. Before the Court can act under this Rule it must have acison to believe on adequate materials, that, unless the jurisdiction is excissed there is real damper that the defendant will remove himself or his property from the unbit of the powers of the Court 12 Order 38 Rule 1-Note 2 See (1897) 11 Cul 635 [ 02)]

1 (1875) 13 Suth W R 278 (2:0) Note 3 1 (18°0) 13 Suth W R 2°s (279) 2 (18°6) 1 Ind Jur N S 265 (18°6) 1 Ind Jur N S 251

(1830) 6 Mal 200 ( 01)

Note 5 1 > e (15.0) 13 Suth W R 75 ( (J)1 1 (1926) 1J.6 Mrd ast (ast) .0 Mrd . (1969) 1 \ W P H C R 91 (93) (18"0) 13 Suth W R 275 (279) 2 Hvde 181

Where there was reason to behave that the defendants were removing goods and selling them at less than cost price, and that they were evading arrest without furnishing any security, it was held the Rule was properly applied to the case <sup>2</sup>. Bu, where the defendant had to leave his place of residence for attendance in a criminal Court, it was held that the departure could not be said to be with a new to delay the plaintiff or to avoid the process of the Court or to obstruct or delay execution and that therefore an order under this Rule should not be passed <sup>3</sup>

6 Suit must be hone fide

Before exercising the powers conferred by this Rule a Court should be satisfied that the plaintiff's suit is bona fide' and that his cause of action is prima facte an unimpeachable one subject to his proving the allegations made in the plaint?

Where the plaintiff is indisputably entitled to a part of his claim the mere circumstance of the rest of the claim heing of a disputable character does not render the suit mala fide.

7 To show cause why he should not furnish security for his appearance

Where the Court issues a warrant of arrest against the defendant, he is entitled to show cause against his arrest. The cause must be either that he is not going to leave the jurisdiction of the Court or not for so long a time as will obstruct or tend to obstruct the plaintiff should be succeed or that the suit is not bona fide one or that even if it is the institution of it has been evantously delayed till the defendant is about to depart in order to embarrass or coerce him.

- 8 Consequences of arrest on insufficient grounds -See Notes to S 90 ante
- 9 Form -See Appendix F Form to 1

R. 2. [5 479] (1) Where the defendant fails to show such cause the Court shall order him either to deposit in Court money or other property sufficient to have a court to be a court to

him or to furnish security for his on called upon while the suit is pending ny decree that may be passed against such order as at thinks fit in regard to the

him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the detendant under the provise to the last proceeding Rule

(2) Every surety for the appearance of a detendant shall bind himself, in default of such appearance, to pay any sum of money which the detendant may be ordered to pay in the suit

[1877-8 479, 1859-S 76]

<sup>2 (1974) 1974</sup> hang out (361-362) 2 I and
362 Court has power oven to have
simultaneous execution for arrest
and attachment before judgment
(1-1) 13 1 Jour \_3 (2) (Lah)
Note 6

<sup>(18 4) 14</sup> Cal 635 (0') 2 (19 6) 19 6 Mad 584 (584) 50 M d . 2 (188 ) 14 Cal 695 (0)

Note 7

<sup>1 (1666) 1</sup> Ind Jur 2 > 11

Note 6 1 (1566) 1 It d Jur N 5 234 1

6

7

## Synopsis

Note No Note No Security Orto furnish security for his appear Deposit not open to rateable distribu-Extent of surety shability 2 5 Deposit by defendant-Effect of insol Appeal Form-See Appendix F Form No 2 vency

Other Tomes

Payment by surety-Rateable distribution See S 73 Note 4 Pt (14)

### 1 Security

In a suit for the recovery of Rs 29 508 the plaintiff obtained a warrant for arrest of the defending but the warrant directed the warrant officer to demand Rs 10,000 and if the sum was not paid then, to arrest him. The defendant did not pay the amount and was arrested and brought before the Court It was held that the Court should limit the security to he aren to Bs 10 000 as per terms of the notice in the warrant and not to order security to be given for amount claimed in the suit 1

2 Deposit not open to rateable distribution - See the last paragraph of Note 4 to S 73

### 3 Deposit by defendant-Effect of insolvency

Money or other property deposited by a defendant arrested before judg ment sufficient to answer the claim is earmarked for the suit and is subject to the hen of the plaintiff in the event of his success. Consequently if the defendant becomes insolvent the plaintiff is entitled to appropriate it to the exclusion of the Official Receiver and other creditors But a security given for the appearance of the defendant in Court whenever called upon cannot be said to be to the credit of the suit of earmarked to the general purposes of the suit 1

### Or to furnish security for his appearance

Where a judgment debtor was released on furnishing security for his appearance on a certain day and the surety executed a bond for the due perfor mance of the decree on failure of the judgment debtor to satisfy it it was held that the bond was not in accordance with the Court's order and the surety was dis charged from his responsibility on the appearance in Court of the judgment debtor on the specified day 1 Where on an application by the plaintiff for arrest of the defendant a pleader appeared on behalt of the latter and stood bail and thercupon the defendant was not arrested it was held that the surety could not be allowed afterwards to contend that the security was illegal by reason of the fact that the defendant was not arrested 2

## 5 Extent of surety's hability

The security to be furnished under this Rule is for the appearance of the defendant while the suit is pending and until satisfaction of any decree that may be passed against him. But the fact that the surety bond went beyond the terms of this Rule and provided for the jayment of the amount claimed in the suit in the event of a decree being passed against the defendant will not render the bond unenforceable 1. Nor will a surety tor the appearance of the defendant, be relieved of his obligation merely because the decree is a compromise decree instead of being Order 38 Rule 2-Note 1

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1 (19_J) 1J2J Cal 732 (733) 56 Cal "CO
                 Note 3
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1 (1914) 1914 L B 54 (55) 2 (1868) 1868 I un he No. 77 Note S

1 (1319) 1919 Mad CO7 (668; 41 Mad 10 3 1 (1929) 1923 Notes 9 (c) 115 I C 244 (Mad) one on trul 2

The object of the security bond under this Rule is merely to seeme the rights of the judgment-creditor. The Government is not interested in the proceedings in any way. On the failure of the defendant to appear as required the Court cannot suo modu make an order forfeiting the bond and direct him to pay the whole of the maximum sum therein stipulated to Government. The enforcement of the bond should only be made on the application of the judgment creditor and then only to the extent of the sum of money found payable under the decree?

See also Notes to S 145, ante

6 Appeal

An order for arrest before judgment is appealable under S 104 (h) of the Code

An order under this Rule is appealable under O 43, R 1 (q) 1

7 Form -See appendix P, Form No 2

R. 3. [S 480] (1) A surety for the appearance of a defendation by sweeth which he became such surety to be discharged from his obligation.

(2) On such application being made, the Court shall summon the defendant to appear or, if it thinks fit, may issue a warrant for his arrest in the first instance

(3) On the appearance of the defendant in pursuance of the summons or warrant, or on his voluntary surrender, the Court shall direct the surety to be discharged from his obligation, and shall call upon the defendant to find fresh security

[1877—S 490; 1861—S 24; 1859—S, 78.7

Scope of the Rule

Note No

Note No

Form See appendix F borm No 3

Note No
3

Other topics

Discharge of surety Sec S 145, Note 9 Voluntus surronder Sec Note 1, Pts (1)

1 Scope of the Rule

A surety for the appearance of the defendant may apply under this Rule to be discharged from his obligation. But before he is so discharged it is essential that the defendant should appear before the Court either voluntarity on in pursiance of a summons or narrant of arrest issued against him under sub-jule (2). If he is present in Court under encumsiances which occupit him from arrest, or if he appears under a protection order of the insolvency Court in his favour? the surety will not be entitled to be discharged from his obligation under this Rule Nor will the insolvency of the defendant release the surety from his obligation.

3.

2 (1920) 1920 Vad 355 (456) 43 Mad 272

3 (1914) 1914 Sind 144 (144) 8 Sind L R 270

Note 6

1 (See (1867) 7 Suth W R 508 (508)

Where the defendant uplears before the Court under this Rule, the Court should direct him to find fresh seconts, an order directing his detention without calling upon him to find fresh security is not lead and if the defendant leaves the Court in defiance of the order he cannot be consisted for an offence under S 225 B of the Penal Code \*

I surety for the due terformance of any decree that may be passed as unst tle defend ut eannot apply under this Rule for being discharged from his obli \_ition

As to the manufamability of a suit for a discharge of the obligations under warety bond, see Note 2 to S 47 and Note 11 to S 145 and and the undermentioned case 6

2 Appeal

In order under this Rule is if calable under O 43, R 1 (q)

3 Form -See Maidis F Form to 3

R. 4. [S 481] Where the detendant tails to comply with any order under Rule 2 or Rule 3 the Court my Procedure where commit him to the cuid prison until the decision defendant fails to of the suit or where a decree is passed against the firms a security or

find fresh security defendant until the decree has been satisfied Provided that no person shall be deturned in prison under this Rule in any case for a longer period than six months nor for a longer period than six weeks when the amount or value of the

subject matter of the suit does not exceed fifty rupces Provided also that no person shall be detuned in prison

under this Rule after he has complied with such order

[1877-5 451 . 1859- S 78]

See Appendix & Form No 1

Scope of the Rule Appeal

1 Scope of the Rule

It is only in the event of a failure to comply with any order under Rule 2 or Rule 3 re in the event of failure to furnish scourty or to make a sufficient deposit that the defendant can be committed to custody under this Rule 1 The whole period of letention before and after decree should not exceed six months

2 Appeal

An a let under this Bule for the airest of the defendant is appealable in der 5 104, Cl (h)

3 Form -See Villend F Form No 4

Attachment before Judgment

Were lefer dant " ay be called upo i to furnish security for product o of property

R. S. [Ss 483, 484] (1) Where at any stage of a suit the Courts is satisfied " by affidavit or otherwise that the defendant, with intent to obstruct or dolay 13 the execution of any decree that may be passed against him.-

> Order 38 Rule 4-Note 1 1 (15 0) 13 Suth W R 9 5 (7 J) ıs 1v (1-24) 1974 Rang S61 (361) 2 R 1 3 (153) 1 om 471 (436)

> > ١

(a) is about to dispose of the whole or any part of his pronertu12, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court. 17 the Court may direct the defendant, within a time to he fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court,14 when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security,

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated

value thereof

(3) The Court may also in the order direct the conditional attachment23 of the whole or any portion of the preperty so specified.

[1877—Ss. 483, 484; 1859—Ss. 81 to 83. See Ss 94 and 95— Cf R S C, O, 50, R 9.1

Synopsis Note No Legislative changes Il Scope object and applicability of the Rule 2 wester structury to be (a) Monthage suits
(b) Divorce proceedings 3 furnished for producing the attached property in Court " 4 (c) Application for leave to sue in (a) Extent of surety s liability 15 forma pauperss
III Applicability of O 21, R 63 to 5 (b) Whether the Court can extend time for furnishing security attechments under this Rule-XII Property situated outside juris 17 See Note 6 to O 21, R 63 and diction Notes to R 8 below XIII Effect of ettaebment 18 IV Applicability of S 64 to such (a) Money deposited into Court in pursuance of the attachment if attachments V Attachment before judgment if hable to rateable distribution becomes attachment in execu (b) Vesting order in insolvency, tion-See R 11, snfra, and also Note S to O 21, R 57 VI Power of Small Cause Court to how affects attachment before 8 ndgment. 20 (c) Right of survivorship if de attach before judgment-See feated by attachment 21 R 13, below XIV Liability for wrongful attach-22 VII Power of Insolveney Court to ment χv 10 Conditional attachment 23 attach properties IVX 24 Where the Court is satisfied ' 11 Appeal XVII Forms 25

1 Legislative changes

1X

The following are the material changes effected in this Rule -1 The words 'or has quitted the pura-diction of the Court leaving therein property belonging to him ' which formed part of S. 483, Cl (b) of the old Code have been

2 The Irovision for the examination of the applicant which occurred in S 484 of the old Code has been omitted

2 Scope object and applicability of the Rule.

Is about to dispose of the whole

The object for the provisions for arrest and attachment before judgment is to tree it my attempt on the part of the defendant to defeat the realization of the decree that may be passed against him 1 It follows that the Rule applies only where the defendant is about to dispose of, or remove from the local limits of the jurisdiction of the Court, his properties, and not to cases where he has already disposed of them 2 It is also necessary, before the Rule can be applied, to show that the defendant has acted, or is about to act with the intent to obstruct or delay the execution of any decree that may be passed against him 3

The Rule applies, in terms, to suits An application to enforce an award under paragraph 20 of the second schedule to the Code, when numbered and registered as a suit, becomes a suit for the purposes of this Order and the Court can pass an order for attachment before judgment under this Rule 1 It has been held by the High Court of Lahore that this Rule may be applied to proceedings other than suits by virtue of S 141 of the Code, and that therefore a liquidation Court dealing with the proceedings under the Companies Act can make an order under this Rule for attachment before judgment 5 According to the High Court of Calcutta an attachment before sudgment is a matter of relief and not of procedure 8 It would seem to follow from this that S 141 under which the procedure provided in the Code in regard to suits should be followed in other proceedings also, will not enable the Court to apply this Rule to such proceedings

An application under this Rule should specify the property to be attached and the estimated value thereof, an application generally for security being taken for the satisfaction of any decree that may be passed, without specifying any property is not one falling within the scope of the Rule In the undermentioned case where an application for injunction was made to restrain the defendant from withdrawing certain amounts standing to his credit, it was held that the order issued thereon really amounted to an attachment before judgment

The Court can pass orders under this Rule even if the trial of the suit has been staved under S 10 of the Code (See Note 12 to S 10, ante) As to whether the Court has power in cases not covered by this Rule, to pass orders for attach. ment hefore judgment, see Note 2 to S 94

The provisions of the Code relating to attachment before judgment apply to all proceedings referred to in S 265 (3) of the Chota Nagpur Tenancy Act (VI of 1908) and in S 16 of the Bengal Rent Act (VI of 1862)

3 Mortgage suits

The provisions of this Rule are not mapplicable to mortgage suits. Where there is a reasonable probability of the mortgaged property being insufficient to discharge the mortgage debt and of the mortgagee being entitled to get a personal decree in his favour for the halance, properties of the defendant other than those covered by the mortgage can be attached before judgment under this Rule, if the requirements of the Rule are satisfied 1 The Courts should, however act with extremo caution in such cases 2

4 Divorce proceedings

It has been held by the High Court of Cilcutta that an attachment before Order 38 Rule 5-Note 2 (1933) 1933 All 1 J1 (192) 55 All 179 Apple 1 (1869) 13 Suth W R 9 (11) cation for final decree pending-Application under this Rule is maintain-

[See also (1899) 26 Cal 531 (533) ]

2 (1928) 1929 Lah 772 (772 773)

3 See Note 12, below

4 (1027) 1927 Boni 259 (200)

. 13

able

2 (1594) 16 411 156 (185)

Note 3 1 (1931) 1931 Bom 329 (329) 5.

judgment is a matter of relief, not of procedure, that therefore in livorce cases to which the Divorce Act, 1869 is applicable the Court is to be suided by \$ 7 of that Aot and that it cannot pass an order under this Rule for attrichment before udgment 1

5 Application for leave to sue in forma pauperis

It has been held in the case cited below that an application to suc in forms pauper is does not become a suit until the same has been granted, and that consequently, the Court has no jurisdiction to make an order for attachment before judgment under this Rule 1 The decision does not however, advert to the applica bility or otherwise of S 141 in such cases

- 6 Applicability of O 21 R 63 to attachments under this Rule > c \oin 6 to O "1 R 63 and Notes to R 8 below
- 7 Applicability of S 64 to such attachments See Yole 4 to S 64 1 de 101 the exes cited below 1
- 8 Attachment before judgment if becomes attachment in execution See R 11 s fin and also Note 8 to O 21 R of
  - 9 Power of Small Cause Court to attach before judgment See R 13 belov
  - 10 Power of Insolveney Court to attach properties

Under S 21, Cl (2) of the Provincial Insolvency Act 1920, the Iusolvency

Court can attach the property of the debtor under circumstances similar to those specified in this Rule Where the Court is satisfied

Under 9 484 of the old Code the Court could issue an older for attachment

before judgment where efter examining the applicant and making any further investigation which it thought fit it was satisfied that the defendant had removed or was about to remove or dispose of his property with the intention of obstructing or delaying the execution of any decree that may be passed against him provision has now been omitted and the Comt can, without any such examination or investigation act under this Rule if it is satisfied by affidant or otherwise of the existence of the specified circumstances

The purisdiction of Courts in attaching property before judgment is of an extraordinary nature and should be exercised spainaly and strictly in accordince with the procedure prescribed by the Code 1 The Court should be satisfied on two points namely -

- (1) that the defendant is about to dispo e of the whole or part of his
- property, and (2) that the disposal is with the intention of obstructing or deliving the
- execution of any decree that may be passed against him 2 absolute right to isk for attachment Note 4

1 (1910) 7 Ind Cas 792 (793) 37 Cal 613 Note 5

1 (1917) 1917 Cul 852 (853)

Note 7 1 (186J) 1 N W P H 6 R 173 (186) Private

I clore sudgment-It is in the discre tron of the Court

2 (1921) 1924 Pat 312 (314) (1934) 1931 Cal 694 (634) 61 Cal 814 I laint fi

case before attach ment can be given (1918) 1918 Lat 387 (388)

Note 10 1 (1014) 1914 111 264 (265) 36 111 63 Note 11

1 (1924) 1924 Lah 376 (378) (1331) 1331 \11 165 (166) Creditor has no Attachment granted only on groun I of difficulty to plaintiff to realize his decree is on insufficient grounds)

there must be definite evidence on these points and not merely vapue illegations 3 But the Court is not restricted to examine attempts at illegations made after the commencement of the action at is onen to it to look to the conduct of the parties immediately before the suit and to examine also the surrounding circumst inces 4

Is about to dispose of the whole or any part of his property

Before excreising purediction under this Rule and passing orders for the ittachment of properties before ind ment the Court should satisfy itself of the practical certainty of the plaintiff's success and of the existence of a grave danger and of a real fear that a dishonest defendant, undoubtedly hable as making away with the probable fruits of the jud\_ment 1 For this purpose it is not sufficient to merely allege that the defendant is likely to dispose of the property. Nor is it sufficient to state that ho is about to dispose it of, without stating the sources of such information ' Pho word property 'includes property of every description whether moverble or immoverble and whether in the possession of the defendant or of some other terson on his behalf. It includes a debte of a chose in action But the debt must be one that is accrum, or has accound a Joint property belonging to a partnership of which the judgment debtor is a member is not the property of the judgment debtor and cannot be attached before judgment under this Rule

with intent to obstruct or delay

The Court must be satisfied not only that the defendant is about to dispose of his proporty or to remove it from the jurisdiction of the Court but also that his object in so doing, is to obstruct or delay the execution of any decree that may be passed against him 1 Such an intention cannot be inferred merely from the fact that the defendant has entered into an agreement to sell a Portion of his proporty or that he has actually alienated a portion of his properties of that he has allowed his properties to be sold in execution of decrees or for arreads of lovenue or that he is running into debts or is attempting to secure debts already incurred by oxecuting a most ago in respect thereof ' \ man is not debarred from dealing

3 (1J18) 1918 Pat 387 (358) (1934) 1934 Cal 634 (697) 6t Cul 814 (1927) 1927 Bom 2 6 (270) 46 Bom 431 (1924) 1324 Lat 312 (314)

(1919) 1919 Mad 20 (20) (See also (1915) 1919 All 277 (27s)

37 411 4931 (184 .) Suth W R .09 (.09) The most 1er

Note 12

1 (13%) 1326 111 406 (40%) 48 111 10 (1934) 1934 Cal 694 (697) +1 Cat 814 9 Hyde 183 (Cools) (1866) 1 Ind Jur V S 241 (ship) [See also (1896) 22 Bm 1 797 (720)]

(1835) 17 111 82 (95) ( (1925) 1920 Cal off (563)

7 (1901) 3 Bom L R 462 (463) 9 (1925) 1925 Cal 561 (569) 3 (1907) 9 Bom L R 540 (541)

Note 13

1 (1924) 1924 Lat 312 (814) (1683) 13 Cal L Rep 356 (35 ) (1915) 1915 All 977 (278) 37 All 424 (1912) La Ind Cas GO4 (GO1) (Cal) (1897) 21 Bom 2"3 (2"8) (1913) 1J18 Pat 387 (388) (1926) 1926 Lab 330 (337)

[See also (1934) 1934 N ug 169 (1711) 2 (1921) 1321 Born 69 (69) 45 Born 1256

3 (1932) 1932 Cal 790 (\*90 791)

(1934) 1934 Cal 694 (697) 61 Cal 814 There must be a present intention (1927) 1927 Cal 354 (357) Mortgage

(19.6) 1926 Cal 855 (65a) 4 (1932) 1932 Cal 790 (791)

5 (1927) 1927 Cal 354 (356)

5

- with his property simply because a suit has been filed against him <sup>6</sup> Nor can an attachment be ordered morely because the defendant has failed to give an undertaking <sup>7</sup>
  - 14 Court may direct security to be furnished for producing the attached property in Court

    The expression has reference only to such property as is capable of being
- produced in Court 1

15 Extent of surety s hashity—See Note 9 to S 145 ante. The surety is liable whether the decree is passed on a compromise or on an award 2. In a recent Bombay case, however, where a decree was passed on the

an award. In a recent bombay case, nower, where a decree was passed on the consent of parties allowing the payment of the decree amount in 9 monthly instalments the Court applied the principles of S 133 of the Contract Act and held that the surety was discharged from liability on the ground that the compromise which was subsequently embodied in the decree prejudiced the rights of the surety against the debter and that such a decree was not in the contemplation of the surety when he gave the bond. Again where a surety for the production before the Court of property released from attachment before judgment was not put in possession of the property so released it was held that he could not be proceeded equinst in the event of a decree being passed.

But a mere notice given by the surety to the effect that he intends not to be surety any longer will not enable him to withdraw from the guarantee at any time <sup>5</sup> Nor will the death of the defendant operate to dischaige him <sup>6</sup> It has been seen in Note 9 to S 145 that the dismissal of a suit will put an end to the liability of the surety. But if the dismissal is one for default and the suit is immediately restored the surety will remain liable under the bond <sup>7</sup>

nmediately restored the surety will remain liable under the bon

16 Whether the Court can extend time for furnishing security

The Court may under its general powers extend the time for furnishing the security directed to be given under this Rulo 1

17 Properly situated outside jurisdiction

As has been seen in Note 7 to 8 136 ante there was a conflict of decisions under the old Code as to whether a Court could statch before judgment property situate outside its jurisdiction. But in view of the omission in the present section of the words, within the jurisdiction of the Court, in no row order the attackment of properties whether stuated within or without its jurisdiction? In the latter case the proper procedure for attackment is to transmit the order to the Court in whose jurisdiction the property is situate?

But a Court cannot order the attachment of properties outside British India 4

6 (1921) 1921 Bom 69 (6J) 45 Bom 1286 7 (1928) 1928 Pat 172 (173) Note 14

1 (1895) 17 All 82 (85) Note 15 Note 15

0 0 D T11 H2 143

Note 16 1 (10\_3) 1923 Cal 639 (641) 50 Cal 21.

Note 17
1 (18"1) 9 1 om H C R 29 (34 35) (No) (18"8) 1 Cat L Rep 330 (338) (No)

(1872) 8 Beng L R 335 (337) (No) (1907) 1907 U B R Civ Pro 13 (No) (1905 06) 3 L B R 255 (2.6) (No) (See also the croses cited in foot notes (1) and (2) of Note 7 to S 136]

2 (1926) 1926 Lah 330 (331) (1911) 10 Ind Cas "34 ( 95) (L B) (1923) 1928 Lah 376 (378)

(1323) 1928 Lah 376 (378) (1931) 1931 Rang 279 (250) 9 Rang 561 [Ent see (1914) 1914 U B 17 (18) 2 U B R 16]

(1918) 1918 Cal 911 (912) 3 (1326) 1926 Bom 278 (278)

[See also (1669) 6 Dom H C R 170 (173)] 4 (1931) 1931 Lah 723 (724)

1

(1931) 1931 124 123 (121) (192 ) 1925 Viad 1100 (1101)

O

18 Effect of attachment

T.

See Note 5 to 8 64 and Note 11 to 0 21, R 54. An ittachment of pioperty involves the ittachment of the profits of that property, but the creditor does not thereby become entitled to such profits. The debtor who collects such profits cannot be called upon to account for the profits received by hm. An attachment of a debt, does not prevent the creditor from suing for the debt. See also Note 16 to 0.21, R 46. An attachment before judgment without complying with the provisions of R 5 is altra arres and does not come in the way of an alternation product such attachment.

19 Money deposited into Court in pursuance of the attachment, if liable to rateable distribution

Where mones and movables his attached before judgment by several redditors in various suits and they are reclized by Court before any of them his obtained a decree, they should be held to the excit of all the suits and distributed rateably among all the creditors who have obtained decrees, before any of the others apply for payment. Attachment before judgment does not give any priority over another who attaches in execution and applies for payment. Money paid by a surety after the decree holder takes out execution is also hable to rateable distribution. See also Notes to O. 21 R. 22 and Note 4 to S. 73.) Where however, property attached before judgment is released on the defendant giving security of some of the items attached before judgment is released on the defendant giving security of some of the items attached the plaintiff on obtaining the decree is entitled to a preferredual right and on execute against the security.

20 Vesting order in insolvency how affects attachment before judgment

Where the property of the defendant is attached before judgment and subsequently the defendant becomes isoslvent, the attachment will not give any priority to the plaintiff over the Official Receiver or Official Assigned in respect of such properties. If the defendant pays money into Court as security for issing the attachment and subsequently becomes insolveet, the plaintiff will not got any charge over the money as against the Official Assignee. (See also Notes 10 and 14 to 9 64 and the case noted I clow?)

21 Right of survivorship if defeated by attachment

There is a conflict of opinion as to the effect of attachment before judgmoot on the right of survivorship among members of a joint Huddi Yuni). Locarding to the High Courts of Dombry and Patar where the judgment debtor dies after in titlehment before judgment but before it is converted into an ittachment in execution the right of survivorship would provail over the attrohment. In High Court of Madras his dissented from the said view ind has held that as soon as a decree is presed in the sit the attachment before judgment would operate so is to defeat the judic of survivorship and that it is not necessary that any steps need.

Note 18

4 (1920) 120 Vad 400 (410)

1 (1869) 12 Suth WR 30 (1932) 2 (1892) 14 All 102 (106) (1895) 17 VII 109 (211) 22 Inl VIP 31 (1 C) (1918) 1918 Cal 631 (632) 3 (1922) 1922 Nag 238 (239) Nate 19

(1333) 1333 Cat 675 (676) (Obiter) (1864) 2 Bom H C R 146 (159 160) (1983) 1930 '-nd 137 (1.5) 2 (1917) 191" Vid. 143 (745) 39 Vid. 903 (1346) 1316 Cit. 931 (532)

1 (1966) 1 Ind Jur N S 325 ("73)

1 (19:0) 14 Sath W R 33 (30) (F B) Attach ment in execution previous to sest ing order under Code of 18:09-Vest ing order did not prevail over the attachment Note 23

Note 20

(1685) 12 Bom 400 (105 407) 3 (1922) 1922 Cal 19 (20)

1 (1911) 1914 Bom 2.6 (257) 33 Bom 10.0

C P C 315 & 316

5

he taken for converting the attrehment into one in execution? Where the jud, ment debtor dies before decree the utachment before judgment will not have the effect of defeating the light of survivorship? See also Note 10 to 5 64, anti

22 Liability for wrongful attachment

The scheril principle is that it is not an actionable wrong to institute Civil Proceedings. But proceedings taken for the arrest of the defendant of for the attachment of his property form an exception to the general rule and a suit is maintunable for damages for wrongful viest or attachment. In such a suit the plantiff must show that the defendant was instituted by malice, that the 110 ceedings were nithout reasonable and probable cause and that damages have been sustained thereby. It should also be shown that the attachment was withdrawn in plantiff statour. The General and special damages may be awarded according to the circumstances of the case.

The cause of action for the suit is the date of the wrongful seizure and not the date when the seizure is declared wrongful  $^4$ 

See also Note 20 to S 9 Note 4 to S 62, and S 95 and also the under mentioned case  $^{5}$ 

23 Conditional attachment

'Conditional attachment' means an immediate attachment of a previsional kind conditioned to become plenary if security should not be furnished or cause shown according to the terms of the order? The power given by O 38 R 8 to make an alternative order directing the defendant within a specified time to furnish security or to appear and show cause carries with it sa an incident the power to confirm the order that security be furnished? A conditional order of attachment cannot be made without at the same time making an order directing the defendant to furnish security or to show cause why he should not furnish security without such an order the order of attachment will be invalid. A conditional order of attachment produced the appearance of a successful control order of attachment produced to the appearance of a successful control order of attachment will be an application for the appearance of a subsequently comes and states that he is unwilling to at? When after a conditional order is passed under this Rule the surt is transferred to another Court the latter Court can press further necessary orders in the matter?

A conditional order has effect only till the defendant shows cause or furnishes security 6

24 Appeal

No appeal is provided for ignist orders under this Rule in O 43 R I An order mide under the provisions of O 33, R 5 is not a Judgment within the meaning of the Letters Patent and is not appealable as such under the Letters Patent.

(1921) 1924 Pit 465 (467) 3 Pat 250

2 (1926) 1926 Vist 72 (77) (1914) 1914 Vist 118 (118)

(1914) 1914 Mid 118 (118) 3 (1931) 1931 Mal W N 1015 (1016) 1931

Note 22
1 (1895) 1895 Pun Re No 86 page 407
2 See cases cilc I in Foot note (1) to Note 13

(1931) 1934 All 165 (167) No notice of it pheation to debtor-defendant—Defendant not called upon to firm he security—Attachment is ultra cires and plaintiff cannot claim benefit

G. (1914) 1914 All 511 (511) Note 24 1 (1925) 1925 Rang 267 (269) 3 Rang 307

25 Forms

Ť

For form of attachment before judgment with order to call for security see Appendix 1, Youm 5 Where, on an application under this Rule before Judgment, the Court instead of issuing a notice in form No 5 Appendix F, issues a notice to show cause in the general form, the provisions of this Rule are not complied with and its action amounts to an arregularity 1

For form of security see Appendix F Form 6

Attachment where

R. 6. [S 485] (1) Where the detendant tails to show cause why he should not turnish security, or fails to turnish the security required, within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as

cause not shown or security not fur nished

appears sufficient to satisfy any decree which may be passed in the suit, be attached

(2) Where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit

[1877—S 485: 1859—S 84]

Synopsis

Note No Scope of the Rule Property specified-Sie Notes 1 and 17 to R 5, above

Note No Form-See Appendix F Form No 7 Enforcement of security bond siven under this Rule

Other Topies

Effect of Attachment " Sec R 5 Note 18

I Scape of the Rule

Appeal

A conditional order of attachment passed under R 5 above has effect only until the defendant furnishes security or appears to show cause 1 In unconditional order of attachment under this Rule can be passed only if the defend int fails to show cause why he should not furnish security or on his failure to furnish the security required. The question whether there has been a failure to do so is one that must be indically determined before drawing up the writ of attachment 3

Where a conditional order of attachment before judgment has been issued under Rule 5 and it is not necessary to issue of serve a fresh warrant of attachment after the conditional order has been made absolute a

Where, in older to west an attachment, security is furnished the Court has not power under this Rule to why

(1567) 7 Suth W R 508 (508) (1598) 1698 All W N 18 (19) Note 25

1 (1934) 1934 All 456 (457)

Order 38, Rule 6-Note 1 1 (1914) 1914 411 511 (511)

(1914) 1914 411 511 (511)

So (1931) 1934 Cal 251 (252)

3 (1927) 1927 Cal 354 (355)

õ. the security should not be furoished \$

- 2 Property specified -See Notes 1 and 17 to R Jabove
- 3 Appeal

This Rule contemplates orders of two kinds -

- 1 An unconditional order directing attachment under Cl 1 on the defendant's failure to furnish security or to show cause against the order for security, and
  - 2 An order withdrawing a conditional attachment made under R 5 on the defendant furnishing security or showing cause

Both these orders are appealable under O 43, R 1 (q)1 but an order directing security to be furnished is not appealable. Similarly where on an application for attachment under R 5 the Court issued notice to the defendant without ordering any conditional attachment and on the defendant's showing cause, in answer to the notice the Court dismissed the application, it was held that the order of dismissal was not one under Cl 2 of this Rule and is therefore not appealable 3 But where the defendant appears in inswer to the cotice and gives an undertaking not to alionate certain properties and the petition is thereupon closed, it has been held by the High Court of Midris that there is an order goder this Rule from which an appeal lies 4

In appeal against an order directing attachment before judgment is not restricted to the grounds mentioned in Rule 5 aute and this Rule. Thus the question whether a certain property can be attached having regard to the provisions of S 60 aute, can be rused in the appeals to order passed under this Rule is a discretionary order and therefore, an appellate Court ought not to interfore with the exercise of the discretion by the first Court, unless it is extissed that it acted on wrong principles. The mere fact that the inpellate Court might have tallen a different view is not a sufficient ground for interference "

An appeal against an order of attachment before judgment under this Rule does not become infructuous merely because of a decree having been passed in favour of the plaintiff

- 4 Form-See App P Form to 7
- 5 Enforcement of security bond given under this Rule

A security bond executed by a defendant under this Rule, for the nurnose of removing the attachment before judgment can be enforced in ovecution under S 67 of the Traosfer of Property Act 13 not necessary to enforce it 1

4 (15-0 S1) 5 Bom G13 (G14 G16) Note 3

1 (19%) 1925 Rang 767 (26%) 3 Rang 30\* (18 19) 21 111 291 (29 2) (19a2) 1932 All 209 (270) Withdrawal of at

tachment (1897) 21 Rom 273 (278) Order of attach

(1973) 1923 Cal 639 (610) 50 Cal 215 (Do)

(See also (1927) 1927 Cal 354 (356) Or ler lor security and order for at tachment comtaned - Comt med order is not always proper - Il com petener of appeal centils of doubt gws to uppallant]

1 3) 1323 Lah 445 (415) An order for at tiel ment is fore jul ment which is

onconditional must be deemed to be an order under O 33 R 6 of the Civil Procedure Code esca though it is stated to be pis ed under R ,

" (1923) 1923 Cal 630 (610) 50 Cal 215 (1931) 1931 Lab 594 (971) But order direct Inc all ) C128

3 1 Lat 4

4 (1929) 13 3 Mad W > 12, (127) 5 (1933) 1933 Cal "57 (704) 60 Cal 13.4 6. (1934) 1934 Cal 631 (637) 61 Cal 814

7 (1933) 1933 Cal 7 7 (157) 60 Cal 1351 Note 5

1 (1931) 1934 Cal 64 (6") GO Cal 1294.

R. 7. [S 486] Saic as otherwise expressly provided, the O attachment shall be made in the manner provi-Mode of making ded for the attachment of property in execution attachment of a decree

[1877-S 486; 1859-S 85]

Synorsis

Note No

Mode of making attachment

Other Topics

Attachn ent before indement if becomes one in execution. See R 5 Note 8

1 Mode of making attachment

I

This Rule provides that the attachment before judgment shall be made in the manner provided for the attachment of property in execution of a decree 1c, in the manner provided in O 21 1a

Thus an attachment before judgment of immoveable property must be effected in the manner provided by O 21 R 14 by a prohibitory order Where no such order is passed or published there is no legal attachment 1 Similarly an attachment before sudement of a debt must be made in the manner prescribed by O 21 R 46 and as in cases under that Rule the Court cannot enquire into the truth or genuineness of the debt 3 Sec also Note 7 to O 21 R 46

Where there is no positive evidence that the attachment was not effected in accordance with the law the Court should give effect to the presumption regarding the regularity of official acts 5 Sec S 114 of the Lyidence 1ct Note 3 to S 64 and Note 5 to O 21 R 24

In attachment ordered before jud-ment cannot be treated as a nullity merely because it is not completed till after judgment \*

R. 8. [5 457] Where any claim is preferred to property O attached before judgment such claim shall be Investigation of claim to property attached before judgment

bereinbefore proclaims to property lecree tor the pay

ment of money

[1577-5 457 1859-5 &6 See O 21, R 58]

Sinopsis Note No 1 Investigation of claims to property

Note No

-1-- --

I Investigation of claims to property attached before judgment -See a so Noto 6 to O 21 R 63

The procedure to be followed in the investigation of claims under this Rule is the same as that provided

Order 38 Rule 7-Note . 1a (See al o (1931) 1934 Cal 251 (9

1 (192 ) 1927 Cal 885 (880)

attached before judgment

to property attached in execution of a decree <sup>1</sup> Thus the clument to a property attached before judgment must show that, at the date of attachment he had some interest in or was possessed of the property attached <sup>2</sup> If it is not possible to decide the question without going into the question of title the Court can go into that question also <sup>2</sup> Order passed on claims under this Rule are governed by O 21 R 63 of the Codle <sup>3</sup>

The Official Assignce of the property of  $\tau$  defendant who has become insolvent of the rangement of  $\tau$  decree attached before judgment of ear prefer  $\tau$  claim under this Rule

The omission to object to the validity of the ittachment before judgment at the time of the application lor such attachment is no bir to such objection beins, taken when an application is made for execution of the decree in the suit.

As to the effect of the dismissal of the suit on the ittachment before judgment see Note 9 to S  $\,$  64  $\,$  and Notes to R  $\,$  9  $\,$  111/7  $\,$  a

See also the undermentioned case?

## 2, Revision

An order refusing to release property attached before judgment is not revisible masmuch as another remedy by suit is open.

.9. R. 9. [S 488] Where an order is made to attachment before judgment, the Court shall order the ment when security attachment to be utlight aun when the defendant

the suit is dismissed

1 Scope of the Rule

furnished or suit dis

furnishes the security required, together with security for the costs of the attachment, or when security for the costs of the attachment, or when security to the costs of the attachment, or when security the costs of the attachment at the co

[1877—S 488, 1859—S 87]

Synopsis
Scope of the Rule Note No. 1

Other Topics

Revival of attachment See Note 1 Pt (1)

Sub Rule (2) of R 6 refers to the withdrawal of a conditional attachment made under R 5 while this Rule refers to the withdrawal of an unconditional attachment effected under R 6, and provides that the Court shall order such attachment to be withdrawn where

(a) the defendant furnishes the security required together with security for the costs of attachment or

[See also (1014) 1914 III 264 (263) 36 III 65 Uttachmant of properties of insolvent—Investigation should be a provided by the Code! 1a(13 o) 19.0 Cal IC2 (167)

5ce also Vote 6 t O 21 P 53 (1929) 1.3 J1 at 747 (745) (1 2 ) 1.32 Sind 114 (115) See also Vote \_0 to O 21 R 35 trug 210 (200) 9 Rang 001 111 275 (277) 37 111 00 11 003 (401) 11 003 (401) 20,5 2 4 Crs 938 (33 ) 33 Mad 6 (1911) 10 Ind Crs 005 (30 ) 34 C 1 449

2 (183) 3 (184) 3 (184) 444 6 (1933) 133 (144) (181) 11 (chnent le fore judgment of delt is not injunction nor objection to such attach ment that delt did notes it one under 0 38 H s

Note 2 1 (1633) 13 111 405 (40 )

This does not mean, however, that where the suit is dismissed that attach ment continues in the absence of an order of withdrawal. Even without any such order, where the suit is dismissed, the attachment before judgment, like all other ancillary and interim orders in the proceedings falls with it and is not revived by the subsequent restoration of the suit or by the dismissal being rever ed in appeal 1. On the same principle when a suit abates, the attachment ceises and the subsequent setting aside of the abatement has not the effect of neviving the attachment2 The High Court of Midnas has held that this principle does not, however, upply to a case where the suit is dismissed for default and that on the restoration of the suit the order for attachment before judgment is also restored and the party is entitled to have the benefit of it 23

I files a suit against B and whiches certain properties before judgment C prefers a claim thereto but the claim is dismissed on 28 2 1914 the suit is dismissed subsequently but the dismissail is set iside on appeal and a decice is In ed in the suit A a\_un attaches the same property in execution of the decree C iguin prefers a claim to the moneity and his claim is disallowed on 2 5 1921 He is entitled to ble a suit under O 21 R 63 within one year from 2 5 1921 It is not harred by his not having brought the suit within one year of the former dismissil in smuch as the attachment came to in end by the dis mi al of the suit and it was unnecessary to ble a suit under O 21 R 63 then '

I clam suit under O 21 R 63 m 10-1 eet of in attachment before judment does not abate by reason of the dismissal of the suit in which the attach ment was effected \$

Attachment before cit not to af fect rights of stran gers o bar decree holder from applying

R 10. [8 489] Attachment before judgment shall not 0. ment of persons not parties to the suit nor but any person holding a decree against the detendent from applying for the sale of the mo perty under attichment in execution of such

for sale decree

Ī

[1877—S 489, 1859—S 89 ]

S.110155

\ole \ Right of third persons not affected by attachment before judgment Other decree holders right to execute

(197J) 1929 Rang J4 (94)

1010 10 Effect of adjudication on attachment before judgment Ser You 0 to R 2 1 1 Note 14 to S C4 as te

4 (1916) 1310 Vad 294 (296)

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their decree not affected
            Order 38 Rule 9 Note 1
                                                                             1 )1 7 R 1 g 310 (311) 7 R n, 4J2
1 31)1 31 R g 7-1 797 7-3) 3 Rang
1 (1J30) 1J30 Mid 514 (6 0) J9 M d 334
Overral ng (1928) 1J29 Mad J40
   (10°4) 1934 MI 165 (168 169)
(1029) 1928 M d 9 G (377)
(1588) 10 MI 506 (511 513)
(1318) 1318 Lal 23 (40) 45 C 11 490 (481)
                                                                                     [Se however (1975) 1975 Oudh J2
                                                                                     (592) Security bond b surety for due
                                                                                     compliance by judgment debtor -
D smits al for default-Restoration-
   (15:0) 14 Suth W R 384 (350)
                                                                                     Surety a liability continue ]
                                                                       2 (19 %) 1925 Cal 234 (*35)
a(1935) 1935 Vad 565 (566 567)
3 (1925) 1925 Cal 1147 (1145)
   (1925) 1J25 Cal 114" (1148)
    (1321) 1321 Cil 101 (103)
    (1311) J It d Cas 918 (9 0) (Cal)
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### Other Topics

Attachment before judgment and r ght of survivorship in Hindu la v See Note 21 to R 5

1 Rights of third persons not affected by attachment before judgment

An attachment before judgment does not affect the rights of persoos not parties to the suit Thus a stranger to whom the property has been transferred before attrehment or a receiver of the property who is not a party to the suit is not affected by the attachment. Where an agreement for sale has been en tered into in respect of a property before the attachment thereof the right of the purchaser to have the conveyance executed is not affected by the attachment's A puisne mortgagee has a charge over the surplus sale proceeds in Court after the property was sold at the iostance of the prior mortgages. He is not affected by an attachment before judgment effected subsequent to the mortgage

As to the effect of attachment on the right of survivorship in a joint Hindu family see Note 21 to R 5

2 Other decree holders right to execute their decree not affected

It has been seen to Note 5 to S 64 and Note 11 to O 21 R 54 that an attachment does not confer any title charge hen or pilority in the property in favour of the person attaching it 18 It will not therefore provent the property from being attached and sold in execution of any other decree against the same judgment debtor 1 Where A attaches before judgment money deposited in Court to satisfy Bs doctee he does not thereby got any right or title to the money and cannot al ply to the Court holding the money for payment Ho must apply for execution of I is decree and for transfer of the money to his one suit

3 Effect of adjudication on atlachment before judgment See Note 20 to Rule 5 and Note 14 to 5 64 ante

[S 490] Where property is under attachment by viitue of the provisions of this Order and a Property attached decree is subsequently passed in favour of the

before julys e t not to be re attached in execut on of decree

1

plaintiff, it shall not be necessary upon an application for execution of such decree to apply

for a re attachment of the property

[1877-S 430]

Order 38 Pule 10-Note 1

1 (1928) 19 S Lom 545 (546) (1331) 13 1 Rang 49 (50) 8 Rang 498 Mortg 40

2 (1979) 1J29 Bom 2 9 (2 0) 3 (1925) 19 81 1 139 (200)

(1J16) 1916 Cvl 92 (925)

See also Acta 15 to S 61 for fuller da cus ton

4 (191") 1917 N d GJ2 (GJ2)

#### Note 2

In (1331) 1931 1at 413 (417) 13 Lat 35 triachment before judgment does not create any title or inte est in poperty to attach ng creditor -Is c nent by such person consen ting to sale of protecty does not (1916) 1316 Cat 3"1 (3 2) (1,06) 33 Cal 633 (613)

(16 0 71) 6 M d H C R 1°5 (186) (1J21) 1J2t Lat 409 (40J)

CO

(1996) Ly 6 Rang Su (8 ) Under the Code of 18ad the creditor ulo frst attacled was er titled to priority

see Note 2 to S 13 and the f llat 112 cases (1838) I ourke O C 260 (1635) Louri a O C 140 (1866) 1 Ind Jur Y S 333

(1535) I ourke O C 32 (18 c) 7 Lom H C R (C C) 183 (185)

2 (1926) 1996 Mad 1104 (1105)

Synopsis. Note No O Note No Legislative changes attchment Scope of the Rule 2 Objection that property is not attachable can be raised after decree Re-attachment, if operates as waiver

Legislative changes

1

The words upon an application for the execution of such decree to apply for a relationment of the property" have been substituted for the words to re attach property in execution of such decree " The words 'upon in application make it clear that after decree the plaintiff must apply like any other execution creditor

2 Scope of the Rule

Where an attachment before judgment has been made, the decice passed in the suit does not determine the attachment. It, therefore, continues to temain in force in the absence of a specific order of the Court raising it 1 Upon an application for execution of the decree, it is not necessity to re-attach the properties 2

But as has been seen in Note 10 to S 73 an attachment before judgment confers no right on the party who obtains the attachment, and he will not thereby become entitled to get rateable distribution under S 73 unless like other decree holders, he applies for execut on after getting his decico 3

3 Re-attachment if operates as waiver of attachment

If an attachment is made before judgment it does not terminate with the decree unless there is proof of an intention on the part of the plaintiff to abandon The more fact that the properties were se attached after judgment is no proof of such abandonment 1

4 Objection that property is not attachable can be raised after decree

When attachment before undement is asked for the defendant is not bound to take exception to the validity of the attachment on the ground the property is malienable Ho could take such objection whom an application is made for execution of the decree passed in the suit 1

R. 12. [New ] Nothing in this Order shall be deemed to o unthorize the plaintiff to apply for the attachment of any agricultural produce in the possession of Agricul ural pro an agriculturist, or to emponer the Court to order

duce not attachalle be fore judju ent

Order 38 Rule 11-Note 2. 1 (1545) 1 45 1 cm 444 (446) (1233) 1° d C il b (5) 60 Cal 1351 (1525) 1925 Mad 1641 (1C43)

(1919) 1019 Lat 454 (463) (18J9) 26 Cal 581 (544)

2 (1929) 1923 Lom 455 (455) (1809) 1 N W P H C R 172 (186) (1929) 1923 Eom 321 (223) 53 Lom 543 (1928) 1928 Eom 545 (547) (1888) 12 Lom 4CO (405)

(1927) 1927 Cal 240 (242) (1906) 33 Cal 629 (643)

(1902) 1 Cal L Jour 97 (100) 29 Cal 773 (1310) 7 Ind Las 856 (857) 34 Mad 25 (1907) 17 Mad L J 485 (489) (1871 74) 7 Mad H C R 847 (348) (1909) 3 Ind Cas 31 (39) 31 111 527

(1925) 13.5 Mad 49 (49) (1921) 1921 Mad 163 (167) 44 Mad 902

the attachment or production of such produce. (1921) 1921 Pat 110 (141) 6 Pat L Jour 332 (1924) 1924 Mad 210 (211) 47 Mad 176 The following ca es are no longer lau (1869) 4 Long L R 63 (63) (F 1) (1870) 2 N W P H C R 365 (366)

8 (1915) 1915 All 275 (27 ) 57 All 578 (1910) 7 Ind Cas 8.6 (85") 34 Nad 25 (1<09) 31 3Ind 502 (504) (1688) 12 Lom 100 (40c)

(1°09) 3 1nd Cas 836 (53") (Cal) (1506) 33 Cal 639 (643) (1869) 4 Leng L R 63 (67) (F B) Note 3

1 (1929) 1929 Cal 465 (467) 56 Cal 416 (1915) 1915 Mad 386 (386) (1912) 16 Ind Cas . 67 (387) (Mad). (1919) 1919 Pat 444 (464)

1 (1911) 10 Ind Cas 805 (306) S5 Cal 449

13

R. 13. [New ] Nothing in the Order shall be demend to emponer any Court of Small Causes to make Smill Cause Court an order for the attachment of immoreable proot to attach the lote able pr jerts ner tu.

Sunorsis

Attachment of immoveable property-Small Cause Courts Note No 1

1 Attachment of immovable property-Small Cause Courts

Is his been seen in the Notes to S 7 ante, that before Act I of 1926 was passed it had been held that an attachment of immoveable property before judg ment could be passed by a Small Causo Court This Rule newly introduced in this Order now makes it clear that such an order cannot now be passed by a Small Cuse Court 2

It bis been held in the undermentioned case3 that Act I of 1926 operates restrospectively and that an order for conditional attachment before judgment mide before the let came into force cannot be confirmed and made absolute after the Act came into force

## ORDER XXXIX

## TEMPORARA INJUNCTIONS AND INTERLOCUTORS ORDERS

## Temporary Injunctions

1 Cases in which tem perary injunction may be granted

R. 1. [S 492] Where in any suit it is proved by attiday it or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted damaged or alienated by any party to the suit, or wrongfully sold in execution10 of a decree, or

(b) that the detondant threatens, or intends, to remove or dispose of his property with a view to dotrand his ereditors the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation sile, removal or disposition of the property as the Court thinks ht until the disposal of the suit or until further orders 16 [1877-8s 492 503, 504; 1859-S 92 See S 45 of the

Supremo Court of Judicatino Act, 1925 and R S C. O 50, R 6?

## Local Amendments

ALLAHABAD

Delete the word -ale after the words damaging alienation CALCUTTA

I e nur ter R 1 as R 1 (1) and a M the following as sub rules (-) and (3) (?) In case of dr obedience or of breach of the terms of such temporar injunction

or order the Court granting the injunction or making such order may or her the property of the per on guilty of such disoladien e or breach to be attached and may allo order such per on to be letrined in the Civil I ri on for a term not exceeding ix months unle s in the meantime the Co t directs his release

See ca es citel in f set note (3) to he e u Order 38 R 13-Note 1 of S 7 See Note 2 to 5 7 ante 1 5r il (1 1") 191" \ag .5 (55) 14 \ag 3 (19 -) 1923 Wad 11,3 (1174) IRt

Note No

13

15

16

18

19 20

2 I

22

23

24

25

26

O

NAGPUR In C1 (a) out the words "or wrongfully sold in execution of a decree "

Onat the word sale and after the words "Jurther orders' meet the following LEGVISO -

Provided that, if it appears to the Court that the property in suit as in danger of laing wrongfully sold in execution of a decice, the Court may also by order grant a tamporary injunction restraining the Court executing the decree from confirm ing the sile held in execution of the deeres until the disposal of the suit or until

HOUD

Delete the words or wrongfully sold in execution of a decrea in Cl (a) and delete the bron ifter the words dimiging alteration and add the following proviso to the Pul. -

Provided that if it appears to the Court that the property in smiles in danger of being wrongfully sold in execution of a decree the Court may also by order grant a temporary inpunction restraining the Court executing the decree from confirm ing the sale held in execution of the decree until the disposal of the suit or until intibut orde

RANGOON In C1 (a) the words or wrongintly sall in execution of a decree shall be decree?

In the lit entence the word sile or uning between the words illeniting rem vel shall be lelete ! Synepsis

3

Note No Legislative changes Injunctions temporary and perpetual Scope and principle of the Rule Applicability of the Rule to probate pro

further orders

ceedings Any property in dispute in a suit In danger of being wasted damaged or alienated by any party to the suit

Injunction in respect of judicial pro ceedings Injunction in respect of elections Right to worship

Religious office Wrongfully sold in execution of a decree

Execution of decree of Revenue Court Disposal of property in fraud of credi tors

Appeal 7 Revision 7a Powers of High Court-General Power to restrain party from proceed 8 ing with suit in another Court 9 Power to stay proceedings pending in 10 Subordinate Court t t Form of temporary injunctions Damages for obtaining injunction with

> he finctio arie and (6) in [ N to 22 F N [1]

14 Pt (2)

out reasonable and probable cause

Preventing of struction to rights of projects -Surf for See Note 8 F > 10) and Note 5

Restruning defendant from using a tribe

mark - Sust for See Note 3 h N (7)

I roper (ourt to grant injunction

See Note 19 Pt

Against whom injunction can be

Insunctions will be granted only in any

Insunction in suit for declaration only

Duration of temporary injunction

Effect of temporary injunction Breach of injunction

Injunction to restrain marriage

granted

suit

Other Topics

12

I reach of contract-5 at fit F N (7) and Note 3 I N (6) Criminal proceedings - St of See Note 24 F N (1)

Defendant reading out the maisdiction but having property within paraediction -Power to issue injunction See Note 13 t N (4)

Delay in applying for injunction - Effect of See Note 3 Pt (13) In russal of suit-Whether injunction sub-

ists after See Note 16 Pt (2) Notice See R 3

Order of the High Court - Appeal from See Note 90 It (C) Lowers of High Court to metrum nets of pub

and O 39 R 2 Note 4 Pt (2) Restrining execution of decrei - Suit for Se Note 7 F \ (I) and Note 7 I'l C and Note 10

Sunt by reservoiour to present waste by a Hindn widow See Note 6 F N (4) Terms-Powerto jut the milliant on Note 3 F N (1) and (1)

1 Legislative changes

In the last paragraph of the Rnle the words for refuse such injunction or other order) which occurred at the end of the old section have been omitted and the words until disposal of the suit or until further orders have been newly added

2 Injunctions temporary and perpetual

An injunction is a judicial process whereby a party is required to do, or to refrain from doing any particular act 1 It is in the nature of a preventive relief granted to a litigant quia timet : c. because he fears future possible injury 2 Its main purpose is to preserve the subject matter of the suit in status and for the time being 3

Injunctions are of two kinds temporary and perpetual. A perpetual injunc t on restrains a party for ever from doing the act specified. It is regulated by So 54 to 57 of the Specific Rehef Act I of 1877 and can be granted only by a decree passed after the hearing of the suit on the merits. A temporary injunction, on the other hand enures only until the disposal of the suit in which it is granted or until the further orders of Court It is regulated by the provision of O 39 of the Codes and can be granted on an interlecutory application at any stage of the Although temporary injunctions are regulated by the Code the general principles governing their grant have been hold to be the same as those governing the grant of perpetual injunctions,6 though in the undermentioned case, the rule was held to be too broadly stated An injunction whether temporary or perpetual, compelling a party to do a particular act is called a mandatory injunction. In a Bomhay case 8 Beaman J doubted whether a mofussil Court in India had nower to issue a temporary injunction in a mandatory form. Such a power has, however, heen recognized in the undermentioned cases

3 Scape and principle of the Rule

This Rule lays down the circumstances under which a tempolary injunction cin be granted 1 and unless those circumstances exist, a Court has no jurisdiction to grant it 2 But the fact that these culcumstances exist does not compel the Court to grant it in all cases masmuch as the Rule only says that in the cases mentioned therein the Court may grant an injunction. Thus the granting of an Injunction under the Rule 1s purely within the discretion of the Court This Order 39 R 1-Note 2 8 (1315) 131 Low 44 (4) S3 low 531 1 (S-a lase (1933) 1933 Lab 48 (50) An order 9 (1931) 1931 Low 13 (1930)

to a defendant to prepare an inven tory and to keep secounts is an order under this Rule]

2 Woodroffe a Law of Injunction 3rd Edn , 3 (1.)22) 67 Ind Cas 742 (743) (Lab) It must

not therefore go further and create s totally new state of things 4 (1925) 1925 Cal 933 (23a)

[See also (1932) 1932 Cal 542 (543

544)]

5 (1J25) 1925 Cal 233 (235).

6 (13-1) 6 Bom 2 5 (279)

(1 )\_3) 1933 Lah 203 (20a) 14 Lah 330.

cit o R.l ef tot are not of placeble to tempo ary injunctions under the ( le ] 7 (1 0a) 6 Mad 169 (17 ) Suit for breach of ntract

(1926) 1926 Sind 201 (202)

Note 3 1 (1925) 1928 Notes 18 (e) 110 Ind Cas 621

(622) (Nag) (18 0) 13 Sath W R 60 (60)

(Soe also (1934) 1934 Mad 199 (200 201) of Mrd 635 Sast for money as due on settlement of necounts-Ap plication for appointment of receiver -Plaintal cannot compel defendant by injunction to produce accounts not connected with suit so that he may be in better position to realize

his decree debt if decree is obtained in suit] 2 (1904) 33 Cd 203 (218) 32 Ind 1pp 185 (PC) (1908) 18 Mad L Jour 302 (101) (1916) 1916 I at 17 (18) 1 Lat L Jour 560

R ght to wor hip-Injunction to res tra a plaintiff from preventing de fendants entering and worshipping

in certain temples 3. (1925) 1J25 Sin 1 317 (318) (1931) 1931 Cal ( )4 (6J7) 61 Cal 814. conferred by this Rule' Thoy are set out in the undermentioned cases and are to the effect that a person who seeks a temporus injunction must satisfy the Firstly that there is a serious question to be tried in the suit and that

exercised in accordance with reason and on sound judicial principles 4

on the facts before the Court there is a probability of his being entitled to the relief asked for hy him

Secondly that the Court's interference is necessary to protect him from that species of injury which the Court calls irreparable before his legal right can be established on trial, and

Thirdly that the comparative mischief or inconvenience which is likely to issue from withholding the injunction will be giester than that which is likely to mise from granting it

The first of the above conditions is what is generally termed a prima facie In other words the mema face existence of a right and its infringement

are the first conditions for the grant of a temporary injunction 8 But the existence 4 (1303) 26 Mad 164 (174) (1922) 1922 Lah 356 (336) (1854) 27 Ch D 497 (206) 1 eston v L 10k-Follo l 18 Ind (22 894 (Cal) Re (1933) 1933 All 56 (+0) [See also (1933) 1933 Lab 903 (205

208) 14 Lah 330 Thit sait would become infructuous if injunction is

become infructions if injunction is not given in or caston in law]
5 (1920) 1923 Sind 182 (100) (1930) 1930 Sind 2-7 (25s)
6 (1024) 1923 Pat 200 (211) (1933) 1933 Lah (21 (0216) Demolition of wall likely to undanger planning building — Term Orary injunction (1038) 1933 Sind 214 (212 313) Planning (1038) 1933 Sind 214 (212 313) Planning thowing retain (1024) 1935 Comparing the property injunction can be erained

rary injunction cin be granted (1995) 7 111 5.0 (553) (1904) 1 All L J 527 (528) Court can put the applicant on terms to abide by the

(1875 77) 1 Bom 550 (554) Snit in respect

(1923) 1923 Lah 227 (228)

(1923) 1923 Lah 239 (241)

ment of a tank (1912) 17 Ind Cas 219 (220) (Mad). (1921) 1921 Pat 526 (527) (1926) 1926 Pat 318 (319) (1925) 1925 Sind 347 (348)

ferred 1 1 7 Born L R 319 and 17 Cal 359 (361) (311)

(192a) 1975 Pat 337 (338) Um an applica tion for a temporary injunction to testrun a sale in execution of a da cree lending a sut the applicant

must show a jrin 1 f ce ase (1931) (1931) Nag 10: (10") In a sunt by the sons for partition und declaration th & thodebts incurs dis thefather were illegal and immioral and so not binding where the sons applied for s feministry injunction to stop the sale threstened by some of the cre dators the chief ground for granting or refusing an injunction in such a cise was held to le whether the plaintiffs have or have not a bone

jide chum (1922) 1922 Pat 34 (36) 1 Pat 356 Sunt on by is of compromise decree not binding on minors - Compromise sparently beneficial to minor-In junction to restrain the decree from being executed cannot be granted

(1911) 9 Ind Cas 227 (228) (Cal) Suit by minor to imperch a decree on ground of fraud-Application for injunction to restrain oxcention pending suit-Held that the cona fides of the suit should be looked into before crant jug the invanction

[But see (1925) 19.5 Mad 896 (996) Order granting injunction without

Civil Procedure Code has no application when the defendant is in posL.

sees a sud a Court will be acting without jurish tion if it grants in injunction in factor of plaintiflout of passes ion of the property in dispute

cin be granted even in such a case wher the threatened injury will be browning

(1 12) Io Ind Cis 350 (200) (Cil) Pruding of a suit for the sprifts performance of a spreament to gruin a lesse of certisin property to the plustiff the Court should gruin 1 temporary supercises to restrict the defend int from grant ing the lesse of the same property to the court of the late to the property of dener of the latestion in the per-

(1320) 1930 Cat 510 (541) A temporary in junction will not be granted to a limit freshming defendants from cling projects to a thirl person during the pindener of a sunt for specific performing oil control to a side where performing oil control to cill the projects wis obtained owing to certain facts not being brought to the notice of the Court granting it.

(1926) 1926 Lab 553 (530). The rule "that before the issue of a temporary in jointton the Court imast starks it self that the plaintid has a printar face case does not meru that the Court should examine the merits of the case closely and come to a conclusion that the plaintift has a case in which he is likely to inceed, but only has to see that on the lace of it the present playing for an upunity of the case of

(1923) 1923 Lah 47 (48) No unjun tion hould be granted where its effect would be to virtually decide the snit frilantia [1.5] 1932 and st (80) -0 Smd L R of Trude mark
[1932] 1332 Bom 165 (167) 55 Lom 254
Sunt for declaration that x bill is
sultra arrest and to restrain the Pr. it
dent of the Legislation & emily
from proceeding with the bill—bill his no effect until pr. ed as an Act
und the declaration sought for no
hiely to be grained in suit—bet
complyined of is no legal wrong
grainst pluntiff—lifence no tempo-

(3.11) 10 Ind Cxx 250 (2.51) 3x Cx1 791 (1931) 1934 Cx1 694 (697) 61 Cx1 8x4 (1331) 1934 Cx1 694 (697) 61 Cx1 8x4 (1331) 1934 Cx1 713 (714) 01 pect of interim injunction is to preserve status ju (1933) 1933 Lxh 2x2 (2x3) (1331) 133 Lxh 2x4 (413)

(133) 1933 Lah 621 (623) (1301) 8 Cal W & 151 (152) Suit in To p. t of a tradeguark.

(1920) 1320 C rl 276 (232) 46 C rl 1001 (1920) 1926 Lab 435 (436) (1920) 1326 Mad 132 (132) (1923) 1325 Sand 317 (348)

(1925) 1325 Sind Sir (345) (1915] 1915 Call of (463) (1920] 1920 Lah 97 (35) 4 (1320) 1320 Lah 97 (35)

(1920) 1320 Lah 436 (435) (1921) 1321 X 1g 30 (91) (1921) 1923 X 1g 2-2 (223)

of the application for injunction is to atoid hiving to sue for po to som and having to just court for accordingly, injunction will be relused.

J (1920) 1920 Cal 2°6 (2°2) 46 Cal 1001 (1312) 17 Ind Cas 219 (221) (Mad) It denot mean mere annovened to a class of people

(1 92] 21 All 439 (500) No injunction will be granted against the exercise of a legitumate right merely be an o it odends the religious feelings of

9± (1953) 1533 Nag 153 (154) 20 Nag L R 204 10. (1577 72) 2 Lora 133 (133) in status 140, an injunction for that purpose should be issued 11. It must however be remembered that a temporary injunction should not be granted on the balance of convenience alone without there also being a prima facte case in favour of the applicant 15

Lyen where all the above conditions are satisfied a temporary appraction mix nevertheless be refused for other reasons. Thus it can be infused on the around of delay 13 For other excumstances justifying such refusal we the under mentioned cases 14

Where the suit itself is one for a perpetual injunction a tempor by injune tion on ht not to be refused where such refusal would defeat the object of the suit 1. In such a case the mere possibility of a perpetual injunction being refused ultimately will be no ground for refusing a temporary injunction 1. Where how ever there is no chance at all of a perpetual injunction being manted in the suit a

temporary injunction during the pendency of the suit may be refused " (1931) 1934 ( al (94 (694) 61 Cal 814

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(1987) 14 (11150 (200)
(159°) 1 ( 1 \\ \ \ 42°) (431)
(1902) 6 C 11 \\ \ \ 308 (310)
(SC3) 41 Cal 420
(1970) 19 O Cal 2"G (abt 28a) 46 Cal 1001
(1376) 1326 Cal 837 (841)
(1928) 1926 (41 233 (795)
(1922) 1322 Lak 356 (356)
(1908) 26 Mad 169 (175)
(1924) 1924 Pat 526 (527) If the other
       pirty has already invested lols of
       fromes on the project which is
        ought to be restrained but he i
        man of means who can easily pay
        my damages that may nitimately
                                          m
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(1904) 1 VIL I J 327 (57 )

injunction were granted and they

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(1,100) G (...) W. N. 205 (210)
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create a totally new state of things
(192") 1927 Wad 188 (189) Stat sq o mean
      alatus at this of suit and not
      it some t me tater of to it
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(192 ) 1927 Wind 184 (189) 13 (1916) 1016 Cal "87 (783) (1933) 1933 Lah 203 (205) 14 Lah 330 (1895) 7 All 550 (553) (1698) 20 411 345 (349)

(1839) 16 Cal 957 (205) (1920) 1320 Cal 738 (738) (1990) 1920 Cal 276 ( 50 291) 46 Cal 1001 (133) 1933 Sind 96 (26) 26 Sind L R 384 Improper delty is taking for nunc tion against a fringement of trade

S also cases in R 2 N 2 F N 9 belot 14 (1903) 23 Bont 90 (57) \ mandators in junction counct be grinted against trespasser compelling him to come on the land on which he had tres passed to remove an encroschment made thereon by lum

(1925) 19-5 Sind 317 (318) Courts of equity vill not give an order over the execution of which they cannot vatch and which they cannot en force A contract by which one larts to required to do numerous and delicate erasces for the other the performance of which need a particular amount of skill and fide hty is one which cannot be specifi

(1919) 1313 Mad 240 (240) An injunction cumot be asked for against a person whose employment whatever its exact nature so long as it continued entitled him to the exercise of the rights propo ed to be restrained

15 (1915) 1918 Cal 495 (495) 16 (1375) 1925 Lah 678 (6-9)

(1937) 1937 Cal 303 (356) Withdrawal of the relief for permanent injunction as unnecessary cannot preclude the Ilamtifi from asking for a tempo rary injunction-Applicant put on term.

17 (1923) 1923 Pat 133 (199) (1933) 1933 Lab 203 (205) 14 Lab 300

ing the states quo. It should not

1.

The power to grant temporary injunctions under O. 39 extends to an appellate Court in regard to appeals pending before it <sup>18</sup> The provisions of O 39 apply also to proceedings in liquidation <sup>19</sup>

Has a Court inherent jurisduction to grant a temporary injunction? It has been held that the inherent jurisduction of the High Courts, as Courts of Equity, to grant such injunctions independently of the Civil Procedure Code, is beyond ill doubt <sup>20</sup> (See also Notes under Note No 22, infia) As regards other Courts there is a conflict of opinion for which, see Note 2 to S 94, ante and the undermentioned cases. <sup>21</sup>

### 4 Applicability of the Rule to probate proceedings

It has been held by the High Court of Bombay that the Rule does not upply to probate proceedings on the ground that the provisions of the Probate and Administration Act 1891, indicate the intection of the Legislature that that let itself should be looked to, for the powers necessary for the proper custody of property pending the proceedings instead of leaving the Court to act under the Civil Procedure Codo! The High Court of Calcutta has held that, assuming that the provisions of O 39 apply to such cases, there could be no "property to dispute" in such a proceeding and that, therefore, no influention can be issued under this Rule, though, in proper cases, the Court could act under R 7, infra\*

5 'Any properly in dispute in a suit '

The Rule contemplates eases where the property in dispute in a suit is to danger of being wasted, damaged, etc. "Property in dispute in the suit" means only such property is in the subject-matter of the suit. For cases of suits for partition of joint estates see the undermentioned cases?

6 In danger of being wasted damaged or alienated by any porty to the suit '

An injunction cin be granted under this Rule only if there is a real danger of the subject matter of the sub being wasted, or damaged, etc. by a party to the suit. Where there is oo allegation of danger of such waste or [See 140 [1932] 1932 Rom [16, 1167] 2, [1933] 1932 Rab [23] [62])

56 Hom 254 (1902) 5 Outh C:

(1902) 5 Onth Cas 65 (63) A claim for messio profits is not a claim for specific movelible property, but one for damages. In such a suit defendant cannot be restrained by an money oney is

the sale of a malikana, the Court

21 [1923] 1923. Mad 180 [181] [1931] 1933. Mad 199 [201] (1931] 1934. Lish 79 [80]. Order refusing deers obsider purchaser from obtaining possession of property—Order is one under \$\frac{5}{3}\$\$\$1.

1 (1900) 2 Bom L R 797 (793) 2 (1915) 1915 Cal 565 (567)

Note 5

in the sait 3 (1830) 17 Cal GII (618) (1866) 6 Suth W B Mis 1 (2) Note 6.

1 (1970) 13 Suth W R to (60) (1901) 6 Bom L R 123 (124) (1906) 33 Cul 203 (218). 32 Ind \p 195

(1835) 19 Bom 209 (171) (1835) 1920 Cal 276 (283) 49 Cal 1001 (1923) 1923 Lah 227 (224) When then 14

a trai danger of damage or waste to the suit property which is in defendamage, the application should be rejected But a mere allegation is not enough There must be proof of actual or reasonably apprehended danger of such waste or damage, before an injunction can be granted 3 The question as to what constitutes sufficient danger of waste or damage will depend upon the facts and circumstances of each case. In order to show that property is in danger of being alienated, some overt act towards the alienation of the properties such for example as negotiations or offers for sale should be alleged and

7 Injunctions in respect of judicial proceedings

proved 3d. For illustrative cases, see the undermentioned cases 4

An injunction can be grinted to restrain a party from proceeding with undicial proceedings (other than execution proceedings) pending in the same or in another Court if such injunction is necessary to provent multiplicity of proceedings and not otherwise 1 It can be issued even in respect of proceedings pending in a foreign Court if the party to be so restrained resides within the jurisdiction of the Court assuing the injunction In Madras however it has been held that such a power exists only in the High Court under its equity jurisdiction and not in the mofus-il Courts ' Speaking generally, a civil Court in the mofussil, cannot issue

dant a possession an order for tem porary injunction restraining defen dint from uing the property is

(192-) 1923 Pat 111 (112) (Do) 2 (1903) 19 Mad L Jour 302 (304)

(1975) 1925 Oudh 698 (6J8)

3 (18°0) 14 Suth W R 409 (403) (1902) 5 Oudh C1s 65 (68) (1919) 1919 Mrd 157 (158) (1925) 1925 Mad 806 (896) Order without

finding of danger of waste is Unons tamaile 7a(1034) 1934 Cal 604 (69b) 61 Cal 814 4 (1970) 13 Suth W R 9b (96) Suit for spe

admission that he intends to insest it in tride is sufficient evidence of its being in danger of being alien

cific sum of money Defendants

(1934) 1934 All 772 (774) The enjoyment of property by a person entitled to it

is not waste (103) 1933 Rung 18 (20) 11 Rung 47 (1864) 12 Sath W R 103 (104) Insolvent s

mones in Court — Court ordering tyment to creditors instead of to Official as ignes — Remedy is tem portry injust tion (1925) 1325 Lvii 628 (628) Danger to

estite by extrinagant alienation by

the life holder apprient
(1854) 10 Crl 225 [931] Nearest reversioner
entering into compromise decree
with Hindu widow—Suit by remote reversioner to set it aside

(1817 78) 2 Bom 252 (255, 256) Suit for redemption of English mortgage— Sile of the projecty by defendant under his power of sale

(1857) 1887 VII W N 42 (42) (1916)

not an alienation or wasts of proports (1873) 20 Sath W R 11 (11) Property held not to be in danger of being wasted,

(1900) 1900 411 W N 159 (160) (Do) (1926) 1926 Cal 604 (60a) (Do)

Note 7 1 (1895) 18 Mad 338 (341) Suit to restrain the defendant from executing or

proceeding to execute a decree-Specific Relief Act, 1877, S 50 Ci (a) [But see (1921) 1921 Pat 92 (93) 6 Put L Jour 203 In this case one subordinate Court issued an order requesting another Court of co ordi nate jurisdiction to present the Receiver appointed by the latter Court from interfering with the taking of possession of certain properties Held, the order was with out jurisdiction The ruling can be supported on the principle that in junction can be directed only to a justy and not to a Court and on the ground that the receiver was not party in the suit Woodroffe's I aw of Injunctions 4th Edn p 1.7 Such injunctions can be granted not

tion for an injunction is of . ... the defendant in a 1-4 f foreign Court must a za 1 ... 4

3 (1928) 1923 Mad 491 (4)

onty in respect of judicial proceedings pending at the time of the

institution of the suit in which the injunctions are prayed for, but .

C P C 317 & 318

1. an injunction restraioing proceedings in a criminal Court, though the High Courts can do so se proper cases Vide also notes under Note Nos 22, 23 aed 24

As regards proceedings in execution of a decree, it is clear that the High Courts have the power under their courty inrisdiction to restrain a party by a temporary injunction from executing his deeree in another Court of even coordinate jurisdiction But the mofussil Courts have no such power unless the case comes within the terms of O 39. Rr 1 and 2 or unless they could act noder their inherent powers. As to whether and where the Court can restrain a party from taking such proceedings under the provisions of O 39, Rr 1 and 2, see Note 3 above and also the undermentioned eases 7 As to the inherest powers of the Court to grant temporary injunctions, see Note 2 to S 94, ante

Courts cannot be too careful as to the mode in which their machinery 19 used to delay a decree holder in another suit in obtaining the fruits of his decree 8 Consequently re injunction in respect of a judicial proceeding should not be issued except in strong cases or neless the facts fall within the express provisions of O 39 9

A permanent injunction can, of course, be granted under the provisions of the Specific Relief Act restraining a party from proceeding with the execution of a decree in neother Court 10

#### 7a Injunction in respect of elections A candidate for election to a Local Board has a right to pureue his legal

remedics but save in exceptional circumstances, it is an abuse for a candidate to make his pursuit of his remedies in the civil Courts a weapon for dislocating the electoral machinery and stopping an election 1

### 8 Right to worship

No person is entitled to enforce his religious views upon another, or to restrain that other from doing any lawful act or from making any lawful use of his property, simply because it would not fit in with the religious teests of that persoe so long as the right to worship is not interfered with, the owner of a property can do what he likes with it 1 Where, however, such act or user amounts to an actionable wrong, it can be restrained by an injunction 2

### 9 Religious office

to injunction can be granted restraining obstruction to a person a performang his religious daty 1 But no injunction will be granted which would have the the services of a pricst whom-

be granted ) 1922 Bons 385 (386) 46 Bons 939 10 (1891) 14 Ved 167 (168) 5 (1872) 17 Suth W R Cr 46 (46)

(1536) 23 Cal 610 (613 617) (1º04) 31 Cal 858 (662)

6 (1880) 5 Cal 86 (96) On review from 4

Cal 360 7 (1926) 1926 Mad 1126 (1127) Execution in

breach of compromise arrived at-R 2 applies (1571) 6 Beng L R 571 (574) A oblaining decree against B for partition and pos

session and, in execution trying to oust C from possession-C can sae, and 1 ray for temporary injunction 6 (1655) 10 MI 50 (62) 1 (1974) 22 Suth W R 506 (507)

O 21 R. 103-Injunction restrain ing delivery of possession should not (1924) 1924 \ag 419 (415) (1891) 14 Mad 425 (431)

Note 7s 1 (1934) 1933 Wad 103 (103)

Note 8

1 (1923) 1923 Pat 209 (211) 2 (1928) 1928 Sind 82 (84)

21 Sind L R 369 Application for injunction-Use

anction 1 (1697) 21 Bom 821 (622) (1659) 11 Mad 450 (452) they are unable to recognise, or forbidding them to employ a priest whose ministra. O tion they desire 2

The trustee of a temple may be restrained by injunction from making unjustifiable changes which would affect the character of the temple 3 Similarly where a new seal sought to be used in connection with a religious office had the effect, of extending rights which, according to the old seal, had been limited tho use of such seal was held restrainable by injunction

10 'Wronefully sold in execution of a decree"

The provisions of this Rule will not apply unless the property is in danger of being wron fully sold in execution of a decree A obtains a decree against B and in execution thereof proceeds to sell properties belonging to B B thereupon files a suit for a declaration that the decree is not binding on him for various neasons He also prays for a temporary injunction under this Rule Does such an application lio? No The reason is that until the decree is set aside it is binding on the parties thereto, and I has every right to execute it. There is thus no danger of property being wrongfully sold in execution of the decree 1 But suppose A, in execution of a decree obtained by bim against B, attaches or otherwise proceeds against properties which belong to C, and the latter, thereupon, files a suit for declaration of his rights thereto and prays for a temporary injunction restraining 4 from executing his decree This is a case of properties being wrongfully sold in execution of a decree and the application for injunction is maintainable under this Rule 2 The words "or wrongfully sold in execution of a decree were deleted from sub rule (1) by the Allahabad High Court by rules framed under S 122 of the Code with the result that an application under this Rule was held not maintainable in Allahabad on the ground that any property is in danger of being wrong. fully sold in execution of a decree 3 The said words have, howover, now been restored See also the Local Amendments for Rangoon, Nagpur and Oudh

(1927) 1927 Mad 1070 (1070) 3 (1907) 20 Mad 159 (162 165, 166) 4 (1599) 22 Mad 189 (193) Note 10 1 (1926) 1973 Mad 258 (258) (1911) 9 Ind Cas 227 (228) (Cal) (See also (1914) 1914 Born 148 (149)

2 (1878 79) 3 Bom 232 (234)

Plaintiff defeated under O 21 R. 99 and suing under R 103-Not enti tied to injunction against taking of po session ] [See also (1933) 1933 Sind 118 (119) Where a martgages or attaching creditor proceeds to sell the right title and interest of his debtor the talance of convenience is in favour of the creditor and no injunction should issue restricting him from effecting such sale during the pendency of a suit to which he is a party and where his claim is being

impagned} 2. (1922) 1922 Lah 59 (58) Claim suit

(1922) 1922 Lab 53 (58) Crim suit (1914) 1914 Oudh 200 (207) Sons of indg ment debtor suing for declaration that property is joint family property and cannot be proceeded against (1931) 1931 Notes 18 (d) % Cri W N 910 (911) Claim suit -- The language of

O 39, R 1, CPC is wide enough to cover the case of a sale in execution of a mortgage decree (1925) 1925 Cal 233 (285)

(1896) 23 Cal 351 (3.6) Claim snit (1688) 10 All 80 (69) Claim suit (1910) 7 Ind Cas 18° (184) 38 All 79 (Do ) 26 411 311 must be taken to be over

ruled

(1930) 1930 Lah 108 (109) (Do) (1870) 5 Beng L R 254n Suit to set aside a mortgage executed to the delen dant and to restrain the sale of tame and to restrain the Sale of the mortgaged property in execution of decree obtained by him on the mortgage—1 temporary municuous as granted restraining the defendant from selling the property till disposal of the suit

(1861) 4 411 W N 319 (349) (Do) (1885) 7 411 550 (553) Suit by son of pidg ment debtor that property is not saleable

\_ 28) Court need not order Pelitioner to furnish security to compensate

opposite party]
3 (1929) 1329 411 115 (116)

Where a case comes under this Rule an application for injunction is the proper remedy and not an application to the executing Court for star of execu tion 4

Where the sale has already taken place no injunction will be granted res training such sale." But an injunction can be granted even in such a caso res training the delivery of nossession 6

In granting injunctions restruining siles in execution Courts should exer case their discretion cautiously and wisely, and see that the machinery of the Court is not abused for fraudulent purposes?

A Court is not debarred from restraining a party in cases covered by Rr 1 and 2 from executing his decree in another Court merely by reason of the fact that such Court is of a superior grade to that of the Court which issues the injunction masmuch as the latter Court has prisdiction over the suit and to pass orders on all interlocutors applications a

11 Execution of decree of Revenue Court

The High Court of Allahabad has held that the word decree does not include the decree of a Revenue Court, and that an injunction cannot be granted restraining the sale in execution of such a decree 1 Where, however the decree of a Revenue Court is being executed by a civil Court, the High Court of Calcutta has held that an injunction restructing its execution can be granted under this Rule on the ground that the decree in such a case should be treated as a decree of a civil Court for purposes of execution 3

12 Disposal of property in fraud of creditors

An injunction can be granted to restrain a threatened disposal of property in fraud of creditors whether the property is moveable or immoveable 1 But in either case the threat or intention to remove or dispose of property to defraud ereditors must be proved by definite evidence 2

13 Against whom injunction can be granted

An injunction can be issued only against a party to the suit and not against either a Court 1 or a stranger to the suit 2

Second Sub Judge can order stay of sale to be held by first Sub Judge 7 (1911) 9 Ind Cas 227 (228) (Cal) 8 (1829) 23 Cal 3ol (3o5 3oG) -Obiter ] (1925) 1925 Cal 233 (235)

(See also (1886) 12 Cal 515 (518 519) Note 11

1 (1894) 16 All 496 (498) 2 (1909) 1 Ind Cus 933 (935) 36 Cal 252

(1912) 15 Ind Cas 614 (615) (Cal) Note 12

1 (1694) 16 VII 186 (187) 2 (1924) 1924 Lah 718 (718) (1917) 1917 All 187 (140) (1975) 1925 Oudh 698 (698) Note 13

1 (190a) 2 All L J 601 (601) But a Court is bound to carry out an order by another Court for injunction against

a party (1896) 23 Cal 351 (356) District Judge bound to postpone execution sale on an injunction by Subordinate Judge in claim suit (See 1)50 (1986) 17 Cal 515 (518 519)

See also the Local An endments :: It I for Nagy ur and O idh [Sec (1937) 1932 Lah 515 (516) In

punction to another Court not to confirm an execution sale.—That

(103)

(1898) 2 Cal V N 521 (523) But in a proceeding under the Guardians and Wards Act an injunction can be issued to a rerson who is not a party

An injunction can be granted against persons within the Court's jurisdiction restraining them from doing acts outside jurisdiction though it will not be granted unless the remedy is likely to be an effective one 22

An injunction will not also be ordinarily granted against a person residing outside the jurisdiction of the Court granting it, and against whom the order cannot be enforced within that Court's misdiction & Where, however, the order can be so enforced, or, where the person has submitted to the jurisdiction of the Court, it can be issued against him. No injunction will ordinarily he issued against Government Officers long fide exercising rights or alleged rights in the course of their duty, of nor against public hodies under similar circumstances, unless it would amount to a manifest injury to refuse to do so 8

An injunction does not run with the land and cannot, therefore, avail against property in the hands of a purchaser 9 But when it has been issued against a defendant it can, if the defendant dies, he enforced against his legal representatives 10

An injunction can be granted against a co-owner or a co sharer in possession restraining him from using the property in a manner which will change the nature of the property 11 Great caution should, however, be exercised in such cases 12

14 Injunctions will be granted only in any suit

Before an injunction can be granted under this Rule -

(1) A suit must, in the first place, he pending Thus no injunction can be granted if the suit has not yet been filed or if the suit has been disposed of 1

(ii) It must be pending on the file of the Court granting the injunction 2

15 Injunction in suit for declaration only

It would appear that a temporary injunction can be granted even in a suit for mere declaration, 1 but not where the plaintiff, if successful in the suit, will have to bring another suit for enforcing the right which he seeks to keep undisturbed by the injunction 2 It is also not proper, in a suit for mere declaration, to grant an injunction staying another suit pending in another Court 3. It was held in the

2a(1932) 1932 Mad 705 (706) 8 (1923) 1923 Pat 209 (210) 4 (1925) 1925 Pat 237 (339) If he has pro

perty within the jurisdiction which can be proceeded against if he dis obers the Court's order, the Court has jurisdiction to pass an order of

11 (1914) 1914 Cal 362 (364) 41 Cal 486 21 Ind Cus b61 (863)

(1915) 1915 Cal 29 (80) 12 (1928) 1928 Cal 293 (294) Note 14

1 (1894) 21 Cal 561 (566) (1924) 1924 Oudh 345 (317) A Court cannot grant a temporary injunction in a

but which has been dismissed for default but for the restoration of which an application is pending (1910) 7 Ind Cas 158 (189) (411) High Court caunot grant injunction after special

leave has been granted for appeal to the Privy Council

(1685) 11 Cat 146 (149) Appellate Court can give injunction but not original Court after its decree 2 (1661 66) 2 bom H C R 98 (100)

Note 15

1 (1926) 1926 Lah 523 (523), 1922 Lah 356

babicabu amend

cutting off pipe water connection from the plaintiff a house is mumtamable n 334

ainst a retion

1. undermentioned case4 that an injunction should not be granted in a suit for declaration where there was no clum for consequential relief of permanent injunction

16 Duration of temporary injunction An order of temporary injunction takes effect only from the time when it is

communicated to the party I It terminates as soon as the suit in which it is granted terminates2 even though it may have been stated to be "until further orders 3

17 Effect of temporary injunction

An alienation made contrary to an order of injunction is not, on that account void 1 But the party guilty of the breach will be liable for contempt of Court or damages 2 (Vide also notes under Note No 18, "Breach of injunction',

infra) 18 Breach of injunction An injunction although subsequently discharged must be obeyed while it

Court which granted the injunction will be the Court competent to punish disobedience 3 but it must be set in motion by the aggics ed party and cannot act suo 4 (1934) 1934 Cal 694 (696) 61 Cal 814 Note 16

1 (1926) 1926 All 457 (458) (1920) 1920 Nag 12 (13) (1903) 26 Mad 260 (262) But the facts

injunction are sufficient proofs of communication (1919) 1919 All 20 (22) 42 All 98 (Do )

2 (1888) 10 All 506 (J11) (1035) 1935 Lah 718 (719) Security bond given by surety to vacate order of injunction under this Rule The order becomes meffectual as soon as suit is disposed of and does not enura to benefit of decree holder so as to enable him to enforce decree of

3 (1887) 7 All W N 207 (297) (1024) 1924 Mad 178 (179) (1930) 1930 All 387 (388) The words until further orders do not extend its

duration beyond the date of decree Note 17 1 (188") 9 All 497 (500) (1889) 1880 Pun Ra No 144 (1903) 25 All 431 (433) (1914) 1914 Lah 3.6 (357) 25 Ind Cas 190

(181)

lasts 1 When the injunction is disoboyed, the party guilty of such disobedience can be proceeded against for contempt under the provisions of R 2. Cl 3 2 The gularity but the sale will not be set

aside unless the judgment debtor has sustained substantial injury by reason of such irregularity [See also (1925) 1925 Oudh 424 (425)] 2 (1928) 1928 Lah 630 (639) Note 18 1 (1915) 1915 P C 106 (100) (P C)

(1912) 14 Ind Cas 350 (382) (Cal) Bu. unless the Court has jurisdiction over the subject matter of the controversy disobedience of its injunction is not punishable An injunction in matters beyond the jurisdiction of a Court is soid and need not be obesed

as 619

(1881) 6 Cal 445 (446) (1889) 12 Mad 356 (365) but a person not named in the pleading cannot be com

(620)

and agents in the order an assistant in the firm not named in the order cannot be punished for contempt of Court but for assisting in a contempt of Court (1887) 9 \11 407 [409 500) (1918) 1918 1114 340 (311) (1930) 1930 All 387 (388) Amendment of

1 sale held in

transferred to another Court.

(1920) 1920 Nag 12 (13) ignorance of an order by way of in junction strying the sale is an irre

3 (1914)

2535

T.

Apart from the provisions of the Code the High Courts have, under authority conferred by Charters of the Supreme Court and continued by their own Letters Patent, power of enforcing abedience of their orders by committing the delinquent for contempt 5

### 19 Injunction to restrain marriage

An injunction may be granted to prevent the marriage of a bride for a second time to another husband 1 But if the bride is a Mahomedan of ago and has ccased to be the wife of her former husband no segunction to restrain the second marriage will be granted either against herself or against her relations 2

An injunction will not be granted to restrate a Hindu woman from marrying her minor daughter to a third party pending a suit for specific performance of a contract to marry 3 But where the father of the bride files a suit for injunction against his wife restraining her from Living away the bride in marriage, a tem porary injunction may be granted masmuch as the father has the predominant right to give his girl in marriage \*

#### 20 Appeal

An appeal lies from an order granting as well as from an order refusing a temporary injunction under this Rule 1 An appeal will also lie if the order purports in he made under this Rule even though the Court had no surrediction to pass it la

It is for the appellant to show in appeals against orders under this Rule that the lower Court acted wrongly to the excresse of its discretion 2 The mere fact that the appellate Court might have come to a different conclusion is not enough " An second appeal hes from an order under this Rule As has been seen in the Notes to So 96 and 104 those sections only apply to appeals from Courts of inferior jurisdiction to Courts of superior jurisdiction and not to appeals within the High Court, 1 e, from one or more Judges of the High Court to other Judges of the same Court 5 No appeal will, therefore, he under O 43, R 1 from an order of a single Judge of a High Court, refusing to grant a temporary injunction. Nor will an appeal he under Cl 15 of the Letters Pitent against such an order masmuch as such an order is not a judgment within the meaning of Cl 15 6 See also Note 2 Pt 40, Cl 15 Letters Patent (Calcutta)

4 (1903) 26 Mad 494 (495) 5 (1884) 7 Hom 1 (4) (1882) 7 Hom 5 (12)

See Notes post Woodraffe 71 et seq 10

(1933) 1933 All 86 (86) 1932 All L J 803 [But see (1933) 1933 Leh 73 (74) Injunction granted under inherent howers without irreturable injury -

[See (1934) 1934 Lah 79 (80) Order of injunction in a case not coming under this Rule but passed under inherent powers is not appealable-

Revision however lies]

In (1900) 23 Mad 517 (521) 2 (1914) 1914 Cal 531 (532)

(1933) 1933 Nag 153 (154) D scretion judi cially exercised—Order granting in

terim injunction should not be dis

punished under R 2 sub r (3) below ] Note 20

1 (1922) 1922 \11 441 (441)

(1333) 1333 Lah 282 (28a) It makes no difference that consequent to the order a notice was assued to show

3 (492)

1.

An order directing the farmishing of security or the submission of accounts passed or directing notice to the opposite party on an application for temporary injunction is not an order under O 39, R 1 and is not, therefore, appealable? 21 Revision

An order passed without jurisdiction is liable to revision will lie on the mere ground of an error of judgment of the lower Court in the exercise of its jurisdiction 1 Where a Court on appeal renews a temporary injunction dissolved by the

first Court a revision may be against it 2

22 Power of High Court-General

Apart from the provisions of the Civil Procedure Code, the High Courts have jurisdiction to grant temporary injunctions in suitable cases 1. The order of injunction will however be directed to a party and not to a Court " But in the undermentioned case3 it has been held that when the High Court deals, as appellate or revisional authority with a case coming from a mofussil Court, it can only apply the law as would he applied by that mofussil Court and that consequently it can only grant an immnetion in such a case in accordance with the provisions of O 39

23 Power to restrain party from proceeding with suit in another Court

Apart from the provisions of the Code, the High Courts have, by virtue of their equity jurisdiction, power to restrain a party before them from proceeding with a suit in another Court 1 Such power extends to restraining a party from proceeding with a suit in a foreign Court but the power in such cases should be exercised with the greatest caution " An order to the said effect cannot, however, prevent the party from proceeding with the suit in the foreign Court but if he

[But see (1934) 1934 Cal 713 (714) Order of Judge on the original side refusing interim injunction-ippeal lies]

7 (1912) 17 Ind Cas 361 (362) (Cal) (1838) 12 Mad 186 (187) No orders passed before notice-Does not amount to refusal

Note 21 1 (1922) 1922 All 441 (441)

(1933) 1933 All 86 (88 90) [See also (1993) 1933 Lah 73 (74) Injunction granted under inherent powers-No irreparable injury-Compensation by damages possible-No jurisdiction to grant injunction-Revision allowed l

2 (1915) 1910 Born 269 (2 0) 40 Born 86

Note 22 1 (1895) 22 Cal 71; (720) High Court has power to restrain a person who has not been duly elected from exercising the functions of a duly elected Com missioner

(1932) 1932 Vad 180 (181) (1907) 34 C11 97 (99)

(1907) 31 Cal 101 (103) (1908) 3 Ind Cas 990 (992) 33 Bom 463 (1925) 1925 Lab 242 (243) (1925) 1926 Mad 1126 (1127) (1931) 1931 Cal 279 (281) 57 Cal 1280

(1928) 1928 Mad 491 (497) (1932) 1932 Mad 180 (181) Appeal from ex parte decree-Execution of decree

restrained (1937) 1932 Cal \$53 (850)

2 (1915) 1915 Bom 146 (148) 39 Dom 604 Judge sitting on the original side has no power to stay proceedings

> 405 But the High Court can restrain a person from proceeding with a suit outside its prisdiction only if he is within the purisdiction of the High Court and not merely where he has

property therein 3 (1933) 1933 Vid 500 (501) 56 Mad 563 Dissenting from (1937) 1932 Vad 180

Note 23

(1931) 1931 Lah 65 (66) [But See (1J03) 27 Bom 357 (361)

granted) 2 (1997) 1927 Pom 135 (137, 138) comes within the jurisdiction of the Court ordering the injunction he can be committed for contempt 3

24 Power to stay proceedings pending in subordinate Court

If sufficient grounds are made out a High Court has also power to stay pro ccedings in a Court subordinate to it, but there is no such power if the latter Court is not so subordinate to it 2

25 Form of temporary injunctions - Set IPI

26 Damages for obtaining injunction without reasonable and probable cause -See S 95

The question of reasonable or probable cause is one of fact 1

R. 2. [S 493] (1) In any suit for restraining the defendant from committing a breach of contract or other Injunction to res injury of any kind, whether compensation is

train repelition or continuance of breach

claimed in the suit or not, the plaintiff may, at any time after the commencement of suit, and either before or after judgment, apply to the Court for a tempo rary injunction to restrain the defendant from committing the breach of contract or injury complained ot, or any breach of contract or injury of a like kind arising out of the same contract or

relating to the simo property or right (2) The Court may be order grant such injunction, on such terms as to the duration of the injunction, keering an account, giving security or otherwise, as the Court thinks Lt

(3) In case of disobedience, or of breach of ann such terms the Court of anting an injunction may order the property of the person quilty of such disobedience or breach to be attached, and may also order such person to be detained in the cuil prison tot a term not exceeding six months, unless in the meantime the Court directs his i elease

(4) No attachment under this Rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the Court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto

[1877—Ss 493, 496, 1859—S 93, R S C, O 50 R 12]

(1894) 18 Bom 581 (584) (Do) (1301) 30 Vad °26 ( 27) (Do) (1305) 31 Vad 510 (511) (Do)

(1925) 1925 Lah 242 (243) But in a suit for s mere declaration it is not proper to grant an injunction slaying proceed ings in another buit pending in ano ther Court

9 (1931) 1931 AH 57 (58) 53 AH 180 Note 26

1 (1933) 1933 Lah 263 (964) 14 Lah 46

<sup>3 (1</sup>J21) 1921 Bom 128 (12J) 45 Bom JJO Note 24

<sup>1 (1684) 1664</sup> All W N 352 (353) (1,02) 26 Bom "85 (7,0) The High Court

has jover to direct that criminal proceedings in the Court of a Magis trite should be streed until the distosal of a Civil Suit in which the question at assue in the cram mal | o ceedings shall have been decided (1892) 16 Lom (2) ((31) (De)



Note No Note No Legislative changes Disabedience of injunction-Effect See Scope and principle of the Rule 2 also Note 18 to R 1 Injunctions to restrain breach of con Power to grant temporary injunction in 3 tract mandatory form 'Or other injury of any kind 4 Appeal Grant of injunction on terms 5

### Other Topics

Injunction in election suits See note 2 F A (8) and Pts (11) and (12)

1 Legislative changes

The words of any hind after the words or other injury are new See Note !

2 Scope and principle of the Rule

This Rule deals with the grant of injunctions in a particular class of cases not covered by the provisions of R 1, tiz, cases of apprehended breach of contract or other injury of any kind. Where therefore, there is no such apprehended breach of contract or other injury of any kind, this Rule will not apply.

As has been seen in Note 2 to R I above, the general principles governing the grant of temporary injunctions is the same as those governing the grant of perpetual injunction. Now S 56 Cl (f), of the Specific Relief Act, 1877, provides that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced, and under S 2I Cl (a) of that Act, a contract will not be specifically enforced when the non performance of it can be adequately compensated for, by the award of damages. This therefore furnishes an important test to see whether temporary injunction should be granted in cases of breaches of contract. Further the general principles governing the grant of an injunction under R 1, also govern the grant of an injunction under this Rule. Thus—

(i) Refore the granting of an injunction under this Rule the Court

(t) Before the guantug of an unjunction under this Rule the Court should be satisfied that the plaintiff has a prima face case 2 that the Court's interference is necessary to protect him from irreparable or at least serious injury 2 that the balance of convenience is in favour of the applicant 25 and that there is no other sufficient.

O 39 Rule 2—Note 2

(1930) 1930 Cal 735 (5 3 761)

(But see (1933) 1933 Lab 73 (\*4)

Breach of contract already committed

—Court can act ex debuto pushina
and grant injunction under 5 101
on proof of strong priva free case
and irreprivable injuny or incontent
cancel

(1931) 1934 118 6 (876) If robet sought

cnce]

laa (1931) 1034 411 8 6 (876) If rohet sought
by plaintiff caunot be grunted tempor
unjunction cannot be sued
(1933) 1033 Lah 203 (\*0a) 14 Lah 330
la (1933) 1033 Lah 203 (\*0a) 14 Lah 330
la (1933) 1033 Lah 203 (\*0a) 14 Lah 330
la (1933) 1033 Lah 203 (\*0a) 14 Lah 330
la (1933) 1033 Lah 203 (\*0a) 14 Lah 330
specifically enforced
2 (10 6) 1036 Lah 589 (500) Bat tha Role

does not mean that the Court should

examine the ments of the case

closely and come to a conclusion

that the plaintiff has a case in which
is is likely to succeed
[1933] 1933 Lah 203 (0.) 14 Lah 330
Fact that suit would be infractious
if no temporary injunction is issued
is not sufficient for a suing such

injunction (1935) 1935 Sind 128 (129) (1931) 1934 Sind 136 (126) (1932) 1932 Sind 81 (86) 26 S nd L R 51

(1931) 1934 Sind 136 (130) (1932) 1932 Sind 54 (86) 26 Sind L R 51 3 (1338) 12 Bom 110 (116) (1933) 1933 Lah 448 (449) Application for injunction in suit for infringement

of copyright - Plaintiff s interests amply protected otherwise-Injune

tion refused (1933) 1933 Lah 1046 (104.)

(1934) 1934 Sind 136 (136)

2a (1934) 1934 Sind 150 (181 152) Deformants members of old executive committee of a society managing

affairs after expiry of period of office

where such injunction was granted, see the undermentioned cases 5 (11) Where a perpetual munction has not been asked for in the suit,6 or where the facts show grama facte, that there is no chance of a perpetual injunction or specific performance heing granted, a temporary injunction will be refused

(111) Delay in bringing the suit or applying for the injunction will be a cround for refusing the same

An injunction under this Rulo also, can be issued only against the defendant n the suit and none else ! It is not necessary that the defendant should be living within the Court's juri-diction 10

Generally speaking, Courts will not issue an injunction restraining a candidato from partaking in an election " Further a Court holding an onquiry into the validity of an election under the District Municipalities Act, has no jurisdiction to grant an injunction restraining the candidate from taking his scat 12. The

rule extends to proceedings under the Guardians and Wards Act 13 This Rule applies to proceedings under the Chota Naupur Tenancy Act \I of

See S 265 (3) thereof

I.

3 Injunction to restrain breach of contract

Pending a suit relating to a contract, the Court can, under this Rule, grant an injunction restraining the commission of any act which will involve a breach of the contract 1 Before such injunction is granted, however, the applicant must satisfy the Court that there is a completed contract under which he has acquired a right2 and that erreparalle enjury will be sustained by him unless the injunction 13 granted 3 Further, as has already been noticed under the provious Note, no in anction will be granted in respect of a contract of which specific performance will be refused Thus.

(1) no injunction will be granted to restrain mairingo or adoption in breach of an agreement to marry or adopt respectively

-Licction of new office beater valu dits of which is questioned in suit-Issue of injunction is unjustifiable as causing inconvenience and mischief

another Court under equitable juris diction-He would raise ples of want of jurisdiction in that case and therefore injunction should not be

5 (1891) 14 Mad 18 (21) (1903) 26 Mad 168 (175)

6 (1912) 15 Ind Cas 614 (615) (Cal)

7 (1877) 1 Bom 550 (554) (1882) 6 Bom 5 (7) (1882) 6 Bom 566 (283)

(188J) 13 Bom 56 (57) [See also (1934) 1934 AM 876 (876)]

8 (1698) 20 411 345 (346) (1993) 1038 Lah 203 (205) 14 Lah 330 (1935) 1935 411 106 (110)

(1913) 20 Ind Cas 676 (677) 41 Cal 384 Suit to declire the election of the

defendant to the Bengal Legislative Conneil as void (1933) 1933 Sind 26 (26) 26 Sind L R 33.

See also cases in Rule 1 Note 3 F N (13) abore 9 (1923) 1923 Lah 47 (49) 79 Ind Cas 233 (1918) 1918 Pat 582 (582) No power to

Improper delay in applying for

injunction against intringement of

issue injunction against non tarts to suit 10 (1931) 1931 Cal 279 (280) 57 Cal 12% 11 (1923) 1923 Inh 47 (48) (1926) 1926 Mad 1147 (1147)

[See also (1333) 1933 Mad 103 (103)

Injunction stopping elections to a District Board-Not to be granted except in exceptional circumstances 1J23 Mad 475 Dist

12 (1924) 1324 Wad 797 (799) 47 Mad 700 13 (1914) 1J14 Lah 180 (180) 23 Ind Cas 351

trade mark

(351) Note 3 1 (1912) 16 Ind Cas 3.J (361) (Cal) The fact

of operation of his pendens is no answer to the application (1926) 1926 Mad 1120 (112")

2 (1891 52) 6 Bom 5 (7) (1877) 1 Bom 5a0 (554)

3 (1920) 1920 Lah 436 (434) 4 (1876) 1 Cat 74 (78)

5 (1859) 13 Born 56 (57)

- (11) no injunction will be granted to iestrain breach of a contract in restraint of trade or profession. But a contract to supply goods exclusively to the promisee and a contract to sure the promisee exclusively for a period are not contracts in retraint of trade or profession and an injunction can, therefore, be granted to restrain breaches of such contracts.
- (iii) no injunction will be granted which will have the effect of compelling the employment of any person, in matters requiring services of a personal nature.
- (11) no injunction will be given where the circumstances under which the contract was made are such, as to give the plaintiff an unfair advivitage over the defendant?
- (t) no injunction will be given where money compensation will afford an adequato relief for the non performance of the contract <sup>10</sup>

Where the defendant alleges a breach of contract and refers the matter to arbitration under a provision contained in the contract, and the plainth thereupon files a suit attacking the contract and asks for an injunction restraining the arbitration proceedings pending disposal of the suit, the injunction asked for will not be granted if the suit is based on a denial of the existence of the contract, but will be granted if the suit is based on an attack of the contract on equitable grounds like fraud or misiepiesentation on the put of the other party.

4 Or other injury of any kind

Under the old Code, the words of any kind were absent. It was held by the High Court of Allahabad that the word 'njury' referred only to injuries akin to beaches of contract and that, therefore, no injunction could be granted in respect of other kinds of injury such as trespies or nuisance. The addition of the words of any kind after the words 'or other injury in the present section, makes it clear that an injunction can be granted to restrain any kind of legal injury. The word injury connotes an act or omission contrary to law, resulting in an infringement of a right vested in a person. Thus an infringenment of a copyright or of a

1

958 (J90) (1920) 1920 Lab 97 (99)

(1933) 1933 Sinal 36 (26) 26 Sinal LR 335 (See also (1953) 1933 Lat 37 (75) No douger of irreputable inpary— Compensation in damages possible— Injunction not to be granted—not bedience of prior injunction—No (1904) 1910 (1904) (1904) (1904) 1910 (1905) (1904)

(1913) 1919 Cal 526 (827, 825) 49 Ind Cas

[See also (1920) 1.)20 Cal 90. (908)] (1927) 1927 Sind 162 (166) Note 4 1 (1500) 22 111 449 (450)

1a(1320) 1920 Lulu 456 (437)
(1933) 1933 All 343 (345) 55 All 399 (Directors of a Company excluded from participation in the munigement of the company—Injunction may be essued

(1904) 27 Mad 400 (415 417)
(See also (1.33) 1.133 Nag 62 (66) 23
Nag L Rt 333 Impaction against
marriage of a minor—Under S 13 of
Gaudians and Word tel—Detend
to under this Rule tylen with S 131
—Injury is to the person of the
minor by a p mannest marriage to
unswitche husbradi

(1947) 1327 Sind 182 (186) 21 Sind LR 306 Arbitration proceedings null and void and not therefore causing any injury'

<sup>6 (1903) 26</sup> Mad 168 (175) 7 (1891) 14 Mad 18 (22)

trule "ark," or an obstruction to a right of easement" or to the obsciess of rights of property or of a right of public worship" or the commission of a wasto or of a nursince" are all injuries in respect of which an injunction may be granted under this Rule. But the lawful exercise of a right cested in a person cannot furnish a ground for grating an unjunction restraining such persons from exercising it?

It is not necessary that the injury should have been actually suffered theuch it is essential that the Caurt should be satisfied that there is a real or reasonable apprehension of such injury. An injunction will be refused if the 2 (18-3) 17 Rem. 51 to 160 Trade mail. ghat belonging to inclinioner for

(1901) -5 Lom 433 (4: 1). (1).)

(1,13) 21 Ind Cis 2 > (,62) 40 Cil 570 Traje narie

(1972) 1302 Stud 84 (~) 26 Stud L R 51

(1.0-) 35 Cal 453 (16-) C pericht 3 (1-45) 19 (11 2.3 (200) Observation to light

and air through a window (1--1) 8 hom '5 (3-) (Do)

(1571) 9 B. m H G R 151 (194) (Do) (1573) 23 Lom 7-6 (755) (Do)

(1 02) 26 Rom 374 (378) (Do) (1 04) 28 Lom -93 (303] (1 04) -9 Rom 157 (RO) (Do) An impine

(1,01) \*3 from 12; (1(0) (1)0) to minute to be trien when the terminal in grandles is considered

(1-19) 22 Mad 251 (254) (Do)

(15-7) 14 Cv1 533 (8-5) (Do) (13-0-) 31 Mad 171 (173, 170) I locking up

the entrance of a channel (1905) 28 Mad 15 (16 17) Of truction to water course or right to flow of water

(1906) 4 Cal L Jour 370 (388) 11 Cal W N 85 Interference with the natural flow of water (1900) 24 Lom 183 (192) An injunction

will be granted to restrain a person from using a way for a purpo e different from that for which it was granted

(1904) 31 Cal 944 (950) Trees overhanging neighbour a land

4 (16,0) 12 All 436 (437) (F B) Joint owner excluding the co owner from pos-

(1914) 1914 Cal 362 (363) 21 L. C. 561 (863) 41 Cal 436 One co sleater using property in a manner which will change

(1904) 31 Cal 174 (178) Erection of an indigo factory by tenant on part of land demised rendering it unfit for purpose of tenancy (1887) 14 Cal 236 (233) Cosharer misused

(1567) 14 Cul 236 (233) Coshurer misused joint property (1691) 18 Cul 10 (20) 17 Ind App 110 (P C)

(1902) 29 Cal 500 (502) Illegitimate use of the family property or acts amounting to ouster (1597) 24 Cil 260 (264) Act threatening

danger to a person's land
(1883) 0 Cal 75 (79) Defendants using

(1839) 23 Jon 144 (145) One member of the family prevented from tiking part in the business of the family

(1862) 1 Mad H C R 341 (348) Partner

caclading his copirtuer from the patientship business 5 (1831) 15 Cal 141 (162) 15 Ind App 59 (P C) 6 (1833) 5 111 363 (371) A plaintiff has no

(1852) 5 111 369 (371) I plaintiff has no right to the removal of trees | Intended by the defendant on his own land until the plaintiff sempoyment of his own 1 110d is directly and immediately interfered with by the growth of the tree-

(190a) 32 C.1 GJ7 (700) Defendant the owner of a shallor factory discharging into Municipal drain refusoliquid of densitie character interfaring with the ordinary comfort of the plainful s occupation of property.

(1904) 41 Cil 214 (221) Wasie by a Hindu

7 (1922) 1922 boin 335 (385) 46 Bom 939 Rightful execution of decree cannot be presented

(1923) 1323 Lah 47 (48) A suit for a decliration that a certain person is not eligible to stand as a candidate cannot be said to be a soil for restraining him from committing an

(1926) 1926 Mad 132 (182) Injunct on to restrain elected candidate from taking

(1868) 10 Suth W R 485 (435) Obstruction to watercourse—Plaintiff bound to

(1869 "O) 5 Mad H C R 6 (24) Obstruction
to water-Injury must not be trivial

8 (1920) 1920 Lah 436 (499) (1908) 32 Bom 146 (148 149)

[See also (1923) 1923 Bom 281 (283)

### applicant has acquiesced in the act or omission complained of <sup>9</sup>

5 Grant of injunction on terms

Sub rule (2) empowers the Court in grunting injunctions to impose such conditions as it deems necessary. Thus it may cill for an undertaking from the plaintiff that he will able by any order which the Court may make as to damage. I or where the plaintiffs are a foreign firm and do not carry on business in British India it is reasonable that they should be nut on terms.

6 Disobedience of injunction Effect-See also Note 18 to Rule 1

A disobedience of an order of injunction is a contempt of Gourt Sub rulo (3) confers on Courts the power to punish such contempt and further prescribes the punishment to be awaided therefor. While the High Courts as Courts of record have inherent jurisdiction to commit for contempt, the other Courts have no such power apart from the provisions of this Rule?

The provisions of the sub rule apply not only to disobedience of an order issued under Cls (1) and (2) of R 2 hut have a more general application and apply equally to disobedience of all injunctions issued under S 94 of the Code

As regards the power conferred by this sub rule for punishing disobedience of injunctions the following points must be noted —

(1) The Court which ordered the injunction is the Court which can punish its disobedience. Thus where an order of injunction was passed by a particular Court and the suit was thereupon transferred to another Court it was held that the letter Court had no power to punish disobedience of the injunction passed by the former Court. It has also been held that an interlocutory application to punish for contempt under this sub rule cannot be transferred to another Court, and thus give that Court jurisdiction to deal with it. But a Court to which the husness of the Court granting the injunction has been transferred under S 150 of the Code can exercise the power of punishment under this sub rule. The appellate Court has the same power to order punishment as the original Court.

(2) In taking action under this sub rule the Court cannot act suo motule that only on the application of the aggreed party?

Threatened nuisancel ting certain

9 (1883) 9 Cai 600 (617) Tenant of an agri cultural holding planted his land with mango trees to the knowledge but vithout the consent of his land lord — Landlord standing by for ting certain property pending de i sion of the appeal the Court can punish the party in contempt under O 39 R. 2 (3)

s 610

Note 5

1

appointment of a receiver operates as an injunction so far as the parties bound by the order the concerned [See also (1932) 1933 Nag 62 (64 6a) 98 Nag L R 332 Injunction seams aminor s marriage under S 12 of Guardivins and Wards Act—Deemel as under this Rule taken with

Plaintiff a foreign firm—Security taken for possible loss to defendant by injunction Note 6

to an appeal disobeys an injunction order restraining him from aliena

7 (1903) 26 Vad 494 (49 )

As regards the penalty for disobedience of an immetion it has been held that the sub rule should be strictly construed and that it cannot be read as providing any regulty other than that specifically mentioned in it . Thus the disobedience will rot render any transaction youd," nor can a separate suit be filed for damages for non-countrynce with an order of injunction. 10 the six months period of deten tion tre-cribed in the sub rule cannot even inducetly be added to 11 But the two modes of tunishment prescribed are only alternative and it is not necessary that a. achment should be effected before impresenting its ordered 12. Where in income ion was issued against a person restraining him from bringing about the marrage of a girl, but the marriage took place, the person injuncted not being responsible for it and he was sought to be punished for contempt on the ground that he did not do all in his power to prevent the marringe, it was held, refusing the all lication that the injunction order contained no direction that he should do all in his power to present the marriage 23. In another case, where a company had been restrained from holding a meeting but the share helders had not been restrained from voting and, at a meeting held in a private house, some of the share I olders attended and voted, it was held that they were not liable to punishment for disobedience 14

Ithough there might be a breach of an injunction in the literal sense yet if the party acted in good faith and without any intention to violite the order, he will not be jubble for punishment 19

Where an injunction has been disobered the fact that the injunction has been subsequently dissolved will not exempt the party from punishment 18 Milnough an injunction takes effect from the date of the service of the order, yet, if the order bad been passed in the presence of the counsel for both sides, it is no excuse to say that the order was not communicated to the party personally in

A person against whom no injunction has been ordered cannot be punished under this sub rule on the ground that he abetted the disobedience of the order 18

An undertaking not to alienate, duly recorded in the order of the Court, amounts to an injunction and a breach thereof is liable to be punished under the Rule.

### 7 Power to grant temporary injunction in mandatory form

Courts in England have power to grant temporary mandatory injunction <sup>1</sup> In a Bombay case, Beaman, J, held that the power to issue such an injunction was not within the scope of 0 39 and donbted whether a molusal Court in India had power to issue such an injunction <sup>2</sup> The power was, however conceded in has been affirmed beyond all doubt in a

prove it before committing him for

(1914) 1J14 Mad 141 (2) (142) (1917) 1J17 Mad 448 (449 451) 39 Mad 907 (1927) 1927 Cal 598 (660) In fact an attach ment is not a proper punjshment

19 (1931) 1931 Bom 509 (510) 33 Bom L R 1109 (1112) Note 7

I (1785) 1 Brown Ch Cas 588 Robinson v Lord Byron-Referred in 24 Ind Cas 625

(1883) 24 Ch D 1 (10) Bonner v Great Western Ry Co, Ltd-Referred in 1918 Vlad 588

had no notice of injunction-Court must give him an opportunity to

9 (1914) 1914 Bom 42 (45) 38 Bom 391 3 (1914) 1914 Eom 135 (197) 3

### number of other cases 4

### 8 Appeal

In appeal lies from an order under this Rule whether the order is one in flicting punishment or one refusing to take action 1 An order refusing to discharge ao injunction issued under this Rule is also appealable is

No second appeal lies against an order passed on appeal from an order under this Rule 2

As to whether revision lies against an order under this Rule see the under mentioned case 3

Before granting in junction Court to direct notice to op granting an injunction, direct notice of the

R. 3. [S 494] The Comt shall in all cases, except where it appears that the object of granting the injunc tion would be defeated by the delay, before

application for the same to be given to the

posite party opposite party

[1877—S 494, 1859—S 95]

Synopsis

Note No | Appeal

Note No

Scope of the Rule I Scope of the Rule

Courts have guirediction to grant an injunction ex parte. But it should not be so granted without stroo, and grave reasons! In other words except where the delay involved in the issue of notice will defeat the object of the injunction notice should be ordered to the party before injunction is ordered against him 2 An injunction granted in violation of this principle is irregular 3

In an appeal from an order granting an ad interim injunction the appellate Court under this Rule can pass an order ex parte staying the operation of the injunction order 4

# 2 Appeal

No appeal lies from an order directing notice before granting injunction 1 4 (1918) 1918 Mad 588 (589) Leaman J in

1914 Bom 42 3S Bom 381 not ac conted

(1927) 1927 Wad 210 (211 212) The power exists under S 151 and not under 0 39

(1929) 67 lnd Cas (42 (143) (Lah) But an m terlocutory injunction of a mandatory nature which does not restore any previously existing state of things but which directs defendant to estab lish a new state of things Note 8

1 (1929) 1329 Nag 278 (273) (1916) 1916 Mad 446 (444)

an injunction is one under O 39 R 2 and is appealable under O 43 R 1

(1931) 1931 Bom 509 (510) Undertaking

2 (1901) 24 Wad 447 (449) 3 (1933) 1933 Lah 1046 (1047) Proceedings for temporary injunction are a case and revision lies Order 39 Rule 3-Note 1

1 (1889) 12 Mad 166 (181) (1924) 1924 Mad 857 (857 858)

<sup># (1932) 1932</sup> All 223 (224) Stay of injune tion restraining nominations in an election Note 2

Order for injune tion may be dis charged varied or sel a side

I.

R. 4. [S. 496.] Any order for an injunction O. may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order.

Appeal

[1877—88, 493, 496; 1859—8, 93.]

Synopsis Note No

Note No

Score of the Rule

Other Topics

criter of n i coltaning injunction on in-utherent ground. See S 95.

1 Scope of the Rule

. Rule is intended to cover two classes of cases -

(1) Where an arcent order ex parte has been made under R 3, and

2) Where an injunction order already in force, has owing to fiesh circaustances become unduly larsh or unnecessary or unworkable 1

1 - not intended to set at mught the ordinary Rule that where an in the been ordered after granting each side an opportunity of being heard, mjur I ad cannot be interfered with except on the presentation of new matter 1t 15

lible when the original order was passed a 1101 Where in immedian is dissolved under this Rule, the plaintiff may apply again a requirement of he can make out a sufficient case 3

2 Appeal An inter under this Rule is appealable under O 43, R 1 (1).1

R. 5. [S. 495.] An injunction directed to a corporation is 0. binding not only on the corporation itself, but

also on all members and officers of the corpora-

tion whose personal action it seeks to restrain.

Injunction to cor peration binding on its officers

> Sunopsis Injunction against corporations -Note No 1

1 Injunction against Corporations

Is to what is a corporation, see the undermentioned case 1

Is to the right of an individual to get an injunction against a Corporation, see the undermentioned case,2 and rade also Notes under Note No 3 to R 1. supra

Order 39, Rule 4-Note 1

1 (1929) 1929 Mad 803 (80) 2 (1929) 1929 Mad 503 (801) 3 (1577) 2 Bom 252 (256)

Note 2 1 (1603) 15 411 8 (9) (1J13) 20 Ind Cas 653 (654) 35 All 425 The

tppc tl is not limited to an affirma tive but includes a negative order also (1929) 1923 Mid 803 (804) An order staying

delivery of property in execution under O S9, R 1 was passed after notice The non applicant without ning an appeal applied for discolution of the order under O 32, R 4 and the Court appointed a receiver

The non applicant appealed from that order Held that the Lower Court had not really varied its origreat injunction staying delivery though it purported to do so by appointing a receiver The original order staying delivery remained in full force and was resterated in the revised order Whatever be the scope of O 39, R 4 it cannot be that a pirty cin appeal against a mere reiteration of the original order of injunction when he has failed to

appeal against the original order Order 39, Rule 5-Note 1 1 (1917) 1917 L B 36 (37) 38 1nd Cas 572 (573). 2 (18:f) 1 Lom 132 [142]

C. P. C. 319 & 320

Note No

## INTERLOCUTORS ORDERS

R. 6. [S 498] The Court may, on the application of any party to a suit, order the sale, by any person Power to order named in such order, and in such manner and interim sale on such terms as it thinks fit, of any moveable

property, being the subject matter of such suit, or attached before judgment in such suit, which is subject to speedy and natural decay, or which for any other just and sufficient cause it may be desirable to have sold ut once

[1877-S 498; R S C, O 50, R 21

Synonsis

Legislative changes

Note No | Scope of the Rule Other Topics

iny other just and sufficent cause See Note 1 1 Legislative changes

1 The words or attached before judgment in such suit are new

2 The words or which for any other just and sufficient cause it may be desirable to have sold at once are also new and have been added in order to empower the Court to order sale of securities when the state of the market requires such a course

2 Scope of the Rule

This Rule will apply only if the property is either the subject matter of the suit of has been attached before judgment in the suit 1. An order under this Rule can be passed only on an application made therefor and after notice to all the parties concerned? The Rule does not empower the Court to appoint a commissioner to sell any crop on the property attached 3

- R. 7. [S 499] (1) The Court may, on the Detention 11esci ration In spection etc. application of any party to a suit, and on of subject after of such terms as it thinks fit,-
- (a) make an order for the detention, preservation or inspection of any property uhich is the subject matter of such suit, or as to which any question may arise therein,
- (b) for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit; and
- (c) for all or any of the purposes afore aid authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence
- (2) The provisions as to execution of process shall apply, mutatis mutandis, to persons authorized to enter under this Rule [1877-S 499; R S C, O 50, R 3]

Order 39 Rule 6-Note 2 2 11884) 7 Mad 211 (212) 1 (1932) 1932 Lah 51 (J2) 134 Ind Cas 118 (119) 3 (1930) 1930 Mad 221 (221)

7

Note No. Legislative changes. Scope of the Rule. Inspection of subject matter of suit. Inventory

I.

Application for such order to be after z Power to allow party to draw money paid into Court pending decision 4 | Appeal

### Other Topus

Order to produce projecty See Note 2, I -N (1) O der sea net party See N to 2 11 (1) and S 44 ( 1 ) (1 Revision See Note 2, F N (1)

## 1 Legislative changes

The with tas to which any me stim iter arise therein " in Sub rule (1) (a) are new 2 Scape of the Rule

The first part of the Rule applies to cases where the atticks no in the possessing or distody of the party in most whom the order is made 1 is to the power ! C urts t pass in order under this Rule in Probate Proceedings, see the anderments nel ence?

3 Inspection of subject matter of suit

Where in respect of the property of one person a right accuses in favour of mether and that right cannot be measured without inspection of the property, such inspection can be ordered under this Rule 1 Thus in a suit for dama\_cs alleged to have been crused to the plaintiff by the defendant's construction in his premises the extent of the alleged many has to be ascertained and the Court has purisdiction under this Rule to order an inspection for the purpose 2 Similarly where the question to be decided is whether certain structures us old or now. the proper procedure is to issue a commission under this Rule and not under O 26 Rr 4 or 9 ante23 In ordering such inspection, the Court should take care to impose as little inconvenience is possible on those against whom the order 15 made 8

#### 4 Inventory

The power to order inspection implies a power to order the preparation of in inventors if such inventors to essential for a proper decision of the case 1. If such an inventory is not so essential, it should not be ordered

#### 5 Application for such order to be after notice

An application for an order under this Rule can only be made after reasonable notice to the parties concerned 1

Order 39 Rule 7-Note 2 1 (1919) 1919 Cu 312 (314) Where serious ornaments are Hedged with the de fendant who has igain pledged them along with other orniments of his own with a third jury and is in a position to redcem them from his pledge a Court had jorisdiction to order their production to the de fendant before it within a cert un time-High Court confirmed the

lower Court's order in revision 2 (1905) 1905 All W N 127 (128) (19t5) 1915 Cat 565 (567) (1929) 1J29 Cal 496 (496)

Note 3 1 (1896) 24 Cal 117 (t2t 122)

(1J10) 6 Ind Cas J74 (575) (C1)) a (1617) 21 Cat 117 (121 122)

21 (1933) 1933 Cal 475 (176) 3 (1,10) 6 lnd Cas 574 (57a) (Cal)

(1908) 2 Smd L R 22 (24) in order by a Sub Judge to open up a particular passage by the defendant to allow a Receiver to enter upon the premises

16

r

Own 11 cm cg Note 4

1 (1910) 6 Ind Cas 574 (575) (Cal) 2 (1919) 1919 Cal 429 (430)

Note 5 1 (1883) 7 Mad 241 (242)

6 Power to allow party to draw money paid into Court pending decision

Where money paid into Court is claimed both by the plaintiff and by the defendant, the Court cannot allow one of them alone to draw the amount pending the decision of the case even on his furnishing security for restitution 1

7 Appeal

No appeal hes from an order under this Rule 1 But if an order applied for under this Rule is wrongly refused, the proper course is to apply for review if any new matter is forthcoming

Application for such orders to be after notice

R. 8. [S. 500] (1) An application by the plaintiff for an order under Rule 6 or Rule 7 may be made after notice to the defendant at any time after institution of the suit.

(2) An application by the defendant for a like order may be made after notice to the plaintiff at any time after appearance.

[1859—S 91]

Sunonsis Notice Note No 1

1 Notice

An application under this Rule also can be made only after reasonable notice to the opposite party 1

When party may be put in immediate possession of land the subject matter of

R. 9. [S 501] Where land paying revenue to Govornment. or a tonure hable to sale, is the subject-matter of a suit, if the party in possession of such land or tenuro neglects to pay the Government rovenue, or the rent due to the proprietor of the

tenure, as the case may bo, and such land or tenure is consequently ordered to be sold, any other party to the suit claiming to have an interest in such land or tenure may, upon payment of the revenue or rent due previously to the sale (and with or without security at the discretion of the Court), be put in

immediate possession of the land or tenure;

and the Court in its decree may award against the defaulter 'the amount so paid, with interest thereon at such rate as the Court thinks fit, or may charge the amount so paid, with interest thereon at such rate as the Court orders, in any adjustment of accounts which may be directed in the decree passed in the suit.

[1877—S. 501; 1859—S. 91.]

Synopsis. "Adjustment of accounts " Note No 1

Other Topics Payment by one co sharer to save sale-Whether entitled to charge See Note 1, Pt (2)

Note 6 1 (1913) 19 Ind Cas 219 (219) (Mad)

Order 39, Rule 8-Note 1

Note 7 1 (1891) 21 Cal 725 (738) (F B) 2 (18J2) 16 Bom 511 (513) 1 (1834) 7 Mad 241 (242)

Note No

Adjustment of accounts

I.

In adjustment of account under this Rule need not be sought in a separate sa ' even if the decree in the first sait is silent about it. It can be worked out in execution of the decree if it could be shown from the nature of the decree, that it could and ought to have contained such an order and is imperfect without it 1

The party paying the revenue under this Rule is entitled to a charge on the

projecty 'or the amount 2

R. 10. [5 502] Where the subject-matter of a suit is o money or some other thing capable of delivery,

Deposits of maney and any party thereto admits that he holds such etc in Court money or other thing as a trustee for another party of that it belongs or is due to another party, the Court may

order the same to be deposited in Court or delivered to such lastnamed july with or without seemity, subject to the further direction of the Court

[1877-8 502 1859-8s 95 and 243]

Sunonsis

\u1e \0 Appeal

Other Topics

Holds W No e 1 1 1 (2)

Refusal to deposit money-Liability to pay interest See Note 1 Pt (3)

I Scope of the Rule

Scope of the Rule

The Rule does not apply unless-

(1) the idmission of the party is in admission sufficient under O 12,

R 61 and (ii) the party making the admission "holds the property or other thing

cipable of delivery A refusal to pay as ordered, under this Rule, will render the party refusing hable for interest from the date of the order 3

The Rule applies to proceedings under the Guardians and Wards Act 4 2 Appeal.

An appeal hes from an order under this Rule under O 43, R 1 (1)

### ORDER XL.

### Appointment of Receivers

appoints out of re

R. 1. [S 503] (1) Where it appears to the Court to be just and convenient,14 the Court may by order-

Order 39, Rule 9-Note 1

1 (1J02) 6 Cal W N 710 (712)

2 (1903) 26 Mad 656 (692) (P B1 Order 39 Rule 10-Note I

1 (1927) 1927 Sind 25 (27)

ceivers

2 (1904) 27 Wad 168 (173) The Rule would not cover a case where the money was held by another Court to the credit of another suit Subramania Alvar J dissenting

3 (1871) 16 Suth W R 297 (298)

4 (1911) 11 Ind Cas 554 (556) 3G Bem 20

23

24

25

(a) appoint a receiver of any property, whether before or after decree:20

(b) remove any person from the possession or custody of the property;49

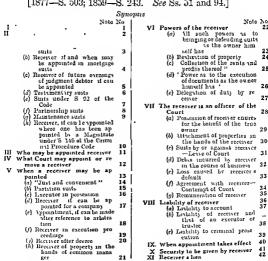
(c) commit the same to the possession, custody or manage-

ment of the receiver; and

(d) confer upon the receiver all such powers, as to bringing and detending suits and for the realization,24 management, protection, preservation and improvement of the property, the colection of the rents and profits25 thereof, the application and disposal of such rents and profits, and the execution of documents26 as the owner himself has,23 or such of those powers as the Court thinks fit.

(2) Nothing in this Rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.

[1877—S. 503; 1859—S. 243. See Ss. 51 and 94.]



### Other Forces

iii c f a parb-Wictler can to ap t i cli cur see e ell it (t). D to rou a SeeNote 13 Pt (22) I'' (All it) at On escution is le i les executed it (t). I b f appeal i the line (concel See Sale 15 receiver—Parties, whether can impugn Se Nete 22.11 (15)
Temporar injunctions and appointment of receivers—Distinction letween Soc Note 13. Pt. (4)
Tau Courts appointing receivers in respect of the same properties—Whether expedient

See Note 12 1't (8)

< 1 1 (a)

1 Legislative changes

1 | r r | 1 | 5 | 63 dealing with receiver's remuneration and receiver's duties have less to take it? 2 and 3 of this Order | Apart from this the present Rule contains the full tables.

(1) S. .03 provided for the appointment of a receiver whenever it appeared "to be a ce and for the realisation presentation of texture custody or management of any projects. Under the pre-tit fluid the Court may appoint a receiver where it appears to be, pust and consequent to do so.

(2) 3 .03 211 had only to property which was the subject of the dust or attachment 1

This restriction has been removed now
(3) The wirds whether before or after the decree' in the present Rule are new

Thus the present Rule is much wider in its scope than S 503

2 Scope and object of the Rule

This Rule unthories a Court to appoint a receive in whenever it appears to it to be jut in deconvenient to do so. The matter is thus left to the discretion of the Court of Such discretion must, however, he exercised, not arbitririly but judicially and ecording to lead principles. (See Note 11, 18/7a.) The object and purpose of the appointment of a loceiver may generally be studed to be the preservation of the object matter of the litigation pending a judicial determination of the rights of the lattes thereto. The Court does not, at the time of appointment of a seconder, intrincat my final decision on the ments of the case, its run being merely to jie eve the status quo ante during, the litigation. Where a receiver is appointed under this Rule in respect of any property, such property in existed legis for the lenent of the several patters according to their titles (see Notes 27 and 28, 18/1s). When the Court appoints a person as the manager of the sur property, it really appoints a receiver, the term 'manager' being only another name for a

## Order 40 Rule 1-Note 1

1. (16%) 9 M.1 233 (337) 2 (1874) 1874 Pan Re No 53 Page 191 (16\*9) 17 Seth W. R. 101 (101) (1873) 1 Ind App S. (102) (P. 6) (1874) 10 Suth W. R. 273 (273) (1876) 6 Suth W. R. Mis 1 (2) Note 2

1 (1912) 2I Ind Cas 283 (287) 16 Ondh Cas 238 (1J33) 1933 Ring 94 (95) (See (1921) 61 Ind Cas 112 (112)

(111) Costs in the application also discret onary ]

1a (1913) 21 Ind Cas 283 (286) 16 Oudh Cas 238 (1907) 34 Cal 305 (316)

2 (1315) 1915 Cul 35 (36) (1324) 1924 Cul 456 (458) (1584) 10 Cul 225 (280 231) (1905) 82 Cul 741 (745)  receiver <sup>3</sup> A sapurdar to whom moveable property attached in execution is handed over for safe custody is not a receiver <sup>4</sup>

3 Receiver if can be appointed in proceedings other than suits

The omission in R 1 of the words subject matter of suit which occurred in S 503 of the old Code makes it clear that a receiver can be appointed in proceedings other than suits. Thus, a receiver may now be appointed in proceedings for the appointment of a guardian under the Guardians and Wards Act, or in a suit for rent and ejectment under Bengal Act VIII of 18693 or under S 32 of the Bengal Settled Estates Act III of 1904 for the purpose of recovering the amount of any decree against a tenant for life of a settled Estate But a Court has no jurisdiction to appoint a receiver in pinceedings under the Succession Certificate Act or in proceedings for the removal of a trustee under S 74 of the Trusts Act to to manage any occupancy holding under the Central Provinces Tenano. Act of

4 Receiver if and when may be appointed in mortgage suits

The High Courts of Albahada and Patna have held that O 40 has no application to mortgage suits inasmuch as O 34 provides in itself a complete machinery for such suits. But the general trend of opinion of the other High Courts is that O 40 is not inapplicable to mortgage suits and that a receiver can be appointed even if the mortgage is a simple one? The test to be applied in this class of suits is, as in the case of other suits, to consider whether it will be just and contenent to appoint a receiver <sup>23</sup> A receiver cannot be appointed merely hecause it is convenient to the mortgagee to do so? or hocause a private sale by the receiver will fetch a higher price than the Court sale, or because the mort

8 (1924) 1924 Vad 614 (614) (1932) 1932 Cal 275 (292) Position and

duties of common manager of estate and of receiver of property are analogous

4 (1924) 1924 Lah 667 (668) Note 3

1 (1916) 1016 Cal 427 (427) 43 Cal 986
[Sea into (1933) 1938 Lah 437 (439)
14 Lah 65 Court has power under
0 40 read with R 95 of the Lahoro
High Court made under Compunies
Act to pass interim order for preceivation of the subject matter in
dispute in proceedings under the

5 (1927) 1927 Sind 237 (938) 6 See S 12 (2) C P Tenancy Act I of 1970 Note 4

implie, that teceiver could be ap

Dis-

ıd ap

(1934) 1934 Lah 33 (38) (1934) 1934 Rung 321 (322) 12 Rung 437 Asse in which the mortgage was in the form of an Engli h mort gage

(1939) 1932 Lah 83 (83) Fquitable mort gageo is entitled to appointment of Receiver

(1925) 1325 Lah 590 (591 592) (1928) 1928 Rang 176 (176) 6 Rang 261 (1927) 1927 Sind 230 (230 231)

[But see (1877 78) 3 Cal 33. (330) 5 243 of Act VII of 1530 not applicable to mortgage decree for sale—Receiver cannot be appointed [But see (1932) 1932 Fat 505 (321)] [But see (1932) 1932 Fat 505 (321)] I Jah 457 Court refused to apploint Receiver in execution to self mortgaged property]

24 (1932) 1932 Cal 194 (195) (See (1932) 1932 Pat 360 (362)

See observations of Fazl 41: J ]
3 (1913) 21 Ind Cas 283 (281 285) 16 Oudh
Cas 238

4 (1806) 23 Cul 517 (521) 5 (1916) 1316 Cal 515 (516)

Mauras has hell that a receiver can be appointed even when the right to a peral acree in t subsisting. But it has been held that a receiver cannot be app n ed f the a let pr permes of the mortgagor where there is no likelihood of a fer at more being pixed against the mortgagor in ease the proceeds of the sale of the miregaged property is found insufficient to sitisfy the mortgage" as tee it a dim the un fermenta note bee that where a receiver is appointed at the we suce of a nortance the rents and profits of the property realized by the receiver mus le trea er as additional security for the amount found due to the meriance under the mertane and that therefore the mortance is entitled to be tadout of the rents and trofits so received in priority to other personal creditors of the mort paper

Where the ir r near is voil ab initio and the morthinee obtains a simple t only decree in respect of the mortage amount it has been held by the High Court of Rango in that he cannot apply for the appointment of a receiver of the properties of the meripiner It has been held by the High Court of Madras that the Court has no power to appoint a receiver pending a suit for the specific performance of a c ntriet to execute mortgage 10

In the circumstances of the following cases, it has been held that a receiver

"av properly be appointed -

(1) Where the interest due on the mortgage is in allears or the sile proceeds of the property pro likely to be insufficient to satisfy the mortgage 11

(1) Where the mortage is by the kirta of a joint Hindu family and it is found that such a mortgage is binding on the family 12

(3) Where the suit is to enforce a floating charge on the good will and the stock in tride of a business under a mortgage containing a provise ould not permit the stock in tride to fall below

(Week & Cance) 1 12 where it was held that a Receiver could be at poin ted for the mort jaged projecties even

it there is no personal remedal 7 (1927) 1223 Mad 550 (576 551 552) 46 Mad J15 , Bertraing 1333 Mad 447 (451) (1926) 1326 'lad 737 (737 798)

 (1931) 1331 Mad 626 (627) 54 Mad 565
 (1332) 1375 Mad 410 (411) Receiver is ap penale litter the benefit of the most gagee-- ill preceeds realized to go to the eredit of the morigage delt-1 jurchaser of equity of redemp tion is not in a letter position than

the mortgager (1J32) 1932 Sind 82 (84) (1929) 1923 Sind 114 (114 115) 23 Sind

L R 200 (1020) 1920 Cal 545 47 Cal 418

(1312) 17 Ind Cas 849 (851) (Cal ) Court cannot order Receiver to 13v out of the moneys in his hands any eums to the mortgagor to prosecute his appeal against the decree in the morigage suit (Sce also (1933) 1933 Mad 293 (294) 141 Ind Cas 372 (973 375 377) Recen ver in mortgage suit-Subsequent Court auction [urchaser in cao cution of money decree-Such pur chaser is not entitled to rents and pro fils though Receiver was milleaded therein and though both suits were in the same Court] (See also (1934) 1934 Rung 321 (823) 12 Ring 437 Acase of Linglish mort

gage 1 (But see (1335) 1335 Mad 146 (149) Getting Receiver appointed does not amount to charge-Nor does such

person get priority over another who uttaches the properties ]
9 (1930) 1930 Rang 271 (272) ]
[I ut see (1870) 13 Suth W R 453 (454) Receiver may be appointed

though the mortgagee his taken only a n oney decree ]

11 (1920) 19°0 Cal 545 (547 ) 47 Cal 418 (1935) 1935 Lah 17 (20) 16 Lah 360 (1931) 1934 Lah 38 (35)

₹ 135

1 (91) 1

a certain value 13

- (4) Where the mortoacor who is in possession on helialf of the mortgagee becomes insolvent 14
  - (a) Where the mortgagee is entitled to enter into possessiou on defult of payment of the mortgage moneys la
  - fayment of the mortgage moneys."

    (6) Where the mortgager transfers his properties with the mortgagers consent, to trustees who undertake to liquidate his debts by periodi

cal payments but the arrangement fails <sup>16</sup>

A receiver can be appointed in a mortga<sub>e</sub>e suit for sale even though a receiver has already been appointed in a prior partition suit comprising such property <sup>17</sup> Such appointment can be mide even after the final decice in the most age suit is pissed and at any time before the mortga<sub>e</sub>e is fully satisfied <sup>18</sup> A receiver may thus be appointed after the sale under the mortgage decree and pending in publication to set saids such sale <sup>19</sup>

Where a receiver is appointed in a mortgage suit the mortgage if in possession must give up such possession to the receiver even though he has been in possession under an arrangement that he should apply the moon of the property to the discharge of the debt.

S 69 A of the Transfer of Property Act which was introduced newly by Act N of 1929 now makes provision for the appointment of a recover of the mortgaged property by the mortgaged himself in cases where he is entitled to sell the property without recourse to a suit for sale. Hence the undermentioned decision passed prior to Act N of 1929 wherein this right was not recomized is n ) longer good law.

5 Receiver of future earnings of judgment debtor if can be appointed

Apart from any charge given by the debtor the Court his no power to appoint a receiver in ad of a judgment of the future earnings of the judgment debtor insamuch as such earnings are not properly in respect of which the judgment creditor could proceed in equity or at law. A receiver cannot therefore be appointed to receive the maintenance allowance. For the pension payable to the judgment debtor. But where the latter has been given certain lauds for his maintenance a receiver can be appointed to collect the rents and profits of the ludgs and pay out of the same, a sufficient sum for the maintenance of the judgment debtor and his family applying the balance if any, to the liquidation of the judgment creditors dobt. See also the undermentioned cases.

6 Testamentary suit

A receiver can be appointed in a testamentary suit <sup>1</sup> See Noto 3 surra

13 (1919) 1919 Cal 860 (861) 14 (1916) 1916 Mad 1123 (1129)

(1917) 1917 Viad "9 (8 ) 40 Mad 302 2 (1909) 4 Ind Cas 145 (148) 1 2 Oudh Cas " 3 I ension also cannot be attached 3 (17) 1 12 P C 1 C (1 (1 ) 1" All 352 3"

(19 6) 1926 Cal 1006 (1003) 19 (1911) 9 Ind Cas 1027 (10 5) (Cal) 0 (1371) 1921 I it 43 (44) 6 I at L Jour 37 1 1918) 1918 Cal 557 (660 670) Note 5 1 1 0 B D and (sai) C A Holzes

1 1 Q B D 551 (551) C A Holrees Mil 17e (1 54) 3 C h D 335 (341) C A Cadega: v I ric Theatre (155) 2 I R 551 R 5 Jones 3 (1911) 6 Ind Cus 9 6 (80) 38 Cal 13 Decree for 1 mintenance may be as gred

Note 6

1 (1573) 17 Bom 3 3 (3 H)

Ω

7 Suits under S 92 of the Code

The Court can appoint a receiver in a suit under \$ 92 of the Code 1 is a mar stit under the Religious Endowments let except under South Lat Act Section the undermentioned eases 3

8 Partnership suils

Where a dissolution of the partnership is mostable and the partners are call the usual way of murding their interests as by impointing a recei is by mem, the sold will of the busines and the stock in trade to be tratmers leng at blerty to lid it the sale! But no necesser can be none of turnership business where all the partners are not ١, It is not need ity that on the death of a co partner the 1 4 / le +nt 1 st in every case all int a receiver. The Court should look at the the creams mees of each case?

9 Mainlenance suits

Wer by a decree for mountainines a charge is created on the defendant's IT to a life parment of maintenance it is desirable in order to ficilitate and a well further littletten that the decree itself should appoint a receiver with inections to till a resession of the momenty, in case of default of the sell the same and to my out of the proceeds of the sale the tic plantal 1 al L

10 Receiver if can be appointed where one has been appointed by a Magistrate under S 146 of the Criminal P C

I c' re the amendment of the Code of Crumnal Procedure in 1923 it was I than envil Court cannot appoint a accessor in respect of proportios for with a criminal Court has shearly appointed a receiver under S 116 of the for the mer liment of 5 136 of the Code of Criminal Procedure. The mere fac that there exists with reference to any property an order under S 145 of the Criminal Precedure Code is no bir to a civil Court appointing a receiver in re just of such preperty? Nor can a Majistrate acting under S 145 of the Criminal Procedure Code interfere with the possession of a receiver appointed by 4 civil Court without the remission of that Court 3

Note 7

1 (312) 20 Ind Can 767 (767) (Mal) (1310) 7 Ind Can 00 (00) (Mad) (1323 Mal 224 (224) Court can

surreche existing trustee Is Recei 160 (19 0) 1320 Pat 174 (177) Settlor a al a that different ledies created 15 hu : should concur in the administration of the trust-Concurrence Iccor ung

impossible-Becomercante agroin ted (1 1 11925 Maid 820 (822) Internering

juarrely latingen the trustees 2 (1.)0°) 8 Cal W N 404 (407)

3 (1 00) 4 Ind C is 106J (10 0) (Mad) Suit to some members of a community against other members-Joint tro perty of community-Priver all omtment of Receiver refused

(197 ) J1 Ind Cas 106 (108) (Mad) Suit for scheme and removat of tandarisan nadlu for misconduct - Death of t andarasan idli - thitement -In an appeal from order of abstement,

erification for appointment of recei ver refuse t

Note 8 1 (tJt4) 1914 L B 209 (210) (1934) 1J34 Cat 444 (440) 5 L B R 392

(1925) 1925 Ring 287 (267) 3 Rai e 196 11 Sid LR (1918) 1918 Soud 61 (f2)

2 (1934) 1934 Cal 444 (446) Order 1) 10int ing receiver for trotor management of a tarti eraling to siness is a tong

3 (1920) 1J20 Lah 125 (127) Note 9

1 (1699) % Cal 441 (448 44J) (See also (1933) 1933 Luh 8-6 (827)

In this case in application was made in execution proceedings ] Note 10

1 (1913) 20 Ind Cas 269 (271) 40 Cal 562 (1926) 1926 Ondh 504 (505) Proterty al

reads to Receiver a hands by Crimi-

#### 11 Who may be appointed receiver 1.

A party to the litigation should not be appointed a receiver except under very special circumstances or with the consent of the other parties, because, as a general rule, absolute disinterestedness is an indispensable qualification for a receiver 3 Subject to the above general rule however in the case of partnership and partition suits, a party is more readily appointed a receiver than in other cases 3 There is nothing to prevent a Hindu from being appointed receiver of the properties of a Muhammadan ualf where his duties do not juclude the performance of religious ceremonies 4 Similarly the appointment of the guardian of a minor as receiver of his properties is not illegal 5 But the attorney of a party to the litigation caunct be appointed receiver, as such appointment will interfere with the arrangement made by such party for the conduct of his case 6

The fact that the receiver lives far away from the properties is a disqualt fication, which though not absolute, should be taken into consideration in making the appointment 7

12 What Court may appoint or remove a receiver

Under S 505 of the Code of 1682 a receiver could be appointed only by the High Courts and the District Courts and not by Courts subordinate to the District Court 1 Under the present Code, a receiver can be appointed by all Courts The appointment can be made only by the Court before which the suit wherein the receiver is sought to be appointed is pending, or where the decree has been appealed against, by the appellate Court 2 Hence a District Court cannot appoint a receiver in a suit pending in a Court subordinate to it 3 Now that the words "property, the subject of a suit or attachment" which occurred in S 503 of the old Code have been omitted in the present Rule, a Court can appoint a receiver even of property situated beyond its local jurisdiction\* and even before deciding the question of jurisdiction, where such a question is raised \$ (A Court of Small Causes cannot appoint a receiver of immoveable property Ss 7 and 94 of the Code 6) A civil Court in the Punish can appoint a receiver to Note II

1 (1926) 1926 Sind 37 (38) (1934) 1934 Cal 444 (446 447) Partnership at will-Plaintiff s title to share admitted-Suit operating as dis solution-One party should not be

appointed receiver without consent of other (1914) 1914 Cal 439 (441)

(1925) 1925 Pat 293 (294) 3 Pat 964 (1915) 1915 Mad 836 (336)

(1920) 1920 Cal 724 (724)

(1913) 19 Ind Cas 873 (874) (Cal)

(1929) 1929 Lah 780 (781) No absolute trobibition against party being

Partner should not be appointed receiver when prima facie case of suspicion of dishonesly has been made against him ]

3 (1925) 1925 Pat 293 (294) 3 Pat 964

Note 12 1 (1883) 7 Cal 713 (721) (1909) 1 Jud Cas 6o7 (657) 33 Dom 104 (1596) 18 All 453 (454) (1885) 1885 Pun Re No 102 page 233

> (But see (1930) 1330 Cal 610 (612) Simple contract creditor without & hen on the property not entitled to ask for receiver 1 [But see (1912) 17 Ind Cas 16 (Ic) (Mad) Properly not subject matter of suit-Receiver cannot be appoin-

ted 1 [But see (1933) 1933 Sind 231 (232) Court cannot appoint receiver in respect of property not subject matter of suit or of execution ap-

dication l (See also (1874) 21 Suth W R 303 (305) Case under Code of 1853-

Question was left of en ] 5 (1925) 1925 Rang 287 (298) 3 Rang 190 6 (1678) 2 Bom 558 (500) Case under Code of collect the rent of agricultural land."

İ

Where a acceiver of a certum property has already been appointed by a Court it sit expedient that another Court should appoint another receiver for the sare ir reity " It is only the C art that appointed the receiver that can remove him? I give him any directions in the maller 10

13 When a receiver may be appointed See als \ to 6 to 5 51

1. 136 I cen seen in Note 2 inte, the appointment of a receiver is in the and a discrete well the Court Where the property is in medio i a in the posses en el a cue a receiver esu readily he appointed. But where any one is in a under a least claum strong reasons, are necessary for interfering with his See Notes 14 and 14 infor where the general principles modiscussed - ib rule (2)

A rhentiff at plane, for the at a interest of a receiver must show mima Le las a strangers and a sel tale to the property or a special courts ir' il 1 the treverty in the hands of the defendant is in danger of bein. waster? The distincts a between the appointment of a receiver and temporary more mis his While in either case it must be shown that the projects al ald learn creed in management in it is enough to show in an applica tunf r named in that the shamliff has a fair question to ruse as to the existence of the right alle, d but this is not enough for the appointment of a receiver a good 11 1 ft title his to be mide out \* The mere fact that the plaintiff in his the male at lent and whole ale charges of malver-ation is anot the defendant in posit i n is no ground for the appointment of a receiver 5. Nor is a incre future prechas nel misappropriation or mismanagement sufficient around for the art intment 6 Vieue charges against the person in possession iro not enough Il condice must be specific. Persons in nossession under a legal claim must not It rem well on the strength of mere suspicion " In a suit for possession and mesno trouts a runst addicad out who clause to hold the property is trustee, the meio fac t it the defendant is a poor min from whom it would be impossible to reilise any use re pr to which might be decreed, is no cound for appointing a receiver Intelle in fused Court of Small

tage lad r power to appoint I e entr

11 - 11J 3 Jah (-3 (f - )

10

Note 13 1 (1324) 1323 Wad 813 (814) (1J22) 1J22 Pat 4J3 (4J4)

(1923) 1923 Lah 48 (1 33) (190 | 1909 Upp Bur R 2nd marter, Cruil Procedure 17 (1894) 5 Cal W N .6 , (867)

[1975] 132, Cal J70 (J71 J'2) Receiver will not ordinarily to appointed at lins tance of a Plaintiff who has merely shadows claim

[See (1900) 27 Cal 279 (282) I nough if fair prima facte case is made out 1 2 (1922) 1922 Pat 318 (319, 320) 6 Pat L Jour

[See also (1933) 1933 Sind 264 (365) Suit for pos ession of property-No traver for meane profits-ippoint

runt freceiver to safeguard mesne profits should not be made except it fer exceptional circumstances ]

3 (1926) 13 6 Sind 37 (35) (1933) 1933 \ \(\lambda\) 234 (235) (1926) 1926 Sind 63 (84) (1,320) 1,320 I om 321 (321)

(1911) 12 Ind Cas 198 (138 199) (L B) (1331) 1331 Lah G88 (G88) Some | crit to the

property must be shown (1659) 1663 Born P J 181 (184) Redemption enti.

711

(1919) 1919 Wad 157 (158)

(189.) 22 Cal 459 (40a) 5 (1883) 5 All 5.6 (5G1)

(1909) 4 Ind Cas 694 (695) 1908 Pun Re No 107 page 494 Proof of such charges is песезьату

where there is no allegation of misappropriation or waste 9 But in the undermen tioned cases the insolvency of the person in possession of the disputed property was held to be good ground for the appointment of a receiver 10

I receiver cannot be appointed for the purpose of ascertaining the real income of a property so that the Court may have connect data for fixing the rate of maintenance payable to a widow 11 The allegation against a defendant a trustee that since his acceptance of office, he has not paid allowances to the beneficiaries, without any allegation of waste or mismanagement etc., is no ground for appointing a receiver in his place 13 Nor should a receiver be appointed merely because the relations between the parties are strained13 or because the manager of the estate of the defendant produces his accounts and documents late 14 But where the defendant removes under suspicious circumstances a large extent of property during the pendency of a suit in which the title to the property is to be determined 15 or where a Hindu widow in possession of her husband's estate is found to be wasting the property16 or where a life tenant intends to transfer the estate to a stranger thus constituting a danger to the reversionary interests, 17 a receiver may be properly appointed. In a suit for possession where it is clearly proved that the estate is grossly mismanaged and wasted a receiver should be appointed 18 It is not necessarily improper that a receiver should be appointed to deal with the rents and profits of land assigned to a Hindu widow for her mainten ance, oven if she has no other source of income 19 The mere fact that the party in possession is a Mahomedan widow claiming a lien for her dower debt is no but to the appointment of a receiver if there are good grounds for such appointment See also the undermentioned cases 21

A receiver may be appointed in a suit for a declaration22 or in a more suit for money "8 But in such cases the cieditor must establish a special equity in his favour 24 The High Court of Calcutta has however held that a simple ereditor denying plaintiffs rights as co owners to share in rents and profits 9 (1921) 1971 All 91 (92) 43 All 311

1915) 1915 Mid 926 (928 929) (1931) 1931 Lah 688 (689)

10 (1918) 1918 L ll 29 (30) Insolveney of admi mistrator is sufficient ground for ap pointing receiver though the admit nistrator has been managing the estate carefully and has kept proper accounts

(1,16) 1916 Mad 1128 (1129) Mortgagor in possession on mortgagee s behalf-Morigagor becoming insolvent-Receiver can be appointed

11 (1975) 1975 M td 1245 (1246) 12 (1916) 1916 Cal 582 (582)

13 (1)23) 1923 Lah 48 (51 53) 14 (1912) 17 1nd Cas 261 (263) (Mrd) 15 (1900) 27 C 1 279 (282) (1J01) a Cal W > 3G2 (4G7)

16 (1910) 7 1nd Cas 534 (537) (Mal) (1868) 1 Leug L R (1 C) 27 (27 28) 17 (1920) 1920 Bom 145 (146) 44 Bom 727

[See (1930) 1930 Bom 545 (552 554) 54 Bom 837 ]

14 1000 501 11 No. 1 No.

O e cooner entitled to manage ut minor--111s mother a Gosh's lal a d acting through stranger -Receiver at pointed (1J10) 7 Ind Cas 344 (345) (All) Suit to et aside trust-Profits from the proterty large-Lapenses of the trust mall-Trustees not paving due re

gard to any method of any count -Receiver may be appointed (1926) 1J% Oudh 504 (505) appointed un ler Criminal Piecedure

Code S 146-Title of one of the 1ar ties declared by Lourd of Resenue-Hell that Receiver scustody should to continued till dispo il of cirl

22 (1923) 1923 Lah G23 (G24 G25) (1922) 1922 Lah 444 (446) (1927) 1927 Lab C5 (G5)

(But see (1900) 4 1nd Cas 603 ((03) 3 Stud L R 118 1 28 (192J) 1J'9 Vrd 184 (186) 52 Vad 93;

(1915) 1915 Nag 98 (100) 11 Nag L R 113 (1907) 30 Wad 255 (264)

(Lut see (1912) 17 Ind Ci . 16 (16) (Ma 1) Receiver cannot be appointed for property which cannot le dealt with in any way by the Court in the

24 (1922) 1922 Pat 318 (319 3.0) G 1 at L Jour



1. manner but cautiously, judicially and according to legal principles after a consideration of the whole of the encumstances of the case 8 A receiver cannot be appointed merely because it is expedient or convenient to the mortgage to do so or because it will do no harm to do so to because it will do no harm to do so to because it will do no harm to do so to because it will do no harm to do so to be disturbed by the appointment of a receiver unless there is some substantial ground for such interference. Such as a well founded fear that the property in question will be dissipated or that other irreparable mischief may be dono unless the Court gives its protection. As has been said already in Note 13 ante the Court will refuse to interfere unless the applicant establishes some special equity in his favour.

O 40 R I suh rule (2) applies only to the dispossession of third parties (See Note 19 infra). Hence it is no bar to the appointment of a necewire in a suit for partition. But a receiver will not be appointed in such a suit in the absence of special circumstances necessitating interference by the Court? The mese fact that there is a dispute as to the share to which the plaintfit is entitled? or that the relations between the parties are strained is no ground for appointing a receiver. Nor is a mere apprehension of future waste sufficient for that purpose. There should be some specific act of misappropriation malvession, of mismanning ment shown and this principle is practically to be applied in the case of partition of Hindu joint family property in the hands of the eldest brother who is the manager of the property. But this Rule does not apply when one colowner occupies the whole property and excludes the other colowners from their shares of the limit of the case of the property and excludes the other colowners from their shares of the limit of the property and excludes the other colowners from their shares of the limit of the property and excludes the other colowners.

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(1918
  (1910
7 (1923) 1073 Lah 239 (241)
                                                     (1924) 1974 Mad 482 (488)
11 (1927) 1927 Rang 179 (179) 5 Rang 70
  (1976) 1976 Cal 1092 (1092 1093 1096)
(1916) 1916 Cal 882 (852)
                                                          (1924) 1924 Cal 456 (459)
  (1928) 1979 P C 49 (50)
                             J5 Ind 41 n 131
          55 C 1 720 (I C)
   (1879) 5 C11 259 (2Ga)
   (1931) 1931 Inh 688 (688)
8 (1925) 1975 Lah 343 (351 352) 6 Lah 74
   (1970) 1970 Lah 125 (127)
   (1910) 6 Ind Cas 659 (660) 1910 Pun Re
          No 36
   (1910) a Ind C is JG (97) (Cal)
   (1917) 17 Ind Cas 202 (203 204) (Call)
                                                         (1910) S Ind Cas 1191 (1194) (L. L.)
                                                         (1910) 5 Ind Cas 27 (29) (Cal)
   (1913) 19 1nd Cas S73 (874) (Cal)
                                                         (1902) 1902 Pun Re No 73 1 age 26,
(1800) 1890 Pun Re No 136 page 437
   (1911) 11 Ind Cas 870 (871) (Wid)
   (1911) 9 Ind Cas 985 (984) (Cal)
                                                     12 (1928) 1928 P C 49 (50) 5 Ind 1pp 131
   (1324) 1924 Cal 456 (4 9)
  (1,326) 1926 Sand 93 (54)
                                                                55 Cal 720 (P C)
   (1893) 5 111 556 (561)
                                                     13 (1922) 1922 Pat 315 (319 320) G Pat L
   (18"0) 13 Suth W R 60 (60)
                                                                Jour 366
   (199a) 22 Cal 459 (464 465)
                                                                          Note 15
   (1998) 15 Cal 918 (822)
                                                      1 (1329) 1929 Yag 283 (291)
   (1855) 1855 Pun Re No 102 page 232
                                                         (1926) 1326 Sand 37 (34)
   (1800) 13 \Ind 390 (3J4)
                                                         (1890) 17 Cal 614 (618 61J)
   (1909) 4 Ind Las 6 14 (695) 1903 Pan Re
                                                      (1932) 1932 Vad 542 (544)
2 (1920) 1920 Bom 321 (321)
          No 107 1age 494
                                                         (1935) 1935 Vad 402 (404)
   (1937) 1932 I th 82 (83)
                                                      3 (1927) 1927 Rang 179 (17J) 5 Rang 70
9 (1916) 1916 Cal 892 (982)
                                                      4 (1920) 1923 I sh 48(51)
   (1924) 1924 Cal 456 (45J)
   (1J25) 1925 Lah 349 (351) G Lah 74
   (1930) 1930 Cal 610 (611)
   (1900) 1800 Pun Re \o 130 page 437
(1913) 21 Ind Cas 283 (250) 16 Oudh Cas
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properties-No finding that manager

1

although no waste or malversation by thin co owner in possession is proved 6. The C Court may also allow the party in soln occupation to elect to pay to the other co owners an occupation rent or may require him to furnish security for the shares of the rents and profits of the other parties 7

A receiver may be appointed in a partition suit at the instance of the cieditors of the co parceners " A receiver an a partition suit is entitled to require payment of rent from the party who is in possession of an important item of the family property in suit 9

16 Executor in possession

In England the rule is that the Court will not interfere with the possession of an executor of a will by appointing a receiver except where a case of gress mis conduct is established against the executor 1 In India also very strong reasons are necessary to appoint a recenier in such a case 2 (See the undermentioned cases3 for instances in which a receiver was appointed) But in the case of Muhammadan will the executor is not entitled to this same degree of protection from interference is is given by the English Liw and a receiver can more readily be appointed in displacement of such an executor than in the case of the executor of a will made by other persons . This is because a Muliammadan can dispose of by his will only a third of his property and the reason for the English rule, viz that the executor is a person enjoying in a marked degree the testator's confidence and as such his possession should not be lightly interfered with, does not apply with the same force to the executor of a Muhammadan will

17 Receiver if can be approinted for a company

A Court eannot appoint a receiver of a company except in a debenture holder's action when the business and assets of the company are charged with payment of the claims of the debenture holders If it is necessary to protect the as ets of a company, the appropriate action must be taken under the provisions of the Companies Act

18 Appointment if can be made after reference to arbitration

A receiver can be appointed after a suit has been referred to arbitration unle s the Court finds that the reference included also the question of interim management 1 Ho can be appointed even in the interval between the submission of an award and the final acceptance or rejection of it 2

is guilty of waste or mismanage ment-Receiver should not be at

1 00 mied (1913) 18 Mad 23 (24)

6 (1910) 5 Ind Cas 96 (96 97) (Cal) (1929) 1929 I ah 497 (497) (1914) 1914 Cal 439 (441)

7 (1914) 1914 Cut 439 (441)

8 (1929) 1929 Nag 293 (284) 9 (1920) 1920 Cul 319 (319)

Note 16

is also executrix under will executed by deceased-Mero claim to such property by alleged daughter is no ground for a pointment of Receiver] 3 (1928) 1928 Cal 256 (259) 55 Cal 249 Frecutor directed to act in consul

(1933) 1933 Bom 342 (346) Appointment of executor questioned and his litle

m dispute—Receiver appointed (1927) 1927 Rang 135 (135) Executor fail ing to file inventory required by la v-Four years income not ac counted for-Receiver should be

appo nied 4 (1927) 1927 Rung 135 (135) (1895) 1J Bom 83 (So)

Note 17 1 (1925) 1925 Cal 817 (819) 52 Cal 513

1 (1928) 1928 Cal 256 (258 2o9) (1975) 1925 Sind 102 (102) 18 Sind L R

2 (1925) 1925 Sand 102 (103) 18 Sand L R

C P C 321 & 322

#### 19 Receiver in Execution proceedings

The appointment of a receiver is prescribed by S 51 of the Code as one of the modes of executing a decree This Rule prescribes the conditions and limitations under which such appointment is to be made. Reading S 51 with this Rule, as it ought to he, it is clear that the Court can appoint a receiver in execution proceedings only when it considers just and contenient to do so 1 The decree holder's consent is, however not necessary for such appointment 2 Nor can be as of right and as a matter of course apply for execution by the appointment of a receiver 2a

Although in India where there is no distinction between law and equity it is not always necessary that legal execution should be exhausted before equitable execution by the appointment of a receiver is made, such appointment is not to be resorted to when there is no impediment to execution being levied in the ordinary way as provided by the Code, the person seeking equitable execution must show that he was met by difficulties arising from the nature of the property which prevented his obtaining relief by the usual modes of execution and that it is necessary and advantageous to appoint a receiver 3 The mere fact that the defendants belong to an old family and that, unless the Court steps in and saves them from the consequences of their debts they may be ruined, is not, in itself, a sufficient ground for such appointment 4

A receiver should not be appointed where it would unduly delay the realisation of the decree debt In execution of a decree against a legal representative of a judgment debtor a receiver cannot he appointed of properties which do not form part of the assets of the deceased o nor can be be appointed where such appointment has the effect of depriving one of the legal representatives of the entire profits from the portion of the estate in his hands without anything being left oven for the maintenance of himself and his family while the other legal representatives who are in enjoyment of substantial portion of the deceased's

Note 19

1 (1931) 1981 Oudh 307 (308) (1933) 1933 All 227 (228) Decree for sale of mortgaged property - application for stay of execution by judgment deb-tor and application for appointment of receiver by decree holder-Execu tion stayed and receiver appointed— Appointment of receiver is just and

fair (1933) 1933 Sind 231 (232) Reasonable grounds must be made for appoint ment of receiver-There must be danger of waste or destruction of

property (1919) 1919 Oudh 326 (328) 22 Oudh Cas 194

(1932) 1932 Cal 194 (195) (See also (1913) 75 Ind Cas 417 (419) (Cal) Impartible Zemindari with valuable forests and mines-Receiver should be appointed

2 (1863) 1863 Marsh 261 2a (1932) 1932 Cil 189 (192) (1929) 1323 Mad 20 (21) 59 Cal 205

(See also (1933) 1933 Sind 231 (232) Decree capable of execution in the

ordinary manner-Receiver will not te appointed) 3 (13 0) 13.0 Cal 502 (501, 506) 57 Cal 364

4 (1895) 23 Cal 517 (520) (1910) 1916 Cal 540 (540) Fact that judg ment debtor will be reduced to

potenty if his properties were allowed to be sold is not sufficient (1931) 1931 Oudh 307 (303) The fact that

the appointment of a receiver is the only way of saving the judgment debtor s ownership of the hypothe eated villages is not sufficient (See also (1878) 2 Cal 58 (73) Simply to carry on judgment debtor s busi ness pending execution proceedings receiver caunot be appointed]
[But see (1859) 12 Suth W R 56 (67)

Receiver should be appointed when udgment debtor offers to place all his properties under Court smanage ment

5 (1569 70) 5 Mad H C R 272 (278) (1801) 15 Suth W R 322 (232) (1871) 15 Suth W R 322 (232) (1876) 25 Suth W R 320 (230) (1874) 22 Suth W R 220 (220) (See also (1816) 2 Cul L Rep 185

(1875) 23 Suth W R 287 (288) Application for appointment of receiver-Simply to put off 13 ment-Application should be refused

6 (16J7) 19 All 235 (237)

estate were left scot free 7

I.

Where the decretal debt will be equally and as surely satisfied by the appointment of a receiver as in any other way and at the same time the undement debtor will be saved from great prospective loss the Court can appoint a receiver 8 Such an appointment can also be made where the interests of both the decree holder and the judgment debtni can be safeguarded and where such appointment annears to be the only way in which the decree holder can hope to realise any appreciable part of his dues 9 Thus where a decree has been obtained against trust property and such property cannot be sold in execution of the decree 10 or where the debts and rents due to the judgment debtor are sought to be attached in execution of the decree and the person owing the same denies his hability to the judament debtor 11 or where a decree in favour of the jud ment debtor is attached in execution of the decree in favour of his decree bolder 1° a receiver can properly he appointed See also the under mentioned case 15 where a receiver was appointed to sell a colliery directed to be sold by the decree so as to safeguard the interests of all parties

A receiver can be appointed for the preservation of a property after its sale in execution and before its confirmation 14

The appointment of a receiver in execution does not operate as a stay of execution so as to disentitle the decree bolder from executing his decree in respect of the same debt in any manner provided by the Code. The mere fact that the decree bolder consented to the appointment does not estop him from subsequently seeking to enforce his decree by execution 15
20 Receiver after decree

The words whether before or after decree are new and make it clear that a receiver can be appointed even after a decree has been passed in the suit 1 These words have given effect to the undermentioned case under the former Code A receiver can be appointed even after execution sale and before its confirmation or after the grant of leave to appeal to the Privy Council But the Court has no puried ction to appoint a receiver when there is no litigation pending before it. in which such appointment can be made. Thus no receiver can be appointed after a suit has been dismissed or complomised or after the decree has been satisfied 7

> proper remedy 11 (1887) 11 Bom 448 (455) (1925) 1925 Rang 318 (319) 3 Rang 235 s 285 12 (1909) 30 411 393 (334) 13 (1930) 1930 Cal 503 (504 505 506 507) 57 Cal 964

[See however (1933) 1933 Lah 687 (688) 14 Lah 457 Receiver cannot be appointed in execution to sell of

(1932) 193, Cal 159 (193) 59 Cal 205 Principle is whether in view of the assets the decree amount is likely to be real sed within a reasonable time from the profits of attached property [See also (1933) 1933 Nag 266 (267) Jacur of defendant not attachable-

Receiver can be appointed on suit debtor) 49 54

[See also (1907) 9 Hom L R 540 (541) Judgment debtor a partner in a firm-Partnership property not at tachable-Appointment of receiver is --- L.J. 208.

Note 20 1 (1926) 1926 Cal 1006 (1008)

(1926) 1926 Cal 978 (979) 2 (1885) 8 Mad 279 (233) 3 (1910) 5 Ind Cas 758 (758) (Mad)

4 (1911) 12 Ind Cas 195 (198 199) (U B) 5 (1870) 14 Suth W R 354 (384)

6 (1J20) 19 0 Pat 501 (502) '5 Pat L Jour

7 (1926) 1926 Cal 9:8 (9:9)

21 Receiver of property in the hands of a common manager 1.

Under this Rule a receiver can be appointed for property in the hand of a common manager under S 95 of the Beogal Tenancy Act 1 A receiver car also be appointed pending proceedions for the appointment of a common manager I Civil Court can appoint a receivor of property to respect of which proceedings for the appointment of a common manager are peoding before the District Judge 3

### 22 Powers of receiver

I receiver has no powers except what have been conferred on him expressly or impliedly by the Court 1 His powers are therefore conditioned by the terms of his appointment subject to any subsequent modification by the Court " In the absence therefore of any provision express or implied as to the powers conferred on him there is no presumption that all the powers mentioned in Cl (d) of the Rule are conferred on him and he caonot deal with the property of which he is the receiver in any way without the consent of the Court \* Thus he has no nower to lease out debutter property without the sanction of the Court 5 Eren if full nowers are conferred on the receiver be should take the directions of the Court in all important matters if he wishes to have complete protection for lumself 6

A receiver who has been given all the powers mentioned in Cl (d) will have impliedly a discretionary power of sale? The authority will also include a power to give notice to quit or to sue for compensation for use and occupation without the special leave of the Court " A general power of manage ment will include a power to exercise the powers of a proprietor under Madras Act II of 1894 9 \ bona fide achoovled meet of a dobt by the receiver is an acknowledgment by ar authorized person which will extend the period of limitation under S 19 of the Limitation Act 10 But a receiver can have at the most ool, such powers and rights over the property as the parties to the suit are found to possess when their rights are finally determined it misrepresentation or concealment of material facts from the Court in connexion with a proposed transaction by the receiver would vitiate the authority can ferred on the receiver 1" Nor can a clause be added to a lease ranted by the receiver subsequent to the grapt of the sanction if it was not mentioned in the

1 (1011) 9 Is d Cas 1027 (1029 10°0) (Cal)

2 (1316) 1916 Cal 477 (427) 43 Cal 386 (1917) 1917 Cal 815 (815) Fyndence of ne cessify for such appointment should

be 1 roduced 3 (1313) 18 Ind Cis 398 (399) (Cil)

Note 22

1 (1925) 1925 Mad 318 (319) 2 (1917) 1917 Mad 746 (744) 3 (1915) 1915 L B 139 (140) (1926) 1926 Mad 357 (358)

[See also S .0 of the Provincial Insolvency Act V of 1920 for the powers of an interim receiver and S 16 of the Lunrib S th Gurdwarus and Shrines let VI of 1922 for the powers of the Loard of Management

under the said let] 1 ut s e (1321) 1921 Nag 136 (13") til sa extressly reserved evers

tioned in Rule 1] 4 (1928) 1928 Cal 40° (40a)

5 (19.9) 1929 Cal 828 (828 879) 6 (1911) 12 Ind C13 780 (786) (C11)

(1894) 19 Bom 660 (662) " (1921) 1971 P C 202 (201) (P C)

8 (1917) 1917 L L 9 (9) (See also (1891) 18 Cal 47" (4-0)

Where the receiver was held entit led to us for the ejectment of the tenant] [But see (1887) 14 Cal 323 (340 341)

Held on construction of the order

Receiver is not agent of party one to but d h m by an acknowled, ment]. 11 (18 3) 19 Suth W R 37 (39)

12 (1929) 1J23 Cal 528 (5.8 5.J)

terms proposed in the application for sanction 13 When property is sold by a receiver in auction under the directions of the, Court, the sale is as much a Court sale as an execution in the usual course, and is therefore not complete till it is confirmed by the Court 14 Nor can it be attacked by the pirties collaterally 1. In the case of a private sale by the receiver, a right of proemption can be exercised to the same extent as if the sale was by the owner himself 16

A Court has no power to confer on the recover any fiesh power such as a liberty to sell after the suit has been dismissed 17 It is also irregular for the Court to order payment of the debts of any party from the estate before the ascertainment of the estate. In exceptional cases, as where a plaintiff applies for payment to the creditors from out of the estate in the hands of the receiver. payments might be ordered out of the share of the plaintiff, where such share is admitted and it is more than enough to satisfy the debts of the creditors. subject to the plaintiff liter on proving that they are liabilities of the estate and as such must come out of the whole estate 18 No Court other than that by which the receiver was appointed can make or give any directions to the receiver as supplementary to those given by the appointing Court 10 A mortgage by the receiver under the Court's order directing that it should be entitled to priority over the pre-existing charges, takes precedence over such mortgages as a salvage han 30 See also Note 42 below

23 All such powers as to bringing or defending of suits as the owner himself has '

A right to suo is not necessarily incidental to the general powers of a receiver and does not exist unless it has been conferred on him expressly or by necessary mplication. It depends solely on the order of the Court and not on the wishes of the parties A Court can expressly authoriso the loceiver to suo in his own name But such an authority may also be given impliedly. Thus a receiver who is given the same powers of suing and defending suits as the owner himself has, is entitled to suo in his own name though not expressly authorised to do so " Similarly, a receiver appointed to collect outstandings can suo in his name 6 On the appointment of a receiver with the requisite powers he is the only person competent to bung suits and obtain decrees. Hence, after such a receiver has been appointed for an estate the landlord cannot sue for sent 7

Though ordinarily a suit for possession can only be instituted by a person having a present title to such possession, and though by his appointment no pro-.: ; ; ,

1: [See however (1J10) 6 Ind Cas 300 (301) (Cal) Where a distinction was drawn between sale by the Court and

a sale under the or lers of a Court] 15 (1907) 6 Cal L Jour 404 (408)

16 (1905) 27 All 670 (677) 17 (1907) 34 Cal 836 (83J)

Τ.

18 (1892) 16 Bom 511 (512, 513)

(1863) 1863 Mursh 261 2 Hay 112 Mana her under S 243 of Code of 1859— Court has no power to order him to pry claims of persons other than

dccree holders 19 (1905) 4 Vind L Tim 268 (26J) 20 (1907) 34 C 11 427 (442) Note 23

1 (1912) 17 I C 751 (751) 1913 Pun Re No 56

4 (1898) 25 Cal 642 (640)

[See also (1904) 6 Bom L R 995 (999) 30 Bom 250 A decree in such suit will be for the benefit of the true

owner 5 (1864) 10 Cal 713 (733)

(192J) 1929 Cat 110 (111) 55 Cal 1216 (1907) 31 Cal 305 (313)

(1903) 26 Cal 715 (720) [But see (1669) 12 Suth W R 117

(118) Receiver oblaining permission to sue on behalf of parties interested

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Court all the requisite powers 8 In a suit brought by the receiver within his authority, the defendant cannot question the validity of his appointment as securer Where however, after the appointment of the secencer, the property is sold in Court auction to a third person, and a sale certificate issued to him, the authority to sue for possession of that property must be taken to he withdrawn from the receiver and he cannot therefore sue for possession of that property. The only person who could sue therefor is the auction purchaser 92 A receiver s dis cretion to spend money in litigation ought not to be interfered with by the appellate Court the Court of first instance will, if necessary take security from him for restitution of such expenses in certain events 10

It was held in the undermentioned case that a neceiver of a Zemindari was entitled to sue for sums spent by the Zemindar at the defendant's request before the appointment of the receiver as it was found that the claim arising out of such expenditure was one unnexed to the estate

## 24 Realization of property

A receiver appointed to get in and realise the estate of a deceased person and to pay debts has a power of sale also I Similarly, a receiver of mortgaged properties in respect of which mortgage decrees have been passed, who has been given powers of realisation, management protection and preservation of the property has a discretionary power of salo 2 But a necesivel empowered to collect outstandings and do all things necessary for the realisation and preservation of the assets of a firm has no power to mortgage the property of the firm 3 A recover of debts due to a judgment debtor can take legal proceedings by way of suit or execution proceedings to collect the outstandings A necessor however, cannot recover property sold away by the judgment debtor, on the ground of the sale heing voidable under S 53 of the Transfer of Property Act 8 Rent accided due to the estate prior to the oppointment of the receiver is not part of the estate in his hands and therefore a payment to the proprietor on account of such hability is a sufficient discharge of the debt " For further information, see Notes 22 and 23, supra

## 25 'Collection of the rents and profits thereof '

A receiver appointed to collect the rents of land ennut raise the rent 1 A receiver appointed in respect of property under attachment, has the powers of the owner as they existed at the time the property was brought under the orders of the Court by attachment provided they have not ceased by operation of law where subsequent to the attachment but before the appointment of the receiver, the landlord had reduced the rate of rent payable by the tenant, the receiver was held entitled to secover sent at the original sate 2

Where a receiver is appointed in execution of a deerce to collect the rents and profits of the estate of the judgment fiebtor, but the lessee pays the jent to the mortgages of the judgment debter, the receiver is entitled to follow the rent

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(1911) 11 Ind Cas 102 (103) (Cal)
 8 (1916) 1916 Cal 51 (53 54)
 9 (1919) 1919 Cal 533 (534) 46 Cal 70
9a (1932) 1932 Rang 11 (12) 9 Rang 565
10 (1915) 1915 Mad 355 (355)
11 (1856) 9 Vind 334 (337 338 340)
 1
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[See also (1873) 19 Suth W R 37 (39) Case under Code of 1859-Receiver &

power confined to rethestion of debts due to judgment debtor 4 (1874) 22 Suth W R "6 (37) (1874) 21 Suth W R 119 (119) 5 (1912) 17 I C 233 (234 235) 35 Mad 578 6 (1918) 1918 I at 133 (133) Note 25

1 (1882) 8 Cal 719 (7 0) p 77 1 2 (1695) 8 Mad 418 (420)

n

in the hands of the mortgagee 3

26 Power as to the execution of documents as the owner himself has When a receiver sells a property under the orders of the Court, he should

be a party to the deed of conveyance A receiver in an administration suit cannot sell in satisfaction of a mortgago executed by one of the claimants of the estate before the administration is complete 2 A conveyance of the property by a receiver acting within his authority binds all the persons entitled to share in the estate including nunors 3

27 Delegation of duty by receiver

A receiver being an officer of the Court, is responsible to the Court for the due discharge of his duties. He is not entitled to delegate to another any of the duties entrusted to him by the Court, or assign to another for valuable consideration any of his rights as receiver 18. Not having any proprietary interest in the estate under his control, he cannot assign his rights to another so as to enable the latter to enforce them as such assignee 2 As to whether and under what circum. stances a receiver is entitled to have clerks and agents to assist him, see Notes 35 and 42 below

28 The receiver is an officer of the Court

A receiver is an officer of the Court He is also "a public officer within the meaning of S 2 Cl 17 1 Ho is nothing more than the hand of the Court for the purpose of holding the property of the litigants whenever it is necessary that it should be kept in the grasp of the Court, in order to preserve the subject matter of the soit pendente lite 14 He is a representative of the Court and not of any of the parties to the suit, though he holds the property for the benefit of those ultimately found to be rightful owners 2 Thus, a receiver in execution proceedings is not the agent of the judgment creditor and moneys realised by the receiver do not become apso facto moneys belonging to the judgment creditor 3 (See Note 33. infra ) A receiver a possession being that of the Court, no one is entitled to intoifere with it . A sale of property by the receiver has the same effect as a sale by the Court and the purchaser is entitled to the assistance of the Court in obtaining possession of the property so purchased 5 A receiver, though an officer of the Court is not a judicial officer Hence, a Court has no power to delegate to a received the duty of enquiring into the claims of rival claimants to the property

A receiver should not be allowed to purchase the property of which he is the receiver and such a sale if made would be soidable and can be avoided by an 3 (19°4) 1934 Rang 84 (84), Reversing 193 8 (1910) 6 Ind Cas 416 (418) 37 Cul 754

Rang 35"

1 (1871) 6 Beng L R 492 Note 2 (1901) 5 Cal W N 409 (409) 3 (1916) 1916 Cal 819 (920) 43 Cal 124

(1894) 41 Cal 479 (481) Note 27

1 (1895) 19 Bom 660 (662) 1a (1910) 8 Ind C is 976 (978) 5 L B R 213

2 (1910) 8 Ind Cas 9"6 (9"8) 5 L B R 213 Note 28

1 (1931) 1931 Cal 503 (503) 58 Cal 8a0 1a (1871) 6 Beng L R 486 (487) (1903) 30 Cal 593 (598)

(1895) 22 Cal 1011 (1015) 22 Ind App 203 (P C) 2 (1928) 1928 Cv1 402 (403 405)

(1921) 1921 Cul 516 (516) (1903) "O Cul 721 (724) He cannot be

fined as representing the owner

(1929) 1929 Cal 609 (660) Receiver cannot pledge credit of any party to the proceeding 2 (1930) 1930 Mad 4 (9) 4 (1929) 1929 Mad 194 (186) 52 Mad 938

5 (1894) 91 Cal 479 (483) [See (1905) 33 Cal 1175 (1177) When Court orders transfer of property at is entitled to priority over subse

quent attachment though the trans fer may be actually executed subse quent to attachment ] 6 (1929) 1929 Bom 478 (479) Order directing

Receiver to hold inquiry as to heirs in contested succession pro cedings -Order held allegal

(1921) 1921 Cal 298 (293) Claims of third parties-Court cannot delegate duty

of enquiry to Receiver 7 (1901) 5 Cal W N 91 (104)

Court all the requisite powers. In a suit brought by the receiver within his authority the defendant cannot question the validity of his appointment as receiver. Where, however, after the appointment of the receiver, the property is sold in Court auction to a third person, and a sale certificate issued to him, the authority to sue for possession of that property must be taken to be withdrawn from the receiver and he cannot therefor is the auction-purchase; is A receiver's discretion to spend money in hisgation ought not to be interfered with by the appellate Court the Court of first instance, will, if necessary take security from him for restitution of such expenses in certain events.

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Where a receiver is appointed in execution of a decree to collect the reals and profits of the estate of the judgment debtor, but the lesson pays the rent to the mortgage of the judgment debtor, the receiver is entitled to follow the rent

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<sup>(1011) 11</sup> Ind C1s 102 (103) 8 (1016) 1016 Cal \*1 (53 54) 9 (1019) 1019 C1 533 (534)

<sup>91 (1932) 1932</sup> Rang 11 (12) 9 Rang 565 10 (1915) 1915 Mad 355 (355)

<sup>11 (15-6) 9</sup> Vind 334 (337 333 340)

due to judgment deltor 4 (1674) 22 Suth W R \*0 (37) (1874) 21 Suth W R 119 (319) 5 (1912) 17 I C 223 (233 235) 35 Mad 578. 6 (1918) 1019 Pat 123 (133)

Note 2 1 (1862) 8 Cal 719 (720) 2 (1883) 8 Mad 418 (420)

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becomer should not be allowed to purchase the property of which he is the receiver and such a sale of made would be voidable and can be avoided by an 3 (1934) 1934 Rung 84 (84) Reversing 193 3 (1910) 6 Ind Cas 416 (418) 3" Cul 754 (1929) 1929 Gal 659 (G60) Receiver cannot

Rang 307 pledge credit of any party to the

1 (1871) 6 Beng L R 492 Note 2 (1991) 5 Cal W N 408 (409) 3 (1916) 1916 Cal 319 (320) 43 Cal 124 (1594) -1 Cal 479 (481) Note 27

Note 28

1 (1991) 1931 C11 503 (503) 58 Cal 850 1a (1871) 6 Beng L R 496 (487) (1903) 30 Cal 503 (599)

(1895) 22 Cal 1011 (1015) 22 Ind Ap 203 (P C)

2 (1928) 1928 C-1 402 (403 405) (1921) 1921 Cal 516 (516) (1903) 30 Cal 721 (724) He cannot be fined as representing the owner

proceeding 3 (1930) 1930 Mad 4 (8)

4 (1929) 1929 Mad 181 (186) 52 Mad 939 5 (1894) 21 Cal 4"9 (483)

[See (1905) 33 Cal 1175 (1177) When Court orders transfer of property at is entitled to priority over subsequent attachment though the traps fer may be actually executed subse quent to astachment

6 (1929) 1929 Bom 473 (4"9) Order directing Receiver to hold inquiry as to heirs

in contested succession proceedings

application made under S 47 of the Code 8

29 Possessian of the receiver enures for the benefit of the true owner

The possession of the receiver is the possession of the Court.12 and the possession of the Court by the receiver is the possession of all the parties to the action according to their titles The property passes into legal custody (custodia legis) and such custody is for the benefit of the true owner. The receiver thus holds the property for the benefit of those ultimately found to be the true owners 1 By the appointment of a receiver the Court takes upon itself the management of the property during the continuance of the litigation But the proprietary right or interest in the property is not transferred from the rightful owner either to the Court or to the receiver appointed by it 2 The receiver s possession being possession sion on behalf of all the parties to the action according to their titles none of them can claim to be in adverse possession during the continuance of the receiver's possession against the party ultimately found entitled to the property 3 Noi is it onen to the receiver during the continuance of the receivership to set up a title in himself adverse to that of the parties Even if the receiver is discharged be would still hold the property on behalf of the rightful owner 1 Thus the title of the real owner is in no way affected either in theory or principle, by the appointment of a receiver A payment made by a receiver out of the funds of an estate 18 equivalent to a payment made by the owner of the estate and where he would be entitled to set reimbursement from a third person if he had made the mayment himself he would be equally entitled to such reimbursement if the payment is made by the receiver 5 If despite the appointment of the receiver the defendant continues in possession he can be sued by the true owner for the prefits misapproprinted by him 6

The appointment of a receiver does not supersede a prior attachment of the property?

When the owner of a property is himself appointed receiver he does not lose his rights as a proprietor of dealing with the property during the receivership except that he cannot impair the value of the propert; in his hands or cause in terference with his possession of the property as receiver?

30 Attachment of properties in the hands of receiver

Property in the hands
[See also (1932) 1332 Ca
59 Cal 956 Decree hold
purchasing in Court auction with
out leave of Court and [

8 (1932) 1932 Cal 672 (673) 59 Cal 956

### Note 29

1a (1935) 1935 Mad 594 (596) (1933) 1933 Lah 671 (673) 11 Lah 779 Receiver appointed by one Court to take charge of properties—another

tike energe or properties-inother

ted and defendant becoming in solvent-Official Receiver is not on titled to the money in preference to the plaintiff!

2 (1929) 1929 Cal 110 (112) 55 Cal 1216 (1)26] 1926 Cal 385 (392) 52 Cal 914 (1916) 1916 Lab 78 (59) 1917 Pun Re \o 34 (184) 19 Suth W R 37 (38)

(1925) 1925 All 72 (72) 46 111 924 3 (1916) 1916 Cal 751 (752) When Received is automated there is no disposes

s all onted there is no disposes sion of true owner within let 112

(1928) 1329 C si 402 (403 405) (1907) 31 C si 305 (316 317) (1899) 20 C si 625 (625 630) 18 8) 12 Mad 448 (452)

[Sec. al. > (1.33) 1933 Cal 625 [627] Application for appointment of rer n partnership suit — Order lat I fendant should page Rs 1 000

Such leave is necessary even where the property is sought to be proceeded against in execution of a mortgage decree, although no attachment is necessary for sale in such a case 3 The High Court of Calcutta is, however of opinion that as no attachment is necessary in the case of a sale under a mortgage decree the permission of the Court is not necessary for such a sale a Even where an attachment was levied on property before the appointment of the receiver it is within the discretion of the appointing Court, to refuse to permit a sale of property under such attachment \ purchaser in Court auction at a sale held without the previous permission of the Court, buys at his peril, as the sale may be cancelled \$ Permission is neces ary even for an application for rateable distribution against the receiver sa

A sale of property in the hands of a receiver without the leave of the Court, is however, not roud but is only v idable, i e, it is valid until set aside by appro priate proceedings. If the persons interested do not impeach the sale it is not open to others to do so 4 It has even been held that the sale cannot be set aside if the person seeking to have it set aside has in no way been prejudiced by the sale?

But where a decree obtained by a receiver is attached without the Court's permission and is then transferred by the receiver to a third person who takes tho assignment in good faith and without knowledge of the attachment the attachment being irregular does not affect the title of the assignee "a

Though a receiver of a property may have been appointed vet until he actually takes possession of the property a stranger decree bolder is not precluded from executing his decree against the property without obtaining the leve of the Court b

Note 30

1 (1925) 1925 Nrd 51 (.41) (1910) 5 Ind Cas 290 (392) (C11) 2 (1923) 1923 Nrd 144 (146) 47 Mrd 47 (1898) 26 Cal 127 (129)

(1892) 16 Bom 477 (579 580) (1834) 21 Cal 85 (91) Such attachment will

not be recognised (18 6) 1 Cal 403 (406)

(1911) 11 Ind C14 187 (188 189) (C4) [See (1J05) 25 Ul W N 110 (111) O1 di charge of receiver no bar to execu

tion of decree aga ist property of which he was appointed receiver]
[See (1935) 1935 Mad 697 (699) Sale

order applying for adjournment so that he may jay decree debt—Salo subsequently held held value even though not held with previous kine of Court and though receiver was not impleted in execution proceedings] 3 (1923) 1923 Wed 144 (2) (146) 47 Wed 47

(1935) 1935 Wad 524 (625) Mortgagee de cree holder party to partition suit in which receiver was appointed-Receiver took 10 session before auc tion sale in favour of mortgagee-Mortgages not having leave of Court -After disposal of suit party from whom passession was taken by Recerver is entitled to possession in Tro ference to mortgage purchaser who

got only symbolical to session 4 (1899) 6 Cal 127 (128 129) 5 (1925) 1925 Vad 51 (51)

8 (1923) 1993 Cil 191 (129 130) (1935) 1935 Vad 624 (624) Persons with paramount rights not parties to suit but in po session of property are not

prejudiced (1919) 1913 Cat 263 (2,0)

The proper Court to permit the attachment of property in the hands of a receiver is the Court by which the receiver has been appointed 9

As to the effect of subsequent grant of leave, see Note 31 infra

31 Suits by or against receiver-Leave of Court -See also Note 43 infra

A receiver can neither sue nor he sned without the leave of the Court 1 He is merely an officer of the Court and not the representative of the owner of the estate Hence, no cause of action vests in him and he has no locus stands to sue except with the leave of the Court 2 "There is no statutory provision which requires a party to take the leave of the Court to sue a necesser. The nule has come down to us as a part of the rules of equity, binding upon all English Courts of Justice in this country. It is a rule hased upon public policy which requires that when the Court has assumed possession of a property in the interests of the litigants before it, the authority of that Court is not to be obstructed by suits designed to disturb the possession of the Court The institution of such suits is in the eye of the law a contempt of the authority of the Court and therefore the party contemplating such a suit is required to take the leave of the Court so as to absolve himself from that charge. The grant of such leave is made not in the exercise of any power conferred by statute, but in the exercise of the inherent power, which every Court possesses to prevent acts which constitute or are akin to an abuse of its authority ' 3

A Court will, however readily grant leave to sue the receiver if it is satisfied that there is a case to be tiled so that the claim of the third party may be tried in the presence of the receiver \*

The omission to obtain the sanction of the Court prior to the institution of the suit can be rectified by leave granted subsequent to the institution of the suit 5 In the undermentioned cases 6 however, it was held that the Court's sanction was a condition precedent to institution of the suit and the defect due to the want of such sanction could not be rectified by leave obtained subsequently 's suit against

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9 (1929) 1929 Lah 147 (148)
                                                                    therefore no leave is necessiry
                                                             (1921) 1921 Bom 427 (428) 45 Bom 99 Re
                    Note 31
1 (1902) 8 Cal W N 829 (829) 29 Cal 509
                                                                    cerver is an officer of the Court and
   (1884) 10 Cal 1014 (1017)
(1927) 1927 Pat 397 (338)
                                                                    any action taken against him with
                                                                    out leave of the Court is contempt
   (1903) 30 Cal 593 (598)
(1903) 30 Cal 721 (724)
                                                             (1914) 1914 Cal 597 (555) Suit against Re
                                                                    center without leave of Court is
   (1925) 1928 Rang 175 (175) 6 Rang 268
                                                                    contempt of Court
   (1J23) 1923 Rang 203 (208) 1 Rung 138
                                                          4 (1924) 1924 Pat 491 (495) 3 Pat 357
                                                             (1927) 1927 Pat 397 (398)
   (1925) 1925 Cal 681 (683)
   (1924) 1924 All 40 (43) 46 All 16 I state
                                                             (1918) 1918 Pat 100 (101) 4 Pat L Jour 20
                                                          5 (1921) 1921 Wad 624 (6°6)
(1923) 1923 Wad 567 (567)
          does not vest in Receiver as in the
          case of Official Receiver in insolvency
                                                             (1920) 1320 Bom 11 (11)
          proceedings
                                                             (1920) 1920 Vad 709 (710) 43 Vad 793
(1911) 10 Ind Cas 527 (529) (Cal)
(1910) 8 Ind Cas 1 (2) (Cal)
(1911) 11 Ind Cas 187 (168 189) (Cal)
(1926) 1926 Cal 1040 (1041)
   (1903) 26 Mad 4J2 (493)
   (1910) 6 1nd C 15 214 (216) (C 11) Suit against
           [See also (1932) 1932 Bom 622 (624
           625) No leave of Court is nece sary
          for making an application for rate able distribution ]
                                                             (1907) 34 Cal 30s (312)
                                                             (1919) 1919 Cal 426 (429) 46 Cal 252 Suit
                                                                    by Receiver
2 (1912) 17 Ind Cas 751 (751) 1913 Pun Be
                                                             (1929) 1929 Cal 110 (112) 56 Cal 1216 (Do)
   1834) 10 Cal 1014 (1017)
                                                             (1920) 1920 Cal 779 (77s)
                                                             (1921) 61 Ind Cas 553 (559) (111) I ut if
   (15"1) ( leng L R 456 (456)
                                                                    there is laches in obtaining have,
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suit liable to be disinis ed

6 (1905) 32 Cal 270 (271 272) (33) 33 half (4101)

3 1 15: 1914 Pat 100 (101) 4 Pat L Jour 20 13 1933 Mad 340 (341) In the case of a

u ur ler O 21 12 63 the suit 19 8

it runtion of the claim case and

a receiver without the leve of the Court is hable to be dismissed. If a decree is passed in such a suit it can bused as the sales. The absence of an objection by the receiver, that no leave was obtained will not entitle the Court to pass a decree against a receiver. But when the receiver has been discharged. On his cassed to exist and has been replaced by the berrs of one of the parties who were on the record. One objection that the suit against the receiver was instituted without the leave of the Court will not stand. The leave of the Court is not necessary for a suit against a receiver, under S 83 of the Madris Act VIII of 1865.

It is the Court appointing the receiver that can grant leave for the institution of a suit by or against the receiver. The Court trying the suit cannot gain
it 12 \ Court does not by granting leave to suc the receiver relinquish its possession of the property to the Court in which the suit against the receiver is instituted 13. The Court trying such suit cannot issue an injunction against the receiver
restraining him from dealing with the property as it would lead to a conflict of
jurisdictions 14. Nor can a Court other than the appointing Court issue a ridder
to the latter Court requesting it to restrain the receiver from taking possession of
a part of the property in respect of which the receiver has been appointed 15. The
proper course for a person who has obtained a decise against the receiver is to
apply to the Court by which be has been appointed, to direct the receiver to act
according to the decree 16.

A receiver is not a necessary party to a suit for declaration of title and possession in respect of the property in the receiver's hands. The decree passed in such a suit can always be carried out against the property in the hands of the receiver with the leave of the Court appointing bim, although he has not been made a party to the suit (See also Note 44, infina)

A receiver appointed by a Civil Court is not a necessary party to proceedings in respect of the property under S 145 of the Criminal Procedure Code <sup>18</sup> A Criminal Court has no jurisdiction in such proceedings to interfere with the possession of a receiver appointed by a Civil Court, without the permission of such Court in Novare of an estate crimot such for accounts a Juhiedra improvided by the

n owner of an estate cumot suctor accounts a lancial appointed by the receiver. These is no fiduciany, relation between the accepter and the owner, which is essential for such an action <sup>20</sup>. Similarly, a present accepted cannot such a former receiver of the estate for recovery of money alleged to be due by the latter to the estate for breach of duty committed by him as receiver. <sup>21</sup>

32 Debts incurred by receiver in the course of business

in respect of debts incurred or contracts

14 (1928) 1928 Prt 321 (323) 7 Prt 684
ers (1925) 1925 Cal 1174 (1175)

appointed in respect of different portions of sa e projects—One of the Receivers sun g another without leave of Court—Meld that it is contempt of Court but not so grave as to make it obligatory on the Court to [See also (1983) 1933 Born 51 (52 53 and 57) Order against Receiver in mother suit to make priments to plaintiffs in the trivalunt—Frequeilly out of income of resels not mort gaged parties in the two suits not being the same ]

15 (1921) 1921 Pat 92 (93) 6 Pat L Jour 203 16 (1925) 1928 Pat 321 (323) 7 Pat 684 (1925) 1925 Cul 1174 (1175)

i (626)

17 (1900) 5 Cal W N 27 (29) (1911) 10 Ind Cas 673 (674) (Mad)

18 (1903) 30 Cal 593 (595) 19 (1903) 30 Cal 593 (595)

20 (1921) 1921 C11 516 (516) 21 (1914) 1914 Cal 744 (745) 41 Cal 92.

......

entered into by him in the course of his mana\_cment of the estate, but he is entitled to indennity from the estate for such debts. The creditors can doo proceed against the estate for the recovery of such debts in priority to other creditors of the estate the principle being that as the acts of the receiver acting within his sutherity are the rets of the Court, the estate cannot be permitted to enjoy the benefits of those acts without being held bubbe for the obligation arising therefrom. The ordinary rule that the creditors who have advanced money to a receiver for the mina\_cment of the estate ein proceed against him personally does not apply where the advance has been expressly made on the condition that the estate dean should be highe?

#### 33 Loss caused by receiver a default

The receiver is not the ament or representative of any party to the suit if therefore less arises from the default of the receiver, such loss, subject to the receiver is tradity for his default, must be borne by the estate, and not by the pirty it whose instance he was appointed receiver. But in the undermentioned cite. I luft Bench of the Oulh Chief Court has held that where a receiver in execution misappropriates the moneys paid by the judgment debtor, the less should be borne by the decree holder end not the judgment debtor, the reason given being that the payment to the receiver absolves the judgment debtor from all further responsibility.

### 34 Agreement with receiver-Contempt of Court

It is only the Court that can control the powers of the receiver As an officer of the Court, he has only such powers as the Court chooses to give him. It is a contempt of Court for anyone else to enter into an agreement with the receiver restricting and controlling his powers. Similarly, a promise by a party to pay remuneration to a receiver as gingst law and not enforceble.

I receive also e in apply for process for contempt of Court igainst any one interfering with his possession?

#### 35 Remuneration of receiver

Under Rule 2, infra the Court lies the power of mains the receiver a remunication such remaineration is generally by way of preceding or commission but there is no absolute rule that he should be so remainerated. The Court has a discretion if it thinks hit to allow him remaineration at a fixed rate. The receiver is also entitled to ill reisonable expenses of mains, smooth including the fees of coursel whom he may have to end-to-2 (See Note 12, infra, for further information). In agreement by a party to pay remuneration to the receiver is has been

Note 33
1 [1431] 17 Mtd 50 [70]
(1537) 20 Mt1 224 (226 223] (1 1) Defiles
ti 1by Receiver in execution proceetings 8 judgment delt satisfic

to by faccinet in execution fro callings is judgment delt satisfied in tinute? No is per 31 pherd J and New is per Davis J

which is invariely deducted before training it sale price. But the everentitled to include freight and taching in the sale proceeds for pur is see of commiss.

<sup>1: (1533) 13</sup> fam (10 (62)) 2 (131) 13 fam (10 (62)) 2 (131) 13 fad (45 750 (57) (Cal).

observed in Note 34, aute against law and cannot be enforced 3. The acceivers remuneration must come out of the estate and the parties are not personally liable for it . The managing partner of a firm by consenting to act without commercation as receiver during the dissolution of the partnership, does not fore o his rights to such remuneration as he would be entitled to as managing partner

The receiver of mort aged property is entitled to priority over the mortgage in re pect of his remuneration and the expenses properly incurred by him in the course of his management 6 But the priority does not extend to the wages that became due to a screant of the estate before the appointment of the receiver?

36 Liability of receiver See R 3 infra

The receiver is liable to duly account for the income and the properties that come into his hands. He is responsible for any loss occasioned to the property by his wilful default and gross negligence See Noto 32 suma for the receiver a liability for debts incurred by him in the course of the management of the estate A receiver disregarding the Court's orders as hable to be removed or committed for contempt in case he is appointed by a High Court " (her further information, see next note)

37 Liability to account

In Mohine Mohan Patra v Baroda Kanta Sarkar 1 Then Lordshins of

the Calcutta High Court expressed themselves as follows -

The receiver is but an officer of the Court appointing him and is therefore bound to account to that Court for all property which he has received. It is his duty to keep his accounts and youchers in such condition that they wilt be ready for examination it any time and as a general proposition whenever property or funds come into the hands of a receiver pending hitgation the Court may require him to report his acts and doings and to render in account in order to ascertain the condition of the properly and to auable the Court to settle the rights of and do justice to all the litigant parties. When the accounts of the receiver como up for adjustment, he is a pirty in interest, entitled to be heard, and it is the duty of the Court o see that his rights are protected But so also all other interested parties are cutified to notice and an opportunity to attend and be heard All pe sous having an interest in the estate which the recover represents have tho right to be present and be examined or any subject pertinent to the inquiry which springs out of the proceedings itself and to take extention to the receiver's accounts Courts are disposed to hold receivers to great strictness in rendering their accounts and a thorough sprestigation of the accounts and southers is Fromer where as here the rights of infants are involved. A receiver is bound to exercise the same dearee of difigence in Aceping down expenses and in caring for the estate in his po se sion as a prudent man would observe in connection with his own property under similar circum saturces A raceiver therefore will not ordinarily be permitted without the sanction and authority of the Court to incur any expenditure which will seriously diminish the funds currently of this charge and its bir duty if he wishes to protect himself to all jib to the Court bur elwarar lo el

bich the receiver

tle fund in his possession ho vill be denied reimbursement Where a receiver has laid out money without a previous order of Court and the transaction is proved by him to have been beneficial to the parties an interest he is entitled to be allowed credit in his accounts for the amount thus expended

I acceiver must produce vouchers for all payments other than letty sums.2 but when produced they will be evidence of the payment of the sums therein specified and ciedit will he given for such sums to the accounting party

<sup>3 (1903) 30</sup> Cal 696 (698) 4 (1923) 1923 Cal 516 (517)

<sup>5 (19</sup>\_6) 1J26 Cal 380 (380)

<sup>6 (1925) 1925</sup> Mad 571 (572 573)

<sup>(1883) 6</sup> Mad 133 (139) 7 (1852) 6 Mad 138 (139)

<sup>1 (1925) 1925</sup> Lah 309 (310 311) 2 (1932) 1932 Bom 638 (6,2) Fulure to com ply with order to pay money Nate 37

<sup>1 (1911) 12</sup> Ind Cas 750 (755) (Cal) 2 (1891) 19 Bom 660 (662)

in the account unless it is shown that there are reasonable grounds for impeaching the vouchers <sup>3</sup>. A receiver can be required to submit his accounts for southry cen after the suit has been dismissed and even after his discharge <sup>5</sup>. He is responsible not only for sums actually received by him but also for all such sums which he might have received but for his default or negligence <sup>6</sup>. A party appointed receiver is liable to account in the same way as a stranger so appointed <sup>7</sup>.

It is not right, when considering the accounts submitted by the receiver, to go into the question of the hability to account for periods other than the period covered by the account itself. Nor does the question of had management by the

receiver arise when he submits his accounts for being passed 9

The accounts of the receiver can be examined only by the Court appointing him 10 And where it has overruled the objections of a party impinging the accounts and passed them, a suit will not be against the receiver for damages for negligence, etc, based on allegations which have already been considered and overruled by the Court 11

See also Note 3 to R 3, infra

38 Liability of receiver and that of an executor or trustee

A trustee or executor is not personally liable for debts incurred by him in the course of the management of the estate, but a receiver is personally hable for such debts '

39 Liability to criminal prosecution

A receiver of property cannot be prosecuted for criminal breach of trust in respect of the property without the sanction of the Court appointing bim. I The same rule applies to any other offence committed by the receiver in his capacity of receiver. But where the offence committed by the receiver has nothing to do with the offence lield by him the Courts sanction is not necessary for his prosecution.

40 When appointment takes effect

11 (1321) 1921 Lom 427 (428) 59 L C 421 (429) 45 Rom 99

Where the order appointing a person as receiver requires him to give scenniy so that the order is conditional on the security being given, the appointment is not complete till such security is given. But the Najpur Judicial Commissioners Court has held in the undermentioned case that the appointment of the receiver is complete on the passing of the order of appointment although he may not be able to take actual possession of the property until security is approved

Where there is no direction as to security and the order appointing the receiver is unconditional, it takes effect immediately it is made <sup>3</sup> But the transfer of the property to the receiver s possession, actual or constructive, and the conferment of special powers on him require specific orders under Cls (b), (c) and (d)

41 Security to be given by receiver

Rule 3, infia, requires a receiver, inter alia, to furnish such security as the Court thinks at As to whether the appointment of a receiver is complete before the payment of security, see Note 40

42 Receiver a hen

T.

A receiver has a lien on the estate for all his just claims and allowances 1 "On this principle it follows that a Court will not compel a receiver who has been discharged, to make over the property in his possession until his lien has been satisfied or provided for hy a sufficient indemnity 2

43 Remedy of third party aggrieved by receiver's action

A third person feeling aggreeted by the receiver's conduct has ordinarily two remedies -

(1) He may apply to the Court in the very suit in which the receiver has heen appointed for a summary order against the receiver .

(2) He may, with the leave of such Court, sue the receiver

The more proper and usual mode is by applying to the Court for summary This is done by the aggreed person applying to the Court for permission to come in and be examined pro interesse suo (for his own interest). If no question of title is involved and if the applicant has shown diligence, the Court will decide the matter on such an application But otherwise, it will refer the third person to a separate suit against the receiver 1 Where debatable questions, not easy to he dealt with at the passing of the receiver's accounts, are involved, the Court will decline to go into them in summary proceedings in the suit itself 3

44 Receiver if and when a necessary party to a suit

In a suit for money against the representatives of a deceased person, the receiver holding possession of the deceased s estate is not a necessary party 1 Nor is he a necessary party in every suit concerning the property of which he is the receiver 2 Thus he is not a necessary party to a suit between third parties for declaration of title to, and possession of, the property in his charge 8 In such cases, if the plaintiff obtains a decree he can go to the executing Court, obtain the leave of that Court to execute the decree against the property in his hands and then enforce the decree Where, however, the property, in the hands of the

Note 42 1 (1576) 2 Cal 58 (70)

(189a) 22 Cal 960 (973) [See al-o (1930) 1935 Mad 594 (596) Right to indemnity of receiver is not created by contract-Suit by him to recover imount, spent by him 15 governed by Art 61 of Limitation Act)

2 (1895) 22 Cal 900 (973)

Note 43

of the Calcutta High Court, persons not parties to the suit may establish their rights by motion [See also (1925) 1925 Cal 750 (752) Held, in the circumstances of the

case that the declaration asked for could not be granted in summary proceedings} [But see (1871) 15 Suth W R 347 (318) Acts of Collector done by him in his capacity of Receiver, in seizing and retaining certain property under his care cannot be disputed by way of motion to discharge or to get rid

of the attachment] 2 (1926) 1926 Cal 385 (394) 52 Cal 914 Note 44

1 (1925) 1925 Bom 523 (523, 524) 2 (1911) 10 Ind Cas 673 (674) (Mad)

(1693 1900) L B R 432 Attachment-Mort-gage decree - Attachment before judgment in suits for money decrees

in Subordinate Court-Lien upon crop by labourers-Joinder of Receiver as defendant

3 (1902) 6 Cal W N 829 (829) (1901) 5 Cal W N 27 (25) (1323) 1923 Pat of (57)

4 (1911) 10 Ind Cas 678 (674) (Mad)

receiver is intended to be affected by the result of the suit and the possession the receiver or the jurisdiction of the Court is intended to be interfered will leave of the Court must be obtained and the necesser made a party 5 Thus t received is a proper party to proceedings for the sale of property in the receive hands in execution of a decree for sale on a mortgage 6

I receive cannot be added as a party to proceedings under the Crimir Procedure Code 2

45 Notice to opposite party if necessary before appointment

Notice to the other side is not indispensable in every ease before a receiv is appointed. The very object of appointing a receiver may be defeated in man cases if notice were insisted on 1 Hence in emergent cases a receiver may l appointed without notice to the opposite side 2 But except for year special reason notice should not be excused before an order is made for such appointment 3

46 Appointment of new receiver in place of old receiver

Where a receiver ceases to bold the office of receiver pending a suit filed h him the suit does not abate but may be continued by his successor in office 1 Se Note 31 supra as to a present receiver's power to sue a former receiver for act done by the latter during his tonute of office as receiver

47 Joint receivers

It is competent to a Court under this Rule to apppoint two or more person as joint receivers of the same property. In such a case, the retirement or resig nation of one of the receivers does not put an end to the order appointing receiver 1 In a partition suit where the Court ordered the plaintiff to be it charge of one portion of the suit properties and the defendant to be in charge of the remaining portion it was held that the order was not ultra unes 2 Ordinauls it is not open to a Court to appoint a receiver when a receiver has already been at pointed in respect of the same property by another Court 3 But a receiver can he appointed in a mortgage suit where the decree is for sale although a receiver has already been appointed in respect of the same property in a prior partition suit

48 Duration of office of receivership

A Court appointing a receiver may order that the office should continue permanently or for such period as is deemed necessary 1 It can also cancel the order of appointment at any time if it considers it necessary 2 Even if such appointment has been made with the consent of parties 27 it has an inherent power to discharge or 1 emove the receiver al pointed by it 3 But until otherwise N to 47

(1023) 1920 Born 523 (523 524) (1902) 6 Cal W N 829 (829) (1901) 5 Cal W N 27 (29) 5 (1910) 6 Ind Cas 214 (215) (Cal)

(1910) 8 Ind Cas 1 (2) (Cal) (1910) 7 Ind Cas 75 ("6) (Cal)

6 (1923) 1923 Mad 144 (146) 47 Mad 47 (1923) 1923 I at 86 (87)

7 (1903) 30 C il 593 (598) Note 45 1 (1923) 1923 Lah 289 (241)

2 (1916) 1916 C11 427 (427) 43 C11 986 3 (1903) 1904) 2 L B R 222 (223) (1883) 1883 Bom P J 160 (160)

Note 46

respected - Person aggreesed mu t take projer steps to qui stion its

4 (1911) 12 Ind Cas 165 (160 166) (Cal)

Note 48

1 (1896) 19 Wad 120 (127) 23 Ind App 25 (P C)

2 (1907 1908) 4 L B R 3.6 (359) 21 (1921) 1921 Mad 234 (294) Mis bo dis clarged before termination of pro ceedings if no injury to the estate

would result by this course 3 (1912) 17 Ind Cas 583 (581) (Mad)

successor1

1.

ordered by the Court the receiver will continue in office+ though the suit in which he has been appointed has come to an end, but the purpose of his appoint ment has not been acknowed a fortiors a receiver in a partition suit is not discharged merely by the passing of a preliminary decree in the suit 6 \ receiver in an administration suit cannot ordinarily be discharged before the completion of the administration 64

A consent order of appointment of a receiver does not prevent a party from impuguing the administration thereunder which is of such a character as to amount to a malfeasance or to be, in substance so protracted and imperfect as to be futile

The removal of a receiver is a matter of discretion to be exercised by the Court with care after due and pioper enquity. A necessor should not be dismis ed summarily merely at the instance of one of the parties " The builden of proving the encumstances instifting the removal is on the party applying for such removal Where incaniaty on the part of the receiver is alleged it should be clearly proved 10 \ receiver may be removed for partiality 11

1 Court which appoints a receiver has authority to pass orders pecessary to wind up his charge even after the suit has been disposed of 12 It can also examine the receiver - recounts and pass all necessary orders 16

Where the receivership is put an end to pending a suit filed by the receiver the party ascertained to be the true owner can continue the suit 14

Where a claim for restitution is made on the cancellation of in older of appointment of a receiver the Court will not, in ordering restitution, consider the fact that the receiver's appointment was to the applicants advantage 10

Where any property in the receiver's possession is duly sold away to another the recency cannot be allowed to continue in possession 10

49 Court may remove any person from the possession or custody of property

The Rule empowers the Court to remove any person from the possession of property in respect of which a receiver has been appointed. The only case in which the receiver's possession can be resisted is that provided for by sub rule (2) according to which the Court has no power to deprive a third person of the possession of any property when no party to the suit has a present right to do so ! When therefore a third person in possession of property in respect of which a receiver has been appointed objects to deliver possession to the jeceiver, the Court

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12 (1924) 1924 Lah 583 (584)
442 Al
rendered
                     [But compare (1634) 21 Cal 561 (565)
                     Suit dismissed-In the interval le
                     tore filing of appeal Court his no
                     power to make order restraining Re
                     certer from paring with the funds
 442
                     in his hands let ding an apreil !
           13 (1895) 92 Cal 1011 (1015 1016) 32 In l \ D
007
                     203 (P C)
on al day
               (1J01) 28 Cat 790 (794)
           14 [1.306] 30 Lom 2.0 (259)
ntlfillt 1-
           15 (1924) 1374 Ring 181 (161)
                                           1 Rung 7:0
11)
           16 (191a) 1915 Vad 924 (J25)
                             Note 49
             1 (1912) 17 Ind Ca 203 (284 235) 3, Mid
               (1933) 1933 All 227 (275) A parts to the
                     suit caunot rely months, sub rule
               (1975) 1920 Pat 337 (3 15)
31.)
               (13°0) 1 '20 Mad 9~ (053)
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₹ 1. must hold an enquiry into his claim with a view to ascertain if he was under a present hability to be removed from the possession of the property 2

It has been held by the High Court of Calcutta that the person in posses sion of the property though he may have a right to continue in possession cannot interfere with the receiver but should apply to the Court for redress and that

otherwise he will be guilty of contempt of Court 3 According to the High Court of Patna on the other hand the third party in possession is not bound to deliver possession to the receiver pending the enquiry into his claim 4 Sub rule (2) applies only to third persons in possession of the property and is

no har to the removal of any party to the suit, from possession . Thus a mortgages decree holder who is in possession of the mortgaged property under an arrangement with the judgment debtor for the liquidation of the mortgage debt is not entitled to possession as against a receiver who is subsequently appointed 6 The Rule does not empower a Court to authorise a receiver to enter upon immoveable property in the possession of another person without his consent, in

order to take an inventory of such property as the plaintiff may indicate as the property in dispute 7 The Court, instead of actually evicting the party in possession, may order him to pay the secenter a certain occupation rent 8 Sub rule (1) (b) refers to the removal of persons other than the receiver

Hence an order removing a receiver does not fall under Cl (b) 9

50 Summary jurisdiction

A Court has power to enforce summarily a contract made by the receiver 1 But where a lease has been granted by the receiver and the lessee has been put 10 possession the lease cannot be set aside in summary proceedings 2 Where a judgment debtor took a sum of money from the receiver and refused to pay it back, it was held that the Court could order repayment and that such order could he enforced as a decree s Although, ordinarily, proceedings for contempt are start ed at the instance of the parties and not of the receiver, there is nothing in law to prevent the receiver from applying for process for contempt 4 51 Appeal

Under O 43, R 1 (s) an appeal hes from an order under O 40, R 1 or R 4. An order under R. 1 may be one either appointing a receiver or may be one refusing to appoint a receiver In either case the order will be appealable 1 The

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2 (1907 1908) 4 L B R 356 (358)
                                                            7 (18.11) 1891 Pun Re No C9 Page 331
                                                            8 (1868) 10 Suth W R 450 (431)
   (1909) 1 Ind Cas 356 (358) 36 Cal 713
                                                            9 (1926) 1926 Cal 593 (591) 3 Cal 319
   (1921) 1921 Cal 298 (299)
                                                               (1924) 1924 Mad 614 (614)
   (1923) 1923 Mad 129 (130)
3 (1914) 1914 Cal 500 (553)
                                                                                Note 50
4 (1918) 1918 Put 364 (365)
(1918) 1918 Put 668 (671)
(1927) 1927 Put 397 (398)
5 (1913) 20 Ind Cas 767 (767) (Mad)
                                                               (1898) 15 Cal 253 (258 259)
                                                            2 (1909) 1 Ind Cas 470 (471) 36 Cal 52
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(1915) 1915 Cal J5 (36) (1922) 1922 Lah 444 (446) (1975) 1925 Lah 590 (191) (1927) 1327 Sind 230 (231) (1929) 1929 Nag 283 (284) (1932) 1932 Mad 193 (195) [See however 1920 Mad 986 (989) 'any person' in Sub rule (2) is not confined to non parties-Per Spen cer J]

(1921) 1921 Pat 43 (44) 6 Pat L Jour 37

6 (1924) 1921 P C 206 (207) (P C)

(But see contra (1918) 1918 All 240

Apir ] 3 (1911) 10 lnd Cas 898 (899) (Cat) 4 (1901) 28 Cal 790 (793) Note 51

1. (1898) 1 Oudh Cas 168 (160) Appointing a receiver (1932) 1932 Pat 360 (361) (Do) (1925) 1925 Lah 469 (489) Appointing receiver in proceedings under Guar-

to one of the parties by practice of fraud on Court-Summarily set

aside of Unl 52 Dist , 1929 Cul 978

O 40. R 1 is a general provision and even an order appointing or refusing to appoint a receiver in execution moccedings falls under O 40. R 1, and therefore is appealable as an appealable order and not as a decree 5 The reason is that the definition of a decice in S 2, Sub S (2) does not include an appealable order though it may fall within the terms of S 47 It has been held by the High Court of Bombay that an order in execution proceedings refusing to remove a receiver comes within S 47 of the Code and is appealable as a decree 6

It is only a final order of appointment or refusal that is appealable. Where an ex parte order is confirmed by a second order, an appeal lies only from the latter order ' In order appointing a receiver subject to his furnishing security is

> older ces an 'adras.

Lahord and Patna 11 No, according to the High Courts of Allahahad, 12 Calcutta, 13 Bombay14 and the Judicial Commissioners' Court of Nagpur140 and Sind 15 An order merely expressing an intention of appointing a receiver and calling upon the parties to suggest names is not appealable 16

Where the effect of an order of appointment of a receiver and the directions given to him, is to remove any third person from the possession or custody of any property, it is an order under Cl (b) of this Rule and is open to appeal by such third party 17 But a third party who is not in possession or custody of any property has no right of appeal against an order dismissing his objection to the

dians and Wards let (1929) 192J Nag 119 (11J, 120) Appointing receiver in proceedings under the ( unidiaus and Wards Act (1300) 24 Bom 88 (40) 1 Bom L R 502

Refusing to appoint (1890) 17 Cal 680 (692) (De)

(1886) 10 Mad 179 (181) (Do) Overruling 6 Mad 355 (354) (1880) 6 Cal L Rep 467 (468) (Do) (1904) 31 Cal 435 (498) (Do)

(1910) 6 Ind Cus (52 (653, 660) 1910 Pun Re No 36 (Do) (1913) 20 Ind Cas 653 (654) 35 111 425 (Do)

(1918) 20 Ind CAS 03 (033) 35 14 325 (199) (1915) 1915 Jom 137 (137) (105) (1916) 1916 All 338 (933) (106) (1926) 1926 C4 1066 (1008) (106) (1926) 1926 C4 153 (544) 58 Cal 319 (But see (1903) 23 All W N 67 (68)].

(1914) 1914 C1 786 (7-6, 787) 4 (1921) 1924 Ylad 614 (614) 4a (1931) 1931 All 72 (73) 5 (1927) 1927 Lah 190 (190).

(1923) 1923 Mad 20 (21) Dissenting from 1928 Mad W N 3JO.

(1911) 12 Ind Cas 745 (750) (Cal) (1922) 1032 Cal 180 (1932) 6 (1831) 5 Bom 45 (45) 7 (1913) 20 Ind Cas 269 (271) 40 Cal 862 8 (1927) 1927 Cal 258 (255)

(1911) 12 Ind Cas 745 (751) (Cal)

9 (1918) 1918 Mad 1146 (1150) 40 Mad 18 10 (1933) 1923 Lah 48 (50) (1934) 1934 Lab 129 (130)

11 (1922) 1922 Pat 577 (579) (1932) 1932 Pat 360 (360) 12 (1915) 1915 411 129 (12J) [See (1924) 1934 411 376 (977), 46

A11 3721

13 (1911) 9 Ind Cas 582 (1) (582) (Cal) (1903) 3 Ind Cas 430 (1) (482) (Cal)

14 (1915) 1915 Bom at (41) 23 Ind Cas 504 (504)

appointment of a receiver masmuch as there is no question of removing him from any possession of any property 18

An order under Cl (d) of the Rule giving directions as to the disposal of the income of the property, is appealable under O 43, R 1 (s) 18 But an older giving certain directions to the receiver in passing his accounts, does not fall under this Rule but under R 3 and honce is not appealable 20 There is no right of appeal in the following cases -

(a) An order that the receiver is hable to account for only one year 21

(b) An order for the examination of the receiver a accounts.22

(c) An order granting leave to sue the receiver28 and

(d) An order raising the receiver s remuneration 24

But an order passing the receiver a accounts" or an order that the receiver should my into Court a sum of money for loss caused by his neglect, and directing the security furnished by him to be proceeded ignit in default 20% will be one falling under R 4 and will thus be appealable

The High Court of Madias has held that an appeal his under Clause lo of the Lotters Patent against the judgment of a single Judge of the High Court passed on an appeal preferred to it under O 43 R 1 db

There is no light of appeal to the Play Council from an older refusing to appoint a receiver 26

In an appeal from an order appointing or refusing to appoint a receiver the appellate Court will not lightly interfere with the discretion of the lower Court" except on the ground of some overwhelming objection in point of propriety or principle's or on the ground that the Court was proceeding on a wrong view of the facts of has fuled to exercise its discretion according to legal principles 90. The

d 915

is not a final order within the

interbocutory order 27 (1927) 1927 Rung 185 (195) (1933) 1333 Rung 94 (94 35) (1922) 1902 Lab 444 (446) (19\_3) 1913 Lah 623 (625) (1927) 1927 Lah 65 (65)

(1910) G Ind Cas 659 (660) 1910 Pan Re No 36, page 99 (1920) 1920 Lah 125 (127)

(1913) 19 Ind Cas 873 (873) (Cal) (1915) 1915 Vad 855 (355) (ppea) from order of lower Court refusing to

direct receiver not to spend money for certain littation - Appellate Court not to unterfere (1905) 32 Cal 741 (745)

(1981) 10 Cal 713 (737) (1994) 18 Boin 474 (4J3) 28 (1924) 1924 Lub 421 (432)

(1913) 18 1nd C 1s 398 (400) (Cal) (1929) 1929 P16 114 (114 114) 115 Ind Cis

55 C (1 720 (P C)

\$90 But the principle at plies only to cases where a neceiver is appointed for the fart time but not to cases in which a reciver is appointed in superses son of an old receiver

29 (1J15) 1 115 Vid 9\_6 (121) 30 (1 17) 1 17 Wed 100 1 (1010) 3, Ind Cas (1915) 1918 Sund 61 (C3) 11 Sund L R 115 (1919) 1919 P C 4+ ( 0) 55 Ind 4pp 131

18 (1926) 1929 Oudh 28 , (296) 19 (1910) 5 Ind Cas 69 (69) (Cal) Directions as to disposal of rent (1912) 17 Ind Cas 849 (851) (Lal) Order to receiver to jus centum sum of money to mortgagor to enable latter to appeal-Order is appealable (1912) 14 Ind Cas 277 (278) (Mad) Order to receiver to pay intintenance to appellant is appellable out see (1929) 1923 Lah 299 (240) That see (1929) 1920 form and and and The Ind Cas 749 Point comeded] (Also (1895) 1895 Pun Re No 107 p 5001 [Sec (1933) 1933 Lab 216 (216 217) Order giving directions to receiver as regards persons to whom the properties were to be restored on the termination of receivership does not fall under Clause (d) and is not appe ilable] 20 (1911) 12 Ind Cas 750 (755) (Cal)

(1903) 35 Cal 568 (a70) 21 (1920) 1920 Pat "03 (701) . Pit L Jour 97

22 (1911) 6 Ind Cas 323 (3.1) (Cat)

(1J21) 1921 Bom 427 (423) 45 Bom 99

(I B) 20 (183 ) 12 Cil 929 (310) (1 113) 1933 Pat 213 (234) 12 Pat 523 It burden of showing that interference is necessary is on the appellant 31 Pending an appeal from an order appointing a receiver the appellate Court can direct the receiver through the lower Court not to take any steps in pursuance of his

appointment 32 Only those tersons who are materially mendiced by the appointment of the received need be made parties to the appeal. Third persons not in possession

of the property are not necessary parties thereto 33 I purty who suggests names for the receivership is not thereby estonged from objecting to the appointment of a receiver in appeal 34

The unlermentioned cases under S JO2 of the old Code regulating the right to appeal against an order under that section are no longer of any practical importance under the present Code is that section has been repealed

## 52 Letters Patent Appeal

In order appointing a accesser under R 1 is a judgment and is appeal able under the Letters Pitent 1 But an order directing a receiver to advance money to a guidan ad latem to conduct the defence on behalf of a minor defen dant is not a jud\_ment within the meaning of the Letters Patent and no appeal hes from the order 2

As to whether appeal hes against Judgment of a single Judge of the High Court passed in an appeal under O 43 R 1 see note of ante

### 53 Revision

I.

An orler appointing a receiver in a case in which the Court has no jurisdic tion to appoint a receiver as for metance, in a proceeding under the Succession Certificate Act, can be set aside in iccision by the High Court 1 Where an objection of a third party in nos-ession of the property, to the appointment of a receiver was dismissed it was hold by the Patna High Court that the third party had no right of appeal but could apply for revision of the order dismissing the objection In the undermentioned case, it was beld by the Vadias High Court that the ic fusal of a Court to join a receiver as a party to proceedings for the sale of pronects in his hands in execution of a decree for salo on a mortgage, was a material irregularity in the exercise of jurisdiction by the lower Court and that a revision lay 3

Applications for the appointment of receivers should be made in the ordinary was by notice of motion in open Court and not in chambers 1

R. 2. [S 503, Cl (d)] The Court may by general

Remuneration

or spread order fix the amount to be paid as remuneration for the services of the receiver [1877 - 8 5031

(1939) 1932 Lah 82 (83) (1937)

learce in a mortgage smit and not ujorencomstruces existin it the t me of its pre ing cannot be illowed to trid 31 (1310) 7 In 1 Cts 344 (345) (All)

(1530) 12 411 436 (435) (1901) 26 VII 238 (213) 31 In1 VIP 67 7 Ou th C is 233 (P C)

32 (1320) 1320 1 at 567 ( 65) 4 Pat L Jour 642 33 (1374) 1374 Cu 4 6 (455) 28 Cu W N 96 77 Ind Cus 783

34 (1921) 1J21 All 91 (92) GD Ind C15 J01 (J02) 43 All 311 3. (190J) 1 In 1 Cas Go7 (1) 33 Bom 104 (1.110) a Ind C is 9.11 (991) (VI.1)

(1910) 6 lnd Cas 603 (653) 1310 I un Ro No 36 1 1,0 39 Note 52

1 (19%) 1324 Rane 133 (133) 5 Rane 39 2 (1901) 24 Ved 511 (513) Note 53

1 (19°4) 1924 AH 3 6 (37°) 46 AH 372 2 (1915) 1318 Pet 364 ( 65) 3 (1923) 1323 Wad 144 (1) (144)

Note 54 1 (197") 137, Bom 256 (7,6) (1901) 23 Cal 250 (251)

Note No

## Local Amendment

## R 2, RANGOON Substitute the following namely -

- 2 The fees to be paid as remuneration for the services of the receiver shall be in ac cordance with the following scale --
- (a) On rents or outstandings recovered or ou the proceeds of the sale of moveable or im moveable property-unless for special reasons to be recorded the Court orders the remuneration to be at some other rate-5 per cent
  - (b) For taking charge of money or of moveable or ammoveable property which is not sold unless for special reasons it is otherwise ordered by the Court on the esti
  - mated value-1 per cent (c) For any special work not provided for above such remuneration as the Court on the application of the receiver shall order to be paid

## Sunepsis

1 Remuneration of receiver (a) Receivers a lien

Note No (b) Receiver a costs II Appeal

See Note 1, Pt (4)

Other Topics

Inherent jurisdiction-Refund of recei ful party ver s charges and commission to success

1 Remuneration of receiver - See also Note 35 to R 1 ante A receiver being an officer of the Court, it is for the Court to determine his remuneration an agreement without leave of the Court by a party to pay remune ration to the receiver is contrary to law and is not enforceable 1. Where the managing partner of a partnership husiness consents to act as a receiver without remuneration and is appointed as receiver for the purpose of leeping the assets and profits and accounts of the partnership and for submitting proper accounts thereof he does not by such consent, forege his right to such remuneration as he would be entitled to for managing and carrying on the husiness 2 A receiver is entitled to a commission on the collections made by him and cannot claim any commission where certain Gevenment securities in deposit with a bank are con verted under the authority of the Court, by the hank itself, into other securities issued by the Government 3 Similarly where in a condiment business the receiver is ordered to retain 5 per cent of the gross sale proceeds he cannot take such commission on trade discounts masmuch as preceeds do not include trade dis counts 32 When a party is dismissed from an action as having been wrongly impleaded and the receivership of his property is cancelled, the Court has inherent jurisdiction to order restitution to be made to such party by ordering the plaintiff to refund to such party the commission and charges paid by him to the receiver

As to the remuneration of the receiver appointed under S 145 of the Criminal Procedure Code see the undermentioned case 5

#### 2 Receiver s hen

3 (1931) 1931 Mad 36 (36)

A receiver has a lien on the estate for all his just claims and allowances 1 Where a receiver is sued for acts done by him as receiver for the benefit of the estate he is entitled to indemnity from the estate for the loss caused to him thereby 2

Order 40 R 2-Note 1 1 (1903) 30 Cal 696 (698) (See also (1895) 22 Cal 648 (656) Agreement restricting Receiver a Receiver a 2 (1926) 1,26 Cal 380 (350 381)

<sup>3</sup>a (1931) 1931 Mad 500 (J01) 4 (1J24) 1924 Rung 181 (181) 1 Rang 770 5 (1925) 1925 Ang 462 (462 463) Note 2

<sup>(1895) 22</sup> Cal 960 (9°3) (1892) 15 Mad 233 (234) 2 (1903) 30 Cal 937 (944)

3 Receiver s costs

A receiver is entitled to the costs charges and expenses properly incurred by him in the discharge of his duties 1 4 Appeal

An order increasing the receiver's remuneration is one falling under R. 2 and not under R 1 and is not appealable 1

Duties

J.

R. 3. [S. 503, Cls. (e) to (h).] receiver so appointed shall-

(a) furnish such security (if any) as the Court thinks fit, duly to account for what he shall receive in respect of the property:

(b) submit his accounts at such periods and in such form as

the Court directs;

(c) pay the amount due from him as the Court directs; and (d) be responsible for any loss occasioned to the property

by his wilful default or gross negligence. [1877—S 503, Cls (e) to (h); 1859—S. 243.]

Synopsis

Responsibility for loss—Clause (d) 4 Note No Security necessary—Clause (a) Liability of the surety Appeal Submission of accounts-Clause (b)

Other Topics

Form of bond by receiver See App F Form No 10

1 Security necessary-Clause (a) This Rule provides for the duties of the receiver 1 Though under the Code the Court has discretion to appoint a receiver without security, it should obviously he done only in the most exceptional circumstances Where the appellate Court directs the lower Court to appoint a receiver and take security from him but the lower Court appoints a receiver without taking any such security the appointment cannot be said to be without jurisdiction 3

Z Liability of surety

A surety for a receiver is hable to the payment of interest on balances improperly retained by him, as also for the costs of proceedings in Court necessarily or properly incurred in consequence of the receiver's default, such as the costs of a proceeding to take accounts of an attachment for failure to account, of an application for his discharge and for the appointment of another person in his place, and of any proceedings taken to enforce the recognizance The liability of a surety upon the bond of a receiver conditioned for the due discharge of his duties is, however, limited to cases of a violation of those duties which may properly be said to be within the scope of his appointment as receiver, in other

Note 3

1 (1895) 19 Bom 660 (662)

Note 4 1 (1915) 1915 Cal 74 (75, 76) Order 40 Rule 3-Note 1

1 (1931) 1931 Mad 760 (762) 2. (1932) 1932 P C 191 (193) 59 Ind App 311 (PC) Parties females and minors-Security essential

3 (1919) 1919 Cal 533 (534) 46 Cal 70 words the surety is responsible only in respect of hability incurred by the receiver in his capacity as receiver. To determine whether a particular hability has been incurred by the receiver in his capacity as receiver the test to be applied is could the receiver be made accountable in that respect in the account proceed ings. If he could not the surety is not hable if he could be held hable in that proceeding as receiver the surety is also liable. But a surety who has satisfied the claim against the receiver is entitled to stand in the place of the receiver and to reimburse himself from the sums ordered to be paid to the receiver 1

3 Submission of accounts-Clause (b) -Sec Note 37 to R 1 sipra

The sunction of the Court is necessary for all expenditure of special nature incurred by the receiver 1 \ receiver is liable for all unauthorised expenditure incurred by him such as salaries of unnecessary servants appointed without the lowe of the Court bribe to the Police for obtaining the release of a minor of whose estate he is the receiver and sums advanced to the minor owner of the estate in excess of the limit sanctioned by the Court 2 Where litigation expenses tro incurred by the receiver the latter must show not merely that he paid the expenses but the details of such expenditure 3

The liability of a rocciver not appearing on the face of the accounts, such is for imprudent management for wilful default or neglect for the mal practices of his solvants etc cannot be properly sone into on the receiver's application for the passing of his accounts A separate suit is the more appropriate procedure tor the investigation of such matters 4

Before passing an order for the attachment of the receiver a property under R 4 the Court should examine the accounts under this Rule and give him an opportunity to pay the amount found due by him 5

If on an application to discharge a receiver the latter puts forward a claim to a larger amount than what is due to him and such amount is deposited in Court he is liable if such amount is found to be in excess of that actually due, to interest on the excess amount but if the receiver a action has compelled the owner of the estate to borrow money at a lusher rate than usual the question of the accerves a hability in consequence of that fact should form the subject of a separate suit 6

No older can be passed against the receiver to make good the loss to the estate due to his gross negligence till the passing of the accounts ?

4 Responsibility for loss -Clause (d)

A receiver appointed to collect the rents due to an estate must make good the loss caused to it hy a breach of his duties. Thus if he delegates his duties to another (which he is not competent to do) and the latter misappropriates the funds collected by him or if he fuls to realise rents by takin, projer proceedings he will be hable for the loss Mistaken proceedings though talen in good futh will not absolve the receiver from hability. A decree holder is not bound to ac cept pro notes obtained by the Receiver from the tenants for the rents due and the receiver must make good the amounts of the rent not collected

Note 2 1 (1915) 1915 Cal 391 (394) Note 3

<sup>1 [</sup>Sec al o (189 ) 1 Cal W N 303 (301) I all applications for payment of notes receiver should appear and give full particulars and informa-

<sup>(1910) 6</sup> Ind Cas 323 (326) (Cal)

<sup>9 (1915) 1915</sup> Cal 146 (147 149) 3 (1921) 1921 Cal 1063 (1064)

<sup>(1915) 1915</sup> Cal 146 (145) 4 (1301) 5 Cit W N 223 (228) a (1923) 1923 Mad 95 (86)

<sup>6 (1915) 1915</sup> Cul 146 (151) (1909) 1 Ind Cas 4"0 (172) 33 Cal o?

<sup>1 (1895) 19</sup> Bom CCO (662)

arising from the default of the receiver will, as between the pirties, devolve on the estate to which the appointment relates and not on the decree holder at whose instance he may have been appointed the Alecence is not entitled to recover the costs of proceedings initiated by him through mistake? A succeeding receiver cannot sue a former Receiver for fonds which he should have realized and accounted for 9 Ordinarily circlitors advancing money to a receiver for the purposes of management can proceed both against the estate and the receiver personally. But the receiver spersonal hability may be expressly excluded by the terms of a particular loan? A receiver shribity on account of his wilful default or neglect, can more approprinted be investigated in a separate suit against him than in an application in the suit wherein he was appointed as receiver? See Notes 31 to 33 to R. 1.

#### 5 Appeal

T.

An order under this Rule is not one that is appealable under O 43, R 1 (s). Thus an order holding a receiver of an estate hable for a certum sum of money is not appealable. But where such an order is followed by another one under R 4 for coercive action against the receiver, an appeal hes and in the appeal the prior order under R 3 can be attacked. An order directing the receiver to pry a certum sum of money is alamages or an order of the Court giving directions to the receiver in passing, his accounts is not open to appeal. No appeal has a gainst an order constrainty an order of appointment of receiver under R 1.4 Where a receiver is appointed subject to his furnishing security the appointment is not complete till security is given and till then there is no right of appeal. See also Note 51 to R 1.

An order under this Rule is open to revision 6

Enfarcement of re R. 4. [New.] Where a receiver-

(a) fails to submit his accounts at such periods and in such form as the Court directs, or

(b) fails to pay the amount due from him as the Court directs, or

(c) occasions loss to the property by his uilful default or gross

negligence,

the Court may direct his property to be attached and may sell such property, and may apply the proceeds to make good any amount found to be due from him or any loss occusioned by him, and shall pay the balance (if any) to the receiver.

[Cf. R. S. C., O. 50, R. 18.]

## Local Amendment

## MADRAS

Substitute the following -

(1) If a receiver fails to submit his accounts at such periods and in such form as the

1a (16.14) 17 Mad 501 (504) The liability of (1923) 1923 Mad 85 (~6) (1924) 1924 Sind 25 (36.37) 19 Sind L. R 39.5

Court directs the Court may order his property to be attached until he duly sub mits his accounts in the form ordered

mits his accounts in the form ordered
(2)
or proceeding in which a
5 time make an enoury as

hown by his accounts or otherwise on whether any loss to the property has been occasioned by his willful default or gross negligence and may order the amount found due or amount of the loss so occasioned to be paid by the receiver into Court or otherwise within a period to be fixed by the Court All parties to the smit or proceeding and the receiver shall be made parties to any since nequiry. Notice of the enquiry shall be given by registered post to the surely if any for the receiver but the cost of his appearance slull be borne by the surerly him elf miless the Court otherwise

directs
Provided that the Court may where the account is disputed by the part es and is of some do the first the part es and is of the parties.

reference
(3) If the receiver fulls to pay any amount which he has been ordered to pay under sub-rule (2) of this Rule within the period fixed in the order the Court may direct each amount to be recovered either from the security (if any) furnished by him under R 3 or by attachment and sale of his property or if his property has been attached under sub-rule (1) of this Rule by sale of the property so attached and may apply the proceeds of the sale to make good any amount found dus from

I im or any loss occasioned by him and shell pay the balance (if any) of the sale

## Sunonsis

Scope end epplicability of the Rule

Loss to property hy wilful default or gross neglect

Note No
Court may direct his property to be attached

Removal of a receiver
Appeal

Appeal

Second Property 10 be attached

Removal of a receiver
Appeal

Appeal

Second Property 10 be attached

Se

## Other Topics

Property in Cl (c) includes income See Property of receiver in the hands of his legal representatives See Note 3 Pt (1)

## Scope and applicability of the Rule

proceeds to the receivor

The Rule provides for coercive steps against the receiver who fails to carry out his duties as laid down in R 3. The Court has got a discretion in deciding whether to take action or not under this Rule as against the receiver. <sup>18</sup> When the receiver is guilty of a willful default or gross negligence the only provision for taking action against him apart from proceeding against the security, is that his property can be attached arrest and imprisonment are not to be the methods of enforcement. <sup>1</sup>

## 2 Loss to property by wilful default or gross neglect

Property includes not only corpus of the property entrusted to the recent or but also the recome derived from it. The Rule is a residuary provision and covers a case of misappropriation also. Even a partner who is appointed receiver of partnership assets will be guilty of gross misconduct if he appropriates to his own use any of the partnership assets.

A separate suit is the proper procedure for proceeding against a receiver on

1 (1931) 1931 Mad 60 (\*63) Note 2

1 (1916) 1916 Mad 521 (522) 39 Mad 584 2 (1916) 1918 Mad 521 (522) 39 Mad 584 discretion 3 (1925) 1925 F C 257 (2.9) [FC]

2587

the basis of a wilful default and neglect . Such a suit may be filed even after his discharge if it transpires that he has in his hands moneys belonging to the estate 5 Similarly his accounts may be re opened on discovery of errors, even where he has been discharged after the passing of his accounts. The proper procedure however, in such a case is to hold an enquiry to find out whether any loss has been occasioned by his wilful default or gross negligence and to pass an order under this Rule or if desired to proceed against him under S 145 of the Code A separate suit against him is not necessary in such circumstances 6

If money paid by a receiver does not reach the proper destination he must make good the loss unless he can show that he acted with perfect regularity and has used such a degree of prudence as would be expected from an ordinary individual in his own affairs.

Where at the time of appointing a receiver, there was a decree in favour of the estate about 11 years old and after his appointment the receiver applied for the arrest of the debtor but not for attachment of his properties on the ground that it was very much encumbered it cannot be said that the receiver is guilty of any negligence at all. It must be shown by the party wishing to ostablish gross negligence on the part of the recener that it would have been profitable to the estate if the dehtor's property had been attached a

## 3 Court may direct his property to be attached

T

Where a receiver dies his property in the hands of his legal representatives may be attached 1 But before directing the attachment of property under this Rule the Court must first determine the exact amount for which he is hable after due enquiry under R 3, and give him an opportunity to pay the same 2

#### 4 Removal of a receiver -See Note 48 to R 1 supra

The Court has an inherent power in the exercise of its discretion to removo a receiver appointed by it 1 A receiver who has not complied with the Court's orders to keep proper accounts should be removed from office 2 A receiver can be removed only by the Court appointing him \$

#### 5 Appeal -Ses also Note 51 to B 1 ante

An order under this Rule is appealable under O 43, R 1 (s) 1

No appeal hes from the following orders -

- (1) An order which merely declares that the receiver is hable to the estate for a certain sum of money and which is not accompanied by any order for the attachment of his property 1a
  - An order fixing the period for which an account is to ho filed a (2)

An order removing a receiver from office 3 (3)

(4) In order for refund of losses to the estate due to the receivers neglect 4

		~ ( 1 ~	21	(925)]
		(		2 (1925) 1925 Lah 309 (312)
- ii .		1		3 (1925) 1925 Lah 209 (310)
-	٠	ا ما ا	- s case	Note 5

the Receiver was held to have ex ercised the requisite degree of care 7a (1931) 1931 Mad 760 (764 765)

Note 3 1 (1916) 1916 Mad 521 (522) 39 Mad 584

2 (1923) 1923 Mad 85 (86) Note 4 1 (1912) 17 Ind Cas 583 (584) (Mad)

(1931) 1931 All 72 (73) (1890) 13 Mad 390 (394) (P C) [See however (1916) 1916 Mad 924

1 (1920) 1920 Pat 220 (220) 4 Pat L Jour 1a (1931) 1931 Wad 760 (7o3 768) Order of realisation out of Receiver s secu

ratv-Appeal lies 2 (1920) 1920 Pat 703 (704) 5 Pat L Jour 97

3 (1931) 1931 All 72 (73)

(1933) 1933 Cal 52 (54) The Receiver cannot appeal-But parties may

4 (1932) 1922 Lah 224 (1) (224)

receiver

1

- (5) An order directing the receiver to pay a certain sum of money into Court without any order for the attachment of his property 5
- (6) \(\)\ n order direction the receiver to pay a certain sum of money by way of damages \(^6\)

considers that the interests of those concerned

But in an apped from an order for attachment under R 4 the propriety of an order under R 3 requiring the receiver to pay a centum sum of money to the estate can be attacked  $^7$ 

It has been held by the High Court of Bombay that an order passing a receiver a account is appealable maximish at it is really an order refusing rehet a anist the recover under this Rule.

R. 5. [S 504] Where the property is land paying revenue when collector to the Government, or land of which the revenue has been assigned or redeemed, and the Coult

will be promoted by the management of the Collector, the Court

may, with the consent of the Collector, appoint him to be receiver of such property
[1877—5 504, 1859—5 92]

Synopsis

Property senzed by collector as receiver Note to I

1 Property seized by Collector as receiver

When ittriched property is seized and retained by a Collector acting is a receiver his acts cannot be disputed by way of motion to discharge the attrichment.

## ORDER XLI

## APPLAIS FROM ORIGINAL DECREES

R. 1. [8 541] (1) Every appeal shall be preferred in the form

Form of appeal what to accompany memorandum signed by the appellant of his pleader and presented? to the Court or to such officer as it appears in this behalf. The memorandum shall be accompanied by a copy of the

decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment's en which it is founded

(2) The memorandum shall set forth, concreely and under distinct heads, the grounds of objection to the decree appealed from without any argument or ministrice, and such grounds shall be numbered

consecutively. [1577—S 541, 1859—S 333, 335 See S 96]

(1924) 1924 St id 85 (3°) 18 Sind LR 335 8 (1921) 19 1 Bot 1427 (32°) 45 Both JJ Order 40 Rule 5—Note 1 1 (15°1) 15 Suth W R JH 7 (34°)

#### Local Amendments LAHORE.

Add the following provise to Sub rule (1) -

'Provided that when two or more cases are tried together and decided by the same judgment and two or more appeals are filed against the decrees whether he the same or different appellants the officer appointed in this behalf may if satisfied that the questions for decisions are analogous in each appeal dispense with the

reduction of more than one copy of the milgment MADRAS

Add the following sentence and proviso to Sub rule (1) --

"The copy of the judgment shall be a printed copy in every case in which the High Court has prescribed that the judgment shall be printed when a copy a applied

for, for the purpose of appeal '

' Provided that in appeals from decrees or orders under any special or local Act to which the provisions of Parts If and III of the Limitation Act IN of 1908 do not apply and in which certified copics of sich decrees or orders have not been granted within the time prescrifed for preferring an appeal the appellate Court may admit the memorandom of appear subject to the production of the copy of the decree or order appealed from within such time as mit be fixed by the Court

4 ( I the following sentence to Sub-rule (') -

The memorandum shall also contain a statement of the a quation of the ai peal for the

purposes of the Court fees Act

And the following as a new Sub rule (3) to R 1 -'(3) When an appeal as presented after the period of function prescribed Therefor, it shall be accompanied by a petition supported by affidavit setting forth the facts on which the appellant relies to catisfy the Court that he had sufficient cause for not preferring the appeal within such period and the Court shall not proceed to deal with the appeal in any way (otherwise than by dismissing it ofther under Rule 11 of this Order or on the ground that it is not satisfied as to the sufficiency of the reasons for extending the period of funitation) until notice has been given to the respondent and his objections if any to the Court acting under the provisions

of S a of Act I'l of 1908 have been heard RANGOON

The following shall be substituted for Sub rule (2) -' (2) The memorandum shall set forth coocceds and under distinct heids the grounds of objection to the decree appealed from without in riginant or nirrative, and such grounds shalf be numbered consecutively. When Burnnes dites are given the corresponding English dates shall be added. The memorandum shall also contan-

(i) the full urmes and addresses of all parties, (ii) particulars (class number year and Court) of the original proceedings, and (iii) the value of the appeal (a) for Court fees, and (b) for jurisduction

Material corrections or alterations shall be anthenticated by the mutuals of the person

copies on

	Sunc	10315	
Memorandum of appeal to be signed by appellant or by his pleader Presentation of memorandum of appeal Presentation of memorandum of appeal Presentation with defective vakalat nama themorand must be accompanied by Date of presentation for purpose of limitation presentation for purpose of companies of the presentation for purpose of limitation of the copy of decree in rival appeal Two decrees in two cross appeals	1 2 3 4 5 6 7	Misdescription in the memorandum of appeal Grounds of objection Grounds in that may be taken in the memorandum of appeal for first time When appellate Court may not interfere with bindings of fact Competency of appeal Consoludation of appeal Stamp on memorandum of appeal Sefund where memorandum is over	10 11 12 13 14 15 16
Limitation for appeal Exclusion of time in seeking review of judgment	8	Applicability of the Order to other pro	17
		- ceenings	ខេ

decree has not yet been prepared3 or the appellant is under an erroneous impression that it has not yet been prepared 4 It has been held that the Court may in such cases give time for getting a copy of decree prepared and filing the same 4a But see the criticism of this view in S 2 (2) Note 8 The Court may however, where the copy of the decree is filed after the expiry of the period of limitation, excuse the delay under S 5 of the Limitation Act to The fact that a copy of the decree has already been filed in another proceeding is not sufficient 5 In an appeal in a land acquisition case a copy of the award which is the decree in the case should be filed along with the memorandum of appeal 6 Similarly in a probate case, a copy of the decree should accompany the memorandum of appeal?

A memorandum of appeal should also be accompaned by a copy of judgment appealed from Only the final judgment need however be filed It is not necessary to tile unterim orders and judgments disposing of preliminary issues in the case \* This Rule makes a distinction between the filing of a copy of the decree and the filing of a copy of the judgment. The Court has no power to dispense with a copy of the decree,9 but it can dispense with a copy of the judgment. But unless dispensed with, a memorandum of appeal unaccompanied by a copy of the judgment is not valid to Where, however an appeal is adimitted without a copy of the judgment, the order admitting the appeal may be taken to amount to an order dispensing with such con " The power to dispense with the copy of the judgment should ordinard, be exercised at the first hearing 12 The fact that a copy of the judgment has been filed in another proceeding is not a sufficient ground for dispensing with the copy 13 By force of O 43, R 2

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(1915) 1915 Cal 698 (694)
(1912) 17 Ind Cas 99 (100) (Cal)
(1912) 14 Ind Cas 1006 (1007) (Cal)
(1911) 11 Ind Cas 8 (8) (Cal)
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from mortgage decree -Copy of pre liminary judgment and final decree filed Held appeal not in order and appellant cannot impuga pieliminars decree

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3 (1922) 1922 Lah 191 (1J2)
  (1922) 1922 Lah 170 (171)
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In I Cas JO

(1J22) 1J22 Lah 93 (93)

T. B 67

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(1J2) 1J2, Lah 433 (438) 6 Lah 218
10 (1 117) 1917 Lah 4 K (437) 1 117 1 un Re
         No 67 (I b)
   (191 J 1315 Wal 433 (434)
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111J. Lali (-1 (- )

<sup>(1314) 26, (24 (1884) 4</sup> N 224 (1933) 5 (11 520 (598) (1919) 1919 Lab

<sup>(1 124) 1924</sup> I 41 (1923) 1923 1

<sup>(</sup>See al. " (1 127) 1927 Lale 1028 Lale A Lak 481 (4

<sup>(1927) 1927</sup> Lah 629 (630) (1927) 1927 Lah 640 (641) (See however (1927) 1927 Lab 905 (905 905) No longer good I'm sipro

the Full Bench decision referred to

<sup>(1926) 1.125</sup> N 15, 131 (132) (1 121) 1 12" Lah 413 (1.1) Com disjensed

order should be accompaned by a copy of the Order appealed from <sup>12a</sup> In cross however, where a formal order is not drawn inp<sup>12a</sup> on where the formal order is an exact copy of the concluding portion of the judgment<sup>13r</sup> the future to all a copy of such order has been held into unafidate the appeal

An appeal from a decree which has been encoded must be accomplanted by a copy of the angented decree and not i copy of the august decree <sup>14</sup>. Where the decree is amended after the filing of the appeal the appeal the four may permit a copy of the amended decree to be attached to the mean random of appeal, and the appeal becomes from that moment an uppeal ignore the ancided decree <sup>15</sup>. Where the amendment of the dre is only for the purpose of making the meaning of the decree clear, there is no such alternation is to make it a new decree and no copy of the inherital decree need be filed in order to make the appeal, already filed competent <sup>16</sup>.

The word 'com in the Rule means a certified capy <sup>17</sup> A copy of the trai slation of the decree is not enough <sup>18</sup> Nu does the Rule require a printed copy of the judgment to be filed <sup>19</sup> It is also not necessary that the copy should be one obtained by the appellant himself <sup>20</sup> See also the case cited below <sup>1</sup>.

As to whether as second appeal a copy of the trial Court's judgment should be filed, see O 42, R 1, and the cases cuted in Note 2 thereof A copy of the trial Court's decree need not, under this Rule be filed along with a memorandum of second appeal <sup>21</sup> The Rule does not apply to appeals under the Madras Reit Recovery Ver<sup>22</sup> or under the Oudh Reit Vet <sup>23</sup>

### 5 Date of presentation for purpose of limitation

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An appeal will be defined to be validly presented for the purposes of lin station only when it is accompanied by a copy of the decree appealed from and of the judgment on which it is founded. Hence though the memitandium of appeal may be filed within the period of limitation, it will be barred if the cop es of the decree and judgment are not filed fill after the expiry of the period of limitation. Where an appeal is filled against a minor respondent

19:(131-) 1319 til 394 (333) 40 til 12 Appeil from order under S 47-Judgment and deere must be filed

and deere must be filed
(1 102) 6 Cal W \ 283 (281) Appeal from
order under 8 47—Order must be

14 (1910) 11 Ind Cons (5) (Cu) Free at o(1116) 1916 Vivi 10 (5) (1060)] 15 (1913) 1918 Cui 10 (5) (1060) 16 (1926) 1926 Cui 11 (5) (1167) 17 (1915) 1131 Vivi 573 (575)

17 (192) 122) Iah 771 (179)

[but see (1320) 1936 I ah 404 (401)

Where al was held that an unate tell ects was chough where the report was that the record could not be true.]

Second appeal - Logis of de ree of

lower Court not continue grounds

wis only technical and the defect

13b(1 24) 194 (III the (fee 163) (133) 192 (III 572 (fee, 764) so til 27 Presentation of appul with copy of only order on record containing grounds of design in uniformi decistants substantial compliance with Ch. 21 R. 24. Whithial Heb Court

Rules (1311) 14 11 1 Crs 1007 (1006-1007) (Crit 13c (1923) 1923 All 57 (57 i)

C. P. C. 3.25 & 3.26

of a peal to that Court is enough 211 (108) 32 Bond 14 (24) But under the Ruisof the appellite side at should be

Note 5 1 (1905) 32 Isoni 14 (22 23) Court directs the Court may order his property to be attached until he duly submits his accounts in the form ordered

(2) The Court may at the instance of any party to any suit or proceeding in which a

at any time make an enquiry as er as shown by his accounts or is been occasioned by his wilful

default or gross negligence and may order the amount found due or amount of the loss so occasioned to be paid by the receiver into Court or otherwise within e period to be fixed by the Court All parties to the suit or proceeding and the receiver shall be made parties to any such enquiry Notice of the enquiry shall be given by registered post to the surety if any for the receiver but the cost of his appearance shall be borne by the surety bimself unless the Court otherwise directs

Provided that the Court may where the account is disputed by the parties and is of a complicat ioned to the property by the parties to a sust ons for the

(3) If the receiver fails to pay any amount which he has been ordered to pay under sub rule (2) of this Rule within the period fixed in the order the Court may direct such amount to be recovered either from the security (if any) furnished by him under R 3 or by attechment and sele of his property or if his property hes been attached under snb rule (1) of this Rule by sale of the property eo attached and may apply the proceeds of the sale to make good any amount found due from him or any loss occasioned by him and shall pay the belance (if any) of the sele

Synopsis

Note No Scope and applicability of the Rule Loss to property by wilful default or

gross neglect

proceeds to the receiver

reference

Note No Court mey direct his property to be attached Removal of a receiver Appeal

Other Topics

Property 14 Cl (c) includes income See Property of secesser in the hends of his legal Note 2 Pt (1) representatives See Note 3 Pt (1)

1 Scope and applicability of the Rule

The Rule provides for coercive steps against the receiver who fails to carry out his duties as laid down in R 3 The Court has got a discretion in deciding whether to take action or not under this Rule as against the receiver 12 When the receiver is guilty of a wilful default or gross negligence the only provision for taking action against him apart from proceeding against the security, is that his property can be attached arrest and imprisonment are not to be the methods of enforce ment 1

2 Loss to property by wilful default or gross neglect

Property includes not only corpus of the property entrusted to the receiver but also the income derived from it 1 The Rule is a residuary provision and covers a case of misappropriation also 2 Even a partner who is appointed receiver of partnership assets will be guilty of gross misconduct if he apprepriates to his own use any of the partnership assets 3

A separate suit is the proper procedure for proceeding against a receiver on

1 (1931) 1931 Mad 760 (763)

Note 2

discretion

1 (1916) 1916 M id 521 (522) 39 Mad 584 2 (1916) 1916 Mad J21 (522) 39 Mad 584 3 (1925) 1925 I O 257 (259) (I C)

the business what of ordered and relect School and leading and relection dicharge if ram pires to Le Las it toma mi mere by! Sim farly his account a man be relegied and a serve entry continuous to the been discharged after the pas made I was The proper product I werer ms. bacase s of dan enquire and . not be in lack box s by his wilful defaul that some acread of a remore it his hale de ired to proced a n h m under > 14 return terrete it is him is no nece art r a ne rear in

If there's pally a recever de rementle le Jerue main he in t make and the low unter be care in the he acted with perfect regularity and has used such a nere trache a wealt le extend from in

individual in hi own thair-

I.

Where at the time of appointing the civer there was the rechnity or of the e- are about 11 year old and after his appointment, the receiver applied for the arre of ic delt r ha not for attachment of his projectics on the around that it was very much encambered it cannot be ulthit the ic ever is multy f any neshgence it all. It mu t be shown by the pirty withing the triblish at w neolisence on the part I the receiver that it would have been prestable to the es ate if the debtor a property had been attached 4

3 Court may direct his properly to be attached

Where a receiver dies his property in the hands of his least rate intitives may be attached 1 But before directing the attachment of project, und a this Rale the Court must first determine the exact amount for which he is hible iffer due enquiry under R 3, and give bin an of portunity to pit the sime "

4 Removal of a receiver -Sec Note 48 to R 1 s pro

The Court has an inherent power in the exercise of its discrete in to remine a receiver appointed by it 1 A receiver who has not complied with the Court's orders to keep proper accounts should be semoved from other? \ seconds ou bu removed only by the Court appointing him 3

5 Appeal -Sec at a Note 51 to R 1 a He

In order under this Rule is appealable under O 13, R 1 (4)1

No appeal hes from the following orders -

- (1) In order which merely declares that the reconcr is liable to the estate for a certain sum of money and which is not account time ! by any order for the attachment of his property in
- In order fixing the period for which an account is to be file 12 (0)

In order removing a receivor from office 3 (3)

(4)

An order for refund of losses to the estate due to the receiver s neglect 4

(925)]
2 (192 ) 1925 I 1 \*00 (314)
3 (1925) 1925 I 1 ±09 (310) Note 5 the Receiver v s leld to have ex

7s (1931) 1931 Mad 60 (764 765) Note 3

1 (1916) 1916 Mad 521 ( 22) 39 Mad 581 2 (1923) 1923 Mad 85 (86)

Note 4 1 (1912) 17 Is d Cas 583 (584) (Mad)

(1951) 1931 111 72 (73) (1830) 13 M d 330 (334) (P C)

(See he vever (1,116) 1916 Wad 924

1 (1920) 1920 1 t 220 (220) 4 1 at I Jour

1 (1931) i 31 Mal TO( ) 708) O 1 - 1 re limit | out of R beens 1

1

- (a) An order directing the receiver to pay a certain sum of money into Court without any order for the attachment of his property 5
- (6) An order directing the receiver to pay a certain sum of money by way of damages 6

But in an appeal from an order for attachment under R 4 the property of an order under R 3 requiring the secencer to pay a certain sum of money to the estate can be ittracked?

It has been held by the High Court of Rombay that an order passing a second is appealable massmuch as it is really an order refusing rehefacing the lecture under this Rule.

When Callector to the Government, or land of which the rovenue has been assigned or redeemed, and the Court considers that the interests of those conceined will be promoted by the management of the Collector, the Court may, with the consent of tho Collector, appoint him to be seen to find property

[1877—S 504, 1859—S 92]

Synovsis

Property seized by collector as receiver Noto No 1

I Property seized by Collector as receiver

consecutively.

When attached property is saized and retained by a Collector acting is a receiver. his acts cannot be disputed by way of motion to discharge the attachment.

## ORDER XLI

# ALPEALS TROM ORIGINAL DECREES

R. 1. [8 541] (1) Livery appeal shall be preferred in the form of a memorandum signed by the appellant or his pleuder and presented to the Court or to such officer as it appears in this behalf. The memorandum shall be accompanied by a copy of the

randum shall be accompanied by a copy of the decice appealed from and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded

(2) The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any urgument or nitative, and such grounds shall be numbered

[1877—8 541, 1859—Ss 133, 335 See 5 96]

<sup>(1924) 13°4 51</sup> d 3°5 (30) 18 Sit d L R 305 8 (1921) 19.1 Lom 47° (42°) 45 1 ort 33 Order 40 Rule 5—Note 1 1 (1571) 15 Suth W R 31° (33°)

## Local Amendments

## LAHORE.

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Add the following proviso to Sub rule (1) --

'Provided that when two or more cases are fixed together and decaded by the same judgment and two or more appeals are filed against the decrees whether by the same or different appellants, the other appeared in this behalf may it statisfied that the questions for decisions are inalogous in each appeal dispense with the reduction of more than one cons of the indement

#### MADRAS

Add the following sentence and provide to Sub rule (1)

'The copy of the judgment shall be a printed copy in every case in which the High Court has prescribed that the judgment shall be printed when a copy is if place

for, for the purpose of appeal

Provided that in appeals from decrees or orders under any special or local let to which the provisions of Parts. It and III of the Limition is it. No flood 3d not appliand in which certified copies of such decrees or orders have not local granted within the time presented for preferring an appeal the appellate Court may admit the memorandum of appeal subject to the production of the copy of the such time is may be found by the Court.

ilement of the viluition of the ipperlifer the

purposes of the Court fees Acl

4dd the following as a new Sub rule (3) for R 1—(3) When no appeals precented after the period of limitation presented therefor it shall be accompanied by a pittion supported by affidavit esting forth the frets on which the appellunt relies to eat by the Court that he had sufficient cause for not preforing the appeal within such period and the Court shall not proceed to deal with the appeal in any way (otherwise flum by disminsing it other nador Rule I of Ilin Order or on the ground little is not valued as to the sufficiency of the reasons for extending the period of limitation) until notice has been given to the respondent and his objections of any to the Court reting under the proxima.

#### RANGOON

The following shall be substituted for Sub rulo (2) -

(2) The monorundum shall set forth, conesely and under distinct heads the grounds of objection to the decree upwaled from without no significant or nutritine, and such grounds, shall be numbered consentisely. When Barmes dates no given the corre ponding Pughish dates shall be idded. The memorundum shall also contain—

(i) the full names and addresses of all parties

of S of Act I's of 1903 have been heard

(ii) particulars (class, number year and Court) of the original proceedings, and (iii) the value of the appeal (a) for Court feet and (b) for jurisdiction

Material corrections or alterations shall be authenticated by the initials of the person

copies on

\$	буна	npsis	
Note 7		Note	
Memorandum of appeal to be signed by appellant or by his pleader	1	Misdescription in the memorandum of appeal	10
Presentation of memorandum of appeal Presentation with defective vakafat	Z	Grounds of objection Grounds that may be taken in the me	1
Memorandum must be accompanied by copies of judgment and decree	3	morandum of appeal for first time When appellate Court may not interfere with findings of fact	1:
Date of presentation for purpose of limitation	s	Competency of appeal	14
Omission to file copy of decree in rival		Consolidation of appeals	15
appeal Two decrees in two cross appeals	6	Stamp on memorandum of appeal Refund where memorandum is over	16
Limitation for appeal Exclusion of time in seeking review of	8	stamped	17
judgment	9	Applicability of the Order to other pro	18

### Other Topics

Delay in presenting appeal—Power of Court to excuse Sec. Vote S
Exclusion of time requisite in obtaining G Form No 1

copies Sec Note 8

Form of Memorandum of Appeal Sec App

1 Memorandum of appeal to be signed by appellant or his pleader

It is necessary that the memorandum of appeal should be signed by the appellant or his pleader By virtue of the provisions of O 3 R 1, supra an agent of the appellant, duly authorised may also sign the memorandum of appeal <sup>1</sup> A defect in the authority will not necessarily invalidate the memorandum of appeal <sup>2</sup> Where an appeal was filed on bebalf of a company by one of its officers not duly authorised to do so, it was held that the defect could be cured by putting in a power of attorney duly authorising him to do so 3 Similarly where a memorandum of appeal was signed by a pleader whose vakalat was not signed by the party, it was held that the defect could be subsequently recurified by the party signing it <sup>4</sup> It is immaterial, if the appellant has signed the appeal, that he has not written the memorandum of appeal humself <sup>5</sup> Where an appeal consisted of two documents one containing the names of the parties and the other containing the grounds of appeal, the fact that the latter was not signed by the party is not fatal to the appeal <sup>8</sup>

2 Presentation of memorandum of appeal

Order 3, Rule 1 provides that an appearance, application or act in or of any Court required or authorised by law to be made by a party may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognised agent or by his pleader. The presentation of a memorandum of appeal by a pleader holding a power of attorney from the party expressly authorising him to present it is valid though the power is not filed with the appeal 1 A memorandum of appeal may be presented where the appellant is a minor, by the appellants guardian ad litem 2 But a presentation by an unauthorised agent is no presentation in the eje of the law 3 As to a presentation by the clerk of the pleader, see Note 9 to 0 3 R 4, ante

The memorandum of appeal should be presented to the Court or to such officer as it appoints in this behalf. A presentation to the Judge at his private residence after Court hours on the last day of limitation, is sufficient compliance with the law. A presentation during the vacation or even on a Sunday is valid, provided it is to the proper officer. It was held in the undermentioned cases that a memorandum of appeal must be taken to have been validly presented where it was deposited in the box put up by the appellate Court for the purpose. But a presentation to an officer of the Court

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| Order 41 Rule I—Note 1 | Sentation of appeal to High Court by 2 | Sec Vote 2 to 0 3 1 2 | The decision it is submitted, as not 4 | 1918 2 | 1 and Court at 1 1
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5 (190s) 1903 Pun W R 71,

1

<sup>6 (1920) 1920</sup> Lah 314 (314)

Note 2

fied in treating such appeal as appeal in due form and rejecting it as statuto barred.

Statuto barred.

<sup>1 (1912) 14</sup> lnd Cas 744 (744) 31 4H 482 (1931) 1J31 Lah 671 (672) 11(1J23) 1J23 Pat 150 (151) 2 Lat 204

<sup>[</sup>But see (1500) 22 111 331 (332) Pre

other than the one appointed by the Court in this behalf or the placing of the memorandum on the table of the appointed officer when he was absent? or the sending of a memorandum by post is not a valid presentation

A debtor in Civil Jail is entitled to present an appeal without the assistance of a pleader 9

An omission to join the necessary parties to an appeal makes the appeal mixald 10

See also Notes to O 4, R 1 as to the presentation of plaints

### 3 Presentation with defective vakalatnama

I.

The presentation of a memorandium of appeal by a valid without any authority from the party is not valid. But the mere fact that the party has omitted by oversight to sign the validationance or the fact that the validationance was not filed with the memorandium of appeal? does not invalidate the appeal Where an appellant executes a validationance in value of the opersons, but one of them alone accepts it, the presentation of the appeal by the latter is a valid messentance?

There is a difference of opinion as to whether the presentation of a memorandum of appeal is valid where the name of the valid presenting it, is omitted in the validationam. The High Court of Allahabad has held that it is not a valid presentation, the reason given being that the word shall in O 3 R 4 shows that the Rule is of an imperative character \* The High Courts of Calcutta, \* Lahore, \* \* Patna\* and the Judicial Commissioner's Court of Nagpur, \* on the other hand, have held that the presentation is not invalid and that the defect is one that can be cured See also O 3, R 4, Notes 14 to 16

4 Memorandum must be accompanied by copies of judgment and decree

It is absolutely essential that a memorandum of appeal should be accompanied with a copy of the decree appealed from <sup>1</sup> A memorandum of appeal in a accompanied by such a copy is not a valid appeal<sup>2</sup> and this is so even if the

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G (1923) 1923 Pat 150 (1.0) 2 Pat 264 Re
              gistrar authorised to receive appeals
               -Presentation to Deputy or Assistant
               Registrar in Registrar s absence not
                                                                            4 (1931) 1931 All 767 (768)
(1927) 1927 All 816 (816)
(1926) 1926 All 252 (253)
     (1872)
                          ٠,
  7 (18:1)
                                                                               (1914) 1914 111 536 (537) 23 Ind C1s 464
(464) 36 111 46
(1913) 19 Ind Cas 674 (674) (411)
  8 (1805) A C P L R 93 (93)
              SCF L 133 pay
(Sce also (1897) 15 Med 137 (138)
Appeal under Crimmal Procedure
Code, S 413-Sending by post is not
                                                                                       fBut see (1921) 1921 All 210 (211) 43
                                                                                         A11 3921
               [danous
                                                                            p (1916) 1918 Cal 482 (483)
9 (1870 71) 6 Mad II C R App 38 (39)
10 (1913) 18 Ind Cay 37 (39) 1313 Pun Re No 59
                                                                           5a (1932) 1932 Lah 134 (135)
6 (1932) 1932 Pat 3 (4)
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Note 4 1 (1933) 1923 Mad 482 (483) [See (1933) 1933 Lah 938 (939), Decree

2 (1920) 1920 Lah 212 (213) (1913) 21 Ind Cas 444 (445) (11) 3 (1926) 1326 Bom 336 (330) (See however (1911) 11 Ind Cas 387

of attorney filed 9 days later-Appeal

Note 3
1 (1920) 1920 Pat 581 (582)
(1934) 1934 Lah 444 (443)
(1932) 23 P L R 517 (1) Appeal filed on the last day of huntation—Power

not in time (1921) 1921 Nig 27 (27, 28) (1911) 11 Ind Cas 387 (888) (Cal)

(1920) 1920 Pat 280 (281)

1.

decree has not yet been prepared3 or the appellant is under an erroneous impression that it has not yet been prepared 4 It has been held that the Court may in such cases give time for getting a copy of decree prepared and filing the same 4a But see the criticism of this view in S 2 (2), Note 8 The Court may, however, where the copy of the decree is filed after the expiry of the period of limitation, excuse the delay under S 5 of the Limitation Act 46 The fact that a copy of the decree has already been filed in another proceeding is not sufficient 5 In an appeal in a land acquisition case a copy of the award which is the decree in the case should be filed along with the memorandum of appeal 6 S milarly in a prolate case, a copy of the decree should accompany the memorandum of appeal?

A memorandum of appeal should also be accompaned by a copy of judgment appealed from Only the final judgment need however be filed It is not necessary to tile interim orders and judgments disposing of preliminary assue, in the case 8 This Rule makes a distinction between the filing of a copy of the decree and the fibng of a copy of the judgment. The Court has no power to dispense with a copy of the decree,9 but it can dispense with a copy of the judgment. But unless dispensed with, a memorandum of appeal unaccompanied by a copy of the judgment is not valid 10 Where, however, an appeal is adimitted without a copy of the judgment, the order admitting the appeal may be taken to amount to an order dispensing with such copy it The power to dispense with the copy of the judgment should, ordinarily, be exercised at the first hearing 12 The fact that a copy of the judgment has been filed in another proceeding is not a sufficient ground for dispensing with the copy 13 By force of O 43 R 2 a memorandum of appeal from an 1926 Lah 638 , 1927 Lah 449 , 1927 (1915) 1915 Cal 693 (694)

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Lth 451, 1928 Lth 45, 1928 Lth 46,
and 1928 Lah 60 Overruled
(1912) 14 Ind Cas 1006 (1007) (Cal)
(1911) 11 Ind Cas n (8) (Cal)
                                                                              [See also (1931) 1931 Lah 202 (203)]
                                                                     (1932) 1932 Lah 136 (137)
(1925) 1925 Nag 59 (58)
(1924) 1924 Nag 271 (278) 20 Nag L R 131
(1921) 1921 U B R 15 (16) 4 U B R 75
                                                                     (1927) 1927 Lah 540 (641)
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from mortgage decree - Cops of pre liminary judgment and final decree filed Held, appeal not in order and appellant cannot impugn pieliminary

(1312) 17 Ind Cas 99 (100) (Cal)

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(1928) 1928 Luh 601 (603)
(1929) 1929 Lah 42 (43)
(1929) 1929 Lah 295 (297) 10 Lah 613
(1929) 1929 Lah 379 (380)
(1922) 1922 Lah 93 (93)
(1927) 1927 Lah 629 (630)
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[See however (1927) 1927 Lah 905 (905 906) No longer good Ita since the Full Bench decision referred to foresta

F. R 67

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(1925) 192, Lih 438 (438) 6 Lih 218
(1 10°) 1 103 Pun Re No 22 p 67
10 (1 117) 1917 Lah 4 % (437) 1917 Pun Me
           No 67 (F Is)
    (1713) 131 , 1/1 131 (434)
    (132-) 1925 \ ig 131 (132)
   (1927) 1927 I ah 413 (1.4) Copy di pensed
    (1 1 0) 19 0 1 11 19 1 (1 1) (10)
11 (113) 1926 \ 12 37 (10)
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(See also (1922) 13221 h 170 (171)] (1)27 J 127 Lab 423 (424), (1)49 1928 Lab 263 (264) (27) 1927 Lab 49 (43) 7 Lab 42

1 12 17 1n 1 C 1s 39 (100) (C:11

(1927) 1927 f th t 1 (4%) 1\* (1925) 1 25 f th t 1 (4%) 1\* (1925) 1 25 f th t 2 (61) 1\* (1927) 1327 Lab 521 (722) 5 132 9 1 12 1 Lab 451 (483) 10 Lab 57 (11)

cases however where a formal order is not drawn imilato or where the formal order is an exact copy of the concluding portion of the judgment 13c the failure to the a conv of such order has been held not to invalidate the appeal

An appeal from a decree which has been amended must be accompanied by a copy of the amended decree and not a copy of the original decree 14 Where the derree is amended after the filing of the appeal the appellate Court may perint a copy of the amended decree to be attached to the memorandum of appeal and the much becomes from that moment, an appeal against the amended derice is Where the amendment of the decree is only for the purpose of making the meaning of the decree clear, there is no such alteration as to make 1 a new decree and no conv of the amended decree need be filed in order to make the anneal aheady filed competent 18

The word conv in the Rule means a certified copy 17 A copy of the trai slation of the decree is not enough is Nor does the Rule require a printed copy of the judgment to be tiled 19 It is also not necessary that the copy should be one obtained by the appellant himself 20 See also the case cited below 1

As to whether in second appeal a conv of the trial Court's judgment should be filed see O 42 R 1 and the cases cited in Note 2 thereof A conv of the trial Court's decree need not, under this Rule, be filed along with a memorandum of second appeal 214 The Rule does not apply to appeals under the Madras Rent Recovery Act22 or under the Oudh Rent Act 23

### 5 Date of presentation for purpose of limitation

I

In appeal will be deemed to be validly presented for the purposes of In tailor only when it is accompanied by a copy of the decree appealed from and of the judgment on which it is founded. Hence though the memorandum of appeal may be filed within the period of limitation, it will be barred if the copies of the decree and judgment are not bled till after the expiry of the period of limitation 1 Where an appeal is filed against a minor respondent,

131(1115) 1915 111 394 (333) 40 411 12 Appeil from order unler 5 47-Indepent

(i 02) 6 Cal W N 253 (281) Appeal from order under S 47-Order must be

while district I for non compliance with the condition - Order of dismissal should also to bled, int object tion on the atound of fulure to file was only technical and the delict was con loned?

135(1024) 1924 111 162 (162 163)

(1333) 1933 All 762 (763, 764) at 111 27 Presentation of appeal with copy of only under on second sontiming grounds of decision and formal deer sion is substitutial compliance with Ch 3, R 2 of Allahalad High Court Rule

(1912) 14 Ind C14 1003 (1006 1007) (Cal) 13. (1923) 1923 111 573 (574)

C P. C. 325 & 326

14 (1910) 11 Ind C is 8 (8) (C il) ( See the (1916) 1916 VI to 1939 (1963))

1> (1918) 1918 Cil (30 (331) 16 (1926) 1926 Cal 11th (1167)

17 (1923) 1923 Lah 771 (172) [But sec (1926) 1 126 I ili 404 (401) Where it wis held that my unittested copy was changle where the report was that the record could not

> Second appeal - Copy of deans of lower Court mot continuing grounds

of appeal to that Court is enough 21. (1908) 32 Bom 14 (24) But under the Rules of the 171. Hate sale it should be filed

(1552) 4 Well 419 (420)

22 (1932) 20 Mad 476 (479) 23 (1916) 34 In 1 Cas 706 (709) (On 1h)

Note 5 1 (1909) 32 B m 14 (21, 23)  the mere fact that the name of a guardian ad litem was not brought on record till after the period of himitation, will not make the appeal itself baired by limitation?

As to when an application for revision may be converted into an appeal, see S 115. Note 18

6 Omission to file copy of decree in rival appeal

Where there are several appeals from one judgment by different appealants a copy of the judgment and of the decree should be filed in \*ach\* appeal\*. Thus in an appeal from an award under the Land Acquisition \*Act the fact that the award disposed of many references and it was filed in an appeal filed by a party in one appeal does not enable its being dispensed with in the other appeals <sup>2</sup> But where the same appellant files different appeals from the same judgment in has been held that it is sufficient if he files a copy of the judgment in one of the appeals only <sup>3</sup>

7 Two decrees in two cross appeals

Where two cross appeals are heard together and disposed of by a single judgment but two seperate decrees are drawn up one in each appeal there is a conflict of opinion as to whether an appeal against the judgment filing a copy of one of the decrees only, is valid. The conflict is due to another aspect of the question, namely whether an appeal against one of such decrees only is barred by res judicata by the non-filing of an appeal from the other. This aspect is discussed in Note 29 to S 11, artie

8 Limitation for appeal

See Arts 152 and 156 of the Limitation Act

The said Act provides for the extension of the period of limitation prescribed in certain cases and for exclusion of certain periods in computing the period of limitation prescribed

Extension of the period —S 4 of the Act provides that where the period prescribed expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court

furnishing second copy was extended under S 5 Lim Act] Note 7

(1916) 1916 Lah 166 1916 Pun R. No Si (Nes) (Nes) 1926 Lah 159 (458) 7 Lah 11 (Nes) (1929) 1929 Nag 229 (23") 25 Nag L R 183 (Nes)

(1917) 1917 Lah 436 (487) 1917 Pun Re No 67

2 (1908) 30 111 55 (.6) Note 6

lellant to be allowed to that to which decree he would contine his

the expiry of limitation — Appeal 1 ad) [85c also (1932) 1932 Pat 319 (519) 12 1 at 36 Two appeals against one order with 0.0 copy—On demand second cup furt shed—Time repired for

(1921) 1921 Lah 346 (347) 56 H d Cao 63 (70) (No) (1911) 10 Had Crs 415 (416) (Crl) (N) (1936) 13 6 Jour 137 (4) 36 H d Cps 336 (Oodl) (No) (1915) 1915 Cal 42 (4) (No)

(1915) 1915 Cal 42 (47) (No) (1915) 1918 1 at 219 (220) 3 1 at L Junt 20 (No) I.

reopens 1 Under S 5 of the Act the Court has a discretion to admit the appeal after the expiry of the limitation period, if it is satisfied that there was 'sufficient cause' for not preferring the appeal within the time 2 In exercising the direction under the section, the Court must, on the other hand, be fully satisfied of the justice of the grounds on which the delay is sought to be excused 3 On the other hand, the expression "sufficient cause' should be liberally construed so as to advance substantial justice when no negligence. nor maction nor want of bona fides is imputable to the appellant 4 So construed it will include not only those circumstances which the law expressly recognises as extending the time, but also such circumstances as are not expressly recogmsed but which may appear to the Court to be reasonable looking to the facts of the case 5 As to what constitutes "sufficient cause" within the meaning of that section, see the undermentioned cases 6

Note 8

(1912) 17 Ind Cas 119 (120) (Cal) (1912) 17 Ind Cas 15, (166) (Cal) (1912) 17 Ind Cas 15, (166) (Cal) (1912) 17 Ind Cas 190 (100) (Cal) (1912) 17 Ind Cas 90 (100) (100) (100) (100) (100) (100) (100) 100 10 100 (100) trict Judge dismissed suit on 17th March 1930-High Court remanded cate—District Judge passed decree on 17th March 1931—On appeal copy of decree of 1920 only filed— The copy of 1931 decree against which really appeal was presented

under R 10-Appellant being under belief that filing of the returned plaint with the endorsement was enough—Order filed after expiry of Innitation - Delay excused under S 5 Limitation Act (But see (1890) 12 All 461 (491) (F B) Bare mistake of law is no excuse

[See also (1888) 12 Boni 320 (322) Mere ignorance of law is no oxcuse I Abana fide mistal o in calculating the period of limitation is sufficient cause -1876) 1 All 250 (252)

1686) 13 Cal 266 (267 268) (1908) 13 Cal 200 (201 200) (1907) 12 Cal W N 20 (27) (1913) 19 Ind Cas 931 (933) (Cal) (1908) 28 All 414 (410) Mistaks of appel lant's pleader—Dolay excused (See also (1909) 4 Ind Cas 405 (2)

time due to mistake of clerk of appellant a pleador—Delay excused] Delay due to amendment of decree in material particulars is sufficient cause — (1900) 3 Cal L Jour 188 (192) (1903) 32 Cal 908 (909, 910)

(496) (Cal) Respodents not added in

Miscellaneous (1920) 1921 Lah 346 (347) 56 Ind Cas 69 (71) Joint appeal filed under mistaken impression that the cases had been consolidated - Separate appeal al lowed to be filed though limitation

had expired (1861) 9 Moo Ind App 26 (38) (P C) Unavoidable accident—Delay excused (1926) 96 Ind Cas 416 (Lah) Delay in fil-

6 Abona file mistale of law is sufficient

be extended] (1928) 1928 Lah 216 (218) 9 Lah 76

(1924) 1J24 Lah 41 (42) 4 Lah 122 Second appeal-Rule requiring copy of trial Court's judgment having come into force only recently-Delay in filing the same was excused

(1930) 1930 Sind 252 (253) Order under O 7 R 10-Appeal against—Re turned plaint with the endorsement thereon filed but not copy of order

1059 Amendment not in material particulars-Even then it may be sufficient cause if appellant waited on the bona fide belief that he was entitled to do sol

Poterty of appellant-Act a sufficient

cause -(1897) 9 4t1 655 (659) Confirming judgment of Mahmood, J in 3 All 11 (18)

1 Judge sitting in the Admission Court has power to excuse the delay in filing the appeal under S 5 of the Limitation Act 7 But au ex parte order admitting an appeal after the period of hmitation can be set aside by the Court on objection by the opposite side after notice 8 Such an objection should, however be taken at the earlest possible opportunity after becoming aware of the order 8 If an appeal is transferred from a District Judge who has admitted the appeal ex parte, to a subordinate Judge for hearing the latter can decide the question of huntation 9

An order admitting an appeal beyond houtation can be attacked in second appeal preferred against the appellate decree 10 But the lower Court's direction in dlowing or refusing to allow in appeal to be filed beyond limitation under S 5 of the Lumitation Act will not be highly in erfered with 11 5 5 of the Limitation Act does not apply to appeals in forma pauperis 19

Factusion of period under \$ 12 of the Limitation Act -In computing the period of limitation for an appeal the appellant is entitled under S 12 of the Limit ition Act to a deduction of the time required for ob aiming copies of the decree and of the judgment appealed from 13 It is not necessary for the extension of time under \$ 12 that the copy must have been applied for by the appellant himself or his authorised agent 14

The following points should be noted in computing the. Time requisite for obtaining the comes --

1 27

(1) The period between the date of the application and the date on which the stamp papers and the necessary amounts are called for should be excluded 15

(1996) 13 C 11 79 (73)

(1)1) 1915 411 4J (460) 31 I C 8iC (517) (1914) 1914 I th 265 (20) 1914 P R No 32 Otler cases -

(1890) 14 Lom 36, (363) Two uits my ly i ig same que tion-Similardeci ions -Oredec ioniciei el io alleal-Sub equent appeal again t the other decision—Delay not exent ed (1915) 1915 Und 433 (494) No secrets an

at perl-Delay in file g copy of mdg ment not excused

(1932) 1932 Ondh 167 (167) Limitation expiring on 9th but spied filed on 19th - Apellant stating that he mistered 9 is 19 in his counsely letter-Letter not producel-Delay not condone l

(1933) 1933 C11 462 (463) Extension not

(too, 08) 17 Cil 11 3 22 (21) (131") 1317 P C 149 (180) 41 Mrd 412 45

1 d 4pg 21 (PC) (1570) 13 Suth W R 245 (246) 81 (1323) 1323 Wid 92 (33)

J (1830) 14 Bom 334 (396) (1898) 21 Mrd 278 (229) (19) 2 Cd W \ 461 (462)

(Bit see (1880) > Lal 1 (1 2) Sub Julgo cannot interfore with District Court's orler-But District Court

itself can et it asi le)
10 (1563) 10 Suth W R 178 (178)
11 (1557) 9 All 244 (246) (1903) 30 Cal 309 (312 816) 30 1 A 20 (PC)

(1904) 2G All 327 (328 829) (1833) 23 Dom 513 (518)

302 52 It l App 161 (PC) I ven though the High Court rules dispense with the production of such a copy (1878 90) 2 111 192 (193) (Do) (130.) 29 VII 192 (130.) (130.) (134.) (130.) 29 VII 961 (260.) 14 (1920) 1920 WA 1 179 (160.)

7 (1913) 21 Ind C15 96 (JS) (Mad) (1918) 1918 P C 155 (136) 43 Loin 376 46

Ind 41 p 15 (1 C)
8. (1915) 1915 C1 666 (667) 42 C11 433
(1996) 9 Mad 450 (4.1)

(1907) 29 111 264 (266)

(1898) 3 Cil W \ 55 ( 5) 15 (1907) 7 Cil W \ 100 (110)

- (2) The period between the date on which the stamp papers are supplied and the date on which the copy is ready for delivery should be eveluded. In calculating such period the day on which the stamp papers are supplied and the day on which the copy is ready should both be eveluded. If
- (3) The interval between the date on which the copy is ready and the actual date on which the party takes delivery thereof cruinot be excluded <sup>18</sup>
- (4) When separate applications are made for copies of the judgment and of the decree the periods necessary for obtaining each of the copies can be excluded except to the extent to which such periods overlap each other.
- (5) Holdays intervening in such a way as to prevent a party from taking, the incressary steps for obtaining copies should be regarded as yart of the time requisite for obtaining copy. Of But to claim the benefit of S 12 the application for copy must be made before the expiry of the period of limitation for the appeal expires on veav on which the Court is closed and it exprellant applies for copy on the re-opening day, he is not entitled to any extension of time on account of the intervention of the holdays.
  - (6) In appellant is entitled to deduct as time requisit, for obtaining copy of decree, any period during which the decree remains unsigned 23 But he is not enutled to do so if the delay in signing the dicree was belore his application for copy 24.

Exclusion of period under S 14 of the Limitation Act — S 14 of the Limitation Ve, does not apply to appeals But where time has been spunt in prosecuting an appeal in a wrong Court through a bona lide instake, the delay in filing the appeal may be excused in the exercise of the discretion of the Court under S 5 of the Limitation Act <sup>58</sup> But where the appellant has been fully of carelessness, he is not entitled to extens on of time on the ground of having

20

decree called for on a dix whon Court closes for viction and stimps supplied on the reoleging dry—the terrous risms should not be counted

called for copies strinck off for non deposit of string papers—Subsequent od-

where the V P P system of despatch of copies is in common use, time to be excluded under the section is that between date of upplies then for copy and date of despatch whether 1 vior turry post or by V P P from copying department]

(1933) 1933 Lih 511 (512) Appeal presented to wrong Court on instaken but bona fide advise by pleader—Time during which appeal remains fending should be excluded 1 prosecuted his remedy in a wrong Court 25 In the cases cited below<sup>27</sup> it was held that the time during which an appellant was prosecuting an application under O 9, R 13 cannot be deducted in calculating the period of limitation against him

The High Court of Madras has added sub-rule 3 to this Rule under which when an appeal is presented out of time, the question whether the delay in filing the appeal should be excused or not should be decided before the memorandum of appeal is admitted <sup>20</sup>

9 Exclusion of time in seeking review of judgment

An appellant is not entitled, as of right, to the exclusion of the time spent by him in seeking a review of the judgment, in computing the period of hinatation for his appeal. But if the appellant can show that he had reasonable grounds for applying for review instead of preferring an appeal and that he had exercised due diligence, the time taken up by the review application may be excused under S 5 of the Lumitation Act in computing the limitation for the appeal.

10 Misdescription in the memorandum of appeal

The mere misdescription of an appeal as where, it is described as being an appeal from an order instead of its being described as one from a decree will not invalidate the appeal.

11 Grounds of objection

The general principle is in favour of the correctness of the lower Courts judgment and the onus is on the appellant to show that it is wrong 1 Accord-

(1896) 23 Cal 526 (531) (1897) 21 Dom 552 (555)

of time

[See also [1915] 1916 Lah 101 [407]
33 had Cas 1000 [1007] Appeal errose
ously return ed by appealiste Courter
for presentation to proper CourterTo
be deemed as filed in proper time in
expresented with due diligence)
[See also [1932] 1932 Cal 713 [713]
Appeal ngainst descree based inded ward under bona fide belief that
papeal lies—Appeal can be converted
into one from order said extension of
time may be granted]

(See also (1933) 1933 Lah 568 (569) Legal adviser a mistake to justily extension of limitation must be bona fide one that is it must be done with due care and attention—Where Law lay not excused and memorandum of

Note 9

1 (18:1) 15 Suth W R 61 (61) (1691) 14 Vad 81 (81 82) (1884) 7 Mad 584 (585 586) 2 (1993) 33 Cal 1323 (132a)

(1884) 7 Mad 584 (585 5°C) (1888) 15 Cal 242 (244) (1999) 2 Ind Cas 961 (96°) (Cal) (1886) 9 Mad 247 (248)

Note 10

(1907) 31 Bom 33 (36) Alpellant haring hnown that the correctness of course being pursued by him was doubtlut, delay not excused (1907) 34 Cal 216 (219) Mere madvertence

not enough (1922) 1922 Lah 233 (234) 2 Lah 1 Revi (But see (1890) 12 All G1 (63) (F B)
Apperl erroncously presented asap
peal from order was refused to be
converted into a peal from decree ]
Note 11
1 (1922) 1922 P C 33 (40) (P C)

ingly this Rule provides that the memorandum of appeal should state the grounds of objection on which the decree is attacked.<sup>2</sup> Such grounds should not be vague's but must raise specific issues.<sup>4</sup> R. 2 of this Order provides that where an objection has not been raised in the memorandum of appeal, the appellant is not entitled, without the leave of the Court, to raise it at the hearing.

It is open to the appellant to set up any circumstance showing that the Judge of the lower Court was disqualified to try the case.<sup>5</sup>

12 Grounds that may be taken in the memorandum of appeal for the first time

71 <et

The general rule is that the appellant cannot be allowed to raise in his memorandum of appeal, a new case, or a plea abandoned by him in the trial Court, or a case inconsistent with that alleged by him in the lower

(1921) 1921 P C 55 (56) 17 Nag L R 72

(P C) (18th 67) 11 Moo Ind App 177 (181) (P C) (1918) 1918 Cul 363 (368, 386) (1871) 18 Suph W 2020

(1571) 15 Suth W R 223 (229) (1576) 25 Suth W R 30 (31) (1 17) 1917 Lah 297 (300) 1917 Pun Re No

106 (1913) 19 Ind Cas 964 (966) (Lah) (1924) 90 Ind Cas 703 (704) (Oudh) (1925) 1925 Oudh 224 (224) (1924) 1924 Oudh 326 (328)

3 (1e95) 9 C P L R 81 (62) 4 (1923) 1923 Oudh 113 (113)

5 (1879) 22 Vand 155 (189, 160)
[See (1879) 3 Ca) L Rep 23 (24) If
party wishes to make misconduct of
Judge's ground of appeal, he ought
to draw Judge's attention to the
matter]

Note 12

1 See generally Note 55 to Section 100 (See also (1905) 24 IL Jour 485 (487)] (1902) 1932 P. C 95 (97) [P. C) Suit on negicence—Plannif in irral Court setting up a particular kind of negligence—Harunf alled to prove is, he cannot in uppeal ask. Court to find negligence on a quie different spe

1932) 1932 Cul 356 (362) 59 Cal 586 (1932) 1933 Cul 356 (362) 59 Cal 586 (1003) 1933 Cul 267 (268) Objection that

(1933) 1933 Lah 179 (182, 183) Plea of

that a certain defendant is a minor

not raised in the first Court and a decree is allowed to be passed— The

ples cannot be raised in appeal (1911) 10 Ind Cas 230 (231) (411) (1927) 1927 All 28 (35) 49 All 162 New ples cannot be raised for the first

plea cannot be raised for the first time in Letters Patent Appeal (1927) 1927 All 63 (65) Point deliberately

(1927) 1927 All 63 (65) Foint deliberately omitted to be taken in lower Court not allowable

135
[See also (1933) 1933 Lah 383 (384)
Question of fact raised in appeal on
which no evidence is on record
Appellate Court will not express op

nion]
2 (1921) 1931 All 197 (195) Plaintiffaccopting
decision of trial Court and not appealing—Cannot challenge in second

appeal
(1933) 1933 All 104 (106) Act admitted by
plaintiffs to have been done by defendant in official capacity in trial
Court—Admission not withdrawn in

Court especially when the opponent is thereby placed at a disadvantage 3 Nor can be tasse in his memorandum of appeal an objection which, if it had been taken in the lower Court, might have been cured, by appropriate cannot learned for first time in ap

tirst appeal-Question Long's mixed me tien of law and fact, High Const will refuse to allow plainliffs to the new pleato the effect that let was not clone in efficial capacity

(1911) 11 Ind C to 403 (409) (Lak) (1917) 1917 Lah 211 (2) (212) 30 Ind C es 181

(1926) 1926 VL J 1167 (1168) 0 VL 1d 10

(1926) 1926 Nig 160 (161) (1921) 1921 Oudh 41 (42) 24 Oudh Cr- 181 · (1J22) 1922 O idh 102 (10a)

suit on this ground] 3 (1921) 1921 P C 27 (29) (P C)

(1926) 1926 It C 18 (20) 53 In t App 64 49 Mad 24J (It C) (15J°) 15 \11 156 (187) \legalion that lo fendant was tenant preclude con

tention that he was trispasser (1598) 20 111 6 (10)

(1304) 26 411 331 (334) (1913) 1 1 I C 601 (002) (411) Smit 1 sed on iort ja je not allowed to be changed

into suit on charge (1J20) 1920 411 149 (14J) (1921) 1921 All 154 (155) (1886) 10 Itom 461 (467) 13 Ind App 66 (P.C) (1911) J Ind Cas 941 (942) 35 Bom 231

Her of separate oral agreement can not be conserted into one of fried (102J) 1929 Lone 114 (115) (1870) 13 Suth W R 10 (11) Sunt by a Hindu widow for possession and de

elaration of title-Defendant cannot uige for the first time in appeal that ly a family custom, femiles could not unherst

(1574) 22 Suth W R 502 (203) (1574) 22 Suth W R 216 (215 219) Incon

sistent plea of title by adverse pos session cannot be raised for first time in appeal (Sec also (1875) 21 Suth W R 441 (445)

Planeiff cannot succeed on title different from that alleged in the plunt]

(1879) i Cal L Rep 52 (54) (1881) 6 C 1 55 (58) Ljectment snit - De

fendant claiming adverse title in himself cannot in appeal contend that he is occupancy ryot and is such not liable to ejectment (1892) 19 C:1 507 (512) 19 Ind App 90

(P C (189J) 3 Cil W N 32a (328) A suit for pos

session based on frand cannot be converted on appeal into one for re demption

(190") a Cui L Jone 653 (662) (1902) 6 Cal W N 787 (791) Plea of fraud

I (1) (1905) 1 Cal L Jour 116 (115) Definition repadrating plantiffs title in a ejectment suit in the trial Co it -

In appeal la connot cet up e pha of ten may and want of notice

(1910) 5 Ind C1s 10 , (10°) (C11) (1910) 6 Ind C1s 520 (830) (C11) Frank alleged in first Court - Ph i cu not lechanged into that of mahance

ուաբթու (1920) 1920 ( 11 36 ( )7) (1925) 1925 Cil 341 (344)

(1926) 1926 Cil 55J (50) Actual 10. 0 100 pleaded but found ignost - Lon structure possession through the defendant cannot to set up f r the

first time in 1110 il (1917) 1917 Lah 220 (221) Cise soldi i id on hunds - Plumtiff cinuot in ft perlacek to rely on original can out

iction (1921)

for title

(1892) 15 Wed 503 (511) 13 Ind \1 n 173 (1909) 18 Mid L Joni 562 (JG3) Huntuf decree holder having instited right to retrable distribution in loner

Court cumoi un appeal demand en two sale morer le (1910) 6 Ind Ci. 423 (423) (Mid) Plantiff same only for partition cannot in second appeal le permitted to set up

new case in nature of easement

(1910) 7 Ind Cas JOS (JGJ, J70) (Mad)

tract of sile (1915) 1315 Mad 74 (75) (1925) 1928 Mad 962 (963)

(1916) 1916 Oudh 329 (330) (1913) 19 Ind C1s 347 (548) 3 \ 1g L R 3> Issue in lower Court whether mort

higo debt has ur has not been sitts fied- Plea that courser has no in terest entitling him to be joined 1; party to the suit cannot be rai ed

for the first time in appeal 19 Oudh Cas (1916) 1916 Oudh 313 (314)

166 Redemption suit - Defeudant plending in hist Court that he had the purchased the equity of re demption - He cannot in appart

amendments or otherwise <sup>4</sup> Thus objections as to joinder of parties or causes of action which might have been cured by amendment even in the trial Court caunot be raised for the first time in the memorandum of appeal <sup>5</sup> Vagan there are certain objections such as those relating to the place of sung or the valuation of the suit that cannot under the specific provisious of the statute be raised for the first time in appeal <sup>6</sup> see <sup>5</sup> 21 of the Codo and 5 11 of the Suns Valuation Vet 18871 Such objections therefore cannot be allowed to be raised fo, the first time in the memorandum of appeal <sup>6</sup> In objection that a declaratory decree cannot be passed with respect to a finite much than the original part will not also be allowed to be raised for the first time in the immorran-

The following are however, recognised as exceptions to the general rule that a new case cannot be raised for the first time in the memorandum of appeal —

- (1) Objections as to jurisdiction apparent on the face of the record 8
  - 2) Hers going to the root of the case and which are obvious on the inte of the record 9 such as non-joinder of essential parties, 10 or want of notice to quit, 10 or insufficiency of notice in suits for foreclosure 12

11 11 thu there has been at recto ite (1416) 1416 Par 357 (35\*) Hantiff claim

ing direct to eston connect in applical allege I se ston through cohorers

(1:13:11:12:11:15:16:137)

dum of appeal 7

I

4 1.1.17.3 ln 1 C 1 9 T (Lnh)

Sign 1 o (1934) 194 Outh 55 (4) 9

1 ock 565 Objection that suit is
breed under S 47 C P C [

> (15/3) =0 Cal 1 (6) 10 1nd 4pp 221 (PC) (18", 1 Suth W R ">9 (38)) [Sec. also (1°0) 26 Mad 363 (364)

With Indice is required by 8.93 i the Rent Recovery Act (Midris t VIII of 1805) should be pleaded in 11 into it cannot be illowed in 12 incompany and 13 incomp

0 (15 ) 4 Cil I Rej 4 1 (4 f) 5 ( 1451 (1870) 14 Suth W R 19( 6) 60

(18:0) 14 Suth W R 19: (1:6) (1912) 16 Ind C1s 46 (47) (C11) C1 e turn ing on S 11 of Suts Vibration Act

(1831) IJ All 165 (165) Cre lining on S 12 of the Court fees Act

(15%) 24 Suth W R 225 (226) (1316) 1316 Up Bur 2 (3) Objection as to stanta

(1857) 11 Bom 320 (324) Reception of in admi sible document in evidence

(1° 01) 49 C 11 142 (145) (Do) (1881) 6 C al 666 (670) (Do)

(1801) 1 Suth W R 12 (12) (Do) (1801) 2 Suth W R 237 (238) (Do) (1876) 25 Suth W R 80 (50) (100) (1878) 23 Suth W R 170 (170) (100) (1910) 6 Ind Cas 1006 (1007) (1 nh) (100) (1900) 4 Ind Cas 10x6 (10xx) (U L) (100) (1000) 4 Ind Cas 522 (843) (11h) (100)

7 (1593) 17 Eom 197 (270 \_21)

S e generally Nete 33 to Nection 100 (1869 66) 2 Boun 11 C R 40 (45) \*(1334) 1934 Oudh 53 (55) 9 Ench 703 (1864) 1 Suth W R 253 (200) (1880) 5 Cal 489 (492)

(1924) 1924 Cil 233 (233) 50 Cil 245 Louit though ibandoncil in trial Court can le rused in [1] (litt. Court [See also (1880) 1 Mil 112 [114]]

[See also (1850) 1 Mal 112 (114) ] (1555) 11 Mal 137 (133)

(1918) 19 In 1 Crs 130 (131) (Lah) Objection 1 to place of sinur, chind be all lowed indust there is consequent fulure of justice

9 See jenerally Nete 55 t Nett 1 100 [See also (1863) 11 Suth W R 40(41) V[] trust defect in [Junt—Of Jection can be used at invistage?

10 (16Jb) 18 VII 109 (112)

11 (1834) 15 bont 110 (114) (1859) 12 Vad 353 (354)

12 (1883) 11 Cal 111 (115) 11 Ind App 186 (P C) 1.

(3) Questions of law<sup>13</sup> such as a question of limitation<sup>14</sup> or of respudicata<sup>15</sup> which can be substantiated on the facts already on the record

13 When appellate Court may not interfere with findings of fact

In Bombay Cotton Manufacturing Co v Moti Lal, their Lordships of the Privy Council observed as follows —

On uppeal the whole case including the facts are within the jurisdiction of the appeal Court. But generally speaking it is undesirable to interfere with the findings of the final Judge who sees and hears tho witnesses and has an opportunity of noting their demonstrate especially in cases where the issuo as simple and depends on the credit which attached to one or other of conflicting witnesses. Nor should his pronouncement with respect to their creditality is put wide on a mere calculation of probabilities by the Court of appeal.

In Prasanna Moyce v Barkunthnath,2 the Calcutta High Court observed as follows --

Two conflicting view points have to be reconciled namely on the one had the undoubted duty of the Court of appeal to review the recorded endence and to draw its own intercures and conclusions and on the other hand, the unquestionable weight which must least attached to the opinion of the Judge of the primary Court who had the advantage of seeing the witnesses and noticing their look and manner.

See also the following cases 3 (See also Ss 100 and 103)

(1863) 1963 Marsh 276 Note 13

(1878 80) 2 All 554 (553) Invalidity of document on the ground of registration

(1J25) SS Ind C15 392 (992) (Mad) (1917) 1917 Oudh 143 (144) (1923) 1923 Pat 423 (429) 2 Pat 469

(1914) 1914 Ca) 484 (485) (1925) 1925 Oudh 435 (427) (1866) 8 All 548 (550) Objection as to the

validity of an award on the ground that it was made beyond time can be laised in alread for the first time

14 (1897) 14 Cal 592 (594) (1865) 2 Suth W R 45 (45) (1914) 1914 Luh 210 (210 211) (1912) 14 Ind Cas 1008 (1008) (Luh) (1866) 3 Mad H C R 258 (259)

(1883) O Cal (38 (637) (1888) O Cal L Rep 207 (2029) (1907) I7 Mad L Jour 281 (282) Plea of exemption under S 14 of the Lumi tation tet cannot be allowed to be raised in appeal (See also (1933) 1933 Pat 224 (22-) 12 Pat (261 Plea of special limitation

12 Paj 261 Ples of special limitation neither taken nor urged in Lower Court— High Co irt will consider it only so far as it is question of Law 22 door a question of fact ] 15 (1899) 21 All 446 (448)

15 (1899) 21 All 446 (448) (1933) 1933 Ondh 104 (106) (1865) 3 Suth W R Act \ 146 (147) 2 (1972) 1922 Cal 260 (267) 49 Cal 132 3 (1863 G6) 10 Moo Ind 11p 429 (486 487) (P G) 1plellate Corrt must weigh the whole syndence and come to an

independent conclusion
(193a) 193a Cal 168 (1°4) 61 Cal 100.
Question of state of mind of a lait,
is one of fact — Finding on such
question by thin Court will not be

is not

Where
rect principle Court of appeal will
not and ought not to interfere with
exercise of discretion by lower Court
(1935) 1935 Rung 39 (42) Api ellut Court
should not ordinarily differ from
tral Court on question of credibility

of witnesses (1996) 1996 Paner 191P (1

(1874) 1874 Pun Re No 7, page 229 The appellate Court in a regular appeal is as much the Judge of the facts as

in whose presence they gave evi

14 Competency of appeal

T

Where leave to appeal has to be obtained before pieferring an appeal, the memorandum of appeal should be accompanied by a petition for such leave 1 An objection as to the maintainability of the appeal should be considered by the Court, though it was not raised in the first instance by the respondent's pleader 2 See also the following cases 3 Where a party has accepted the order of the lower Court as correct and his enjoyed the benefit thereor he will be estopped from appealing against the same 4 (See also Notes under S 96)

### 15 Conselidation of appeals

A Court has inherent power to consolidate suits or appeals in proper cases. But this cannot be done so as to affect the provisions of the Court-Fees. Act or of this Code. Thus several appeals in cases disposed of by one judgment cannot be consolidated so as to enable the appellant to pay Court-fee on the value of the consolidated appeals and file only one valual? Where one decree only was passed in two appeals preferred by two sets of defendants against the decree of the trial Court it was held that one second appeal was enough?

## 16 Stamp on memerandum of appeal

It has been seen in Note 2 to S 149 auto that the institution of a suit or other proceeding will not be a legal institution if the fee chargeable under law is not peak at the time of the institution but that Court may urder the provisions of S 149, allow the payment of the stamp fee at any stage u d thus addate the institution A memorandum of appeal which does not bear the proper stamp-fee prescribed therefor is not validly presented, unles the Court allows under S 149 the fee to be pead subsequently tables.

lence

(157: ") Suth WR "63 (364) It is an error i law to d shelieve wit seess believed by the original Court in the shence i sufficient grounds for doing so

(19° s) 1925 Pat 68 (04) Where the opinion f the trait Court depends not on the honest of the winesses but upon cason, which the appellate Court unnot ac rpt it is obviously the 1 t of the appellate Court to set d the till Courts finding of fact

(10%) 1025 Pang 308 (30J) 3 Rai g 177 Pailure of tiral Judge t discuss exidence — Appellate Court can reverse finding

(19°5) 1325 Sind 16 (16) Commission evi better

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cleur grounds (1x\*2) 18 Shith W R 452 (453) (Do) (19\*3) 1923 Mid 103 (104) Demeanour of withe see 18 not invariable 8 safe guide to the truth of their explence Note 14

1 (1916) 1916 111 849 (8.0) 2 (1891) 18 Cal 469 (472)

3 (1930) 1930 Cal 748 (749) Non joinder of non contesting latties—Allead held maintainable

(1917) 1917 Lah 28 (74) 1916 Pun Re No 99 4 (1917) 1917 Cal 546 (64")

Nete 15,

1 (1930) 1930 Mad 376 (SS1) 53 Vad 248

(1929) 1979 Nag 279 (231) 20 Nag L R 193 2 (1930) 1930 Nad 376 (381) 53 Nad 248

3 (1939) 1932 Vind 689 (691) Note 16

1 (1913) 19 Ind Cas 971 (9:2) (Cu) (1932) 1932 Cul 482 (485) 59 Cul 388 The memorandum of appeal should in

memorandum of appeal should to such a case be at once returned to the parts (1890) 12 Vit 120 (142) (F B)

(1890) 12 Alt 129 (142) (F I 12 See Notes to S 149

[See also (1906) 28 All 270 (272)

[See also (1938) 1933 All 572 (573 574) Memo of appeal presented on last day of limitation on insufficient stamp—On report by office deficiency

stamp—On report by office deficiency made up—Single Judge allowing to receive deficiency—Rinch admitting 1

Under S 5 of the Court-Fees Act, 1870, the decision of the Tring Officer as to the Court-fee required is final. Where however, no such decision has been given by the Faving officer, the respondent can raise the question at the time of the hearing of the appeal.

In order to see which part of the decree is the subject of appeal before it, the appellate Court must look at the memorandum of appeal and not in the stamp fee affixed thereon 3 Nor, where a memorandum of appeal is misufficiently stamped can the Court grant a relief proportionate to the strap affixed 4 As to the amount of fee leviable in appeals, see the Court-Fees Act, 1870, and the undermentioned cases 5

# 17 Refund where memorandum is over stamped

The Court has inherent jurisdiction in a fit case to order the refund of textes Court fee paid on the memorandum of appeal. But the Court can only grant a certuicate to the appellant authorising him to receive back such excess. The appellant should thereafter apply to the Collector for refund of the Court-fee. See also S. 13 of the Court-free Act.

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lool pipmet indicase coming for
beining-Pichman irv objection that
uo vilid a peal blel-Dider of single
Judge held could not be pussioned
it such lite stage
(133-131) Oudh 231 (232) Apeil filel

with no Court fee stimp cinnot be deemed to be unlits 1 (1518) 21 Mid 260 (2 0)

[But ee (1633) Is til 117 (118) ] 3 (1565) 11 All 3s (3s)

4 (1868) To Suth WR 242(1)(742) But where the applicant his valued his appeal at a perticular imount he cannot be awarded a larger amount

[See (1303) 30 C-1 501 (502)]
5 (1503) 12 Suth W R 443 (449) Stromp vitue
mry be made up by several stromp.
(1902) 6 C-11 W W 657

(1893) 16 Mid 910 (911) Decree directing

is one entire claim and not two dist

Reference under the Court fees let

1570 --(1534) 16 All 401 (406) (Do)

(1899) 21 All 304 (300) Apoil from the order of a District Judge as to the disposal of compensation in a land acquisition of a must be stamped as an appeal from an original decice. I openior and Court fees let \$5.5.

is not chargeable under the Court

(1995) 17 VII 278 (210) Vited from order under S 214 of het VI of 1893 (Indian Companies let) is properly stampel with a Court fee of Rs 2 (1985) 7 VII 565 (667) Decision of digital visits of the court fee of Rs 2

1989 7 111 50; 4,667) Decision of a line under S 862 B of the Civil line dure Code of 1882 — tiped from decision—id laterem Court lee IV

(1885) 7 VII 761 (763) Suit for profit—Apperl — Court fee to be eliculate for aggregatio innount of profits claimed and not separately on the profits claimed limited for each year.

(1885) 8 Mid 22 (21) Repetion of clum is Forest Settlement Other - Mr. 11 to District Court under 5 10 (4) of Midris Loiest Act of 1852 — Art. 17 (6) and not Art. 11 (1) of Sch. 2 up plied

(182) 5 Cal 707 (709 709) Smit for partition separation and kins po esson of that share after separation— Art 17 (6) Sch. 2, Court less Act applies

(1998) 21 Mad "71 (372) We no profits all equent to institution of suit left to be determined in execution."

No Court fee on such messic 12 little

(1893) 16 Mad 415 (418) Sunt for it letip tion and for irrens of tent - liters

Note 17 1 (1918) 1918 Pat 496 (496) 3 Pat L Jour

452 (1932) 1932 Mad 438 (439) 55 Mrl 641 (1933) 1933 Oudh 170 (170) 7 Luck 573 (See also (1870) 14 Suth W R 47)

2 [See [1920] 1920 \11 51 (50)] (1932] 1932 Mad 438 (439) 55 Mad 641

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18 Applicability of the Order to other proceedings

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It has been held by a Full Bench of the High Court of Midias! that the provisions of this Order apple vides to Original Sude appeals in the auditmentioned cases it was held that appeals under S 476 B of the Code of Criminal Procedure should also be treated as exil appeals regulated by the provisions of this Order

The provisions of this Order apply to proceedings under the NWFP Lay and Justice logishion All of 1901 5 89 and the Punjab Pre emption Act 101913 S 29 See also the Agra Tenanica Act 111 of 1926 Sch 2

R. 2. [S 542] The appellant shall not, except by lewe of the Court, urge or be heard in support of any around of objection not set to their the memorandum of appeal but the Appellate Court, in deciding

the appeal, shall not be comined to the grounds of objection set torth in the memor andum of appeal or taken by leave of the Court under this Rule

Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufferent opportunity of contesting the case on that ground

Synorsis

New case in appeal Sec Note 12 to R 1 1
Change of case in appeal Sec Note 17 to R 1
Point not set forth in the memorandum of appeal 3

Leave of Court to raise new point

Point of limitation
Point of jurisdiction
Appellate Court shall not be confined
by leave of the Court
Party affected must have had an oppor
tunity of contesting the case

### Other Torics

Al allocated tor wanter-Warring objection in to a Count-I flect. See Note 12 to R 1

Applied Cut Whetherem et up a new cir See Note 7 It (?) Inconsistent please Note 12 Pt (3) to 9. X

Object u us to thin thirty of a lo mment See Note 12 Ft (6) 11 R 1

Objection as to join der of pirties in leannes of action. See Note 12 Pt. (s) in R. 1.
Plens 1 of allowed in opject See Note 1?
Pts. (1) to (1) in R. 1.
Plens of tw. See Note 1. 1. (s) in 1. (d)

Plea of I'm See Note 4 It (2) unlide Note 12 Pt (12), w. R. I. Itea of limitation See Note 2 Pt (4) and also Note 12 Pt (4) a. R. I.

l New case in appeal -- 5 Note 12 to R 1

2 Change of case in appeal -5 Site 12 to R 1

3 Point not set forth in the memorandum of appeal

The penalty for not raising an objection in the memorandum of appear is that the appellant will not be entitled as of right to urge such an objection

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17 Refund where memorandum is over stamped

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4 (1-6-) 10 Suth W R 42(1)(242) But where the Hellint has valued his ipped at a preficulty mount he connot be intite? I lurger unount [5ce (1903) 30 Cul 501 (502)] 5 (1862) 12 Suth W R 440 (449) Stimp value

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(1534) 16 411 401 (406) (130) (15J9) 71 411 3J4 (3J5) 411er from the

order of a District Judge as to the distoral of compensation in a land acquisition case must be stumped as un uppeul from an original decree I eference under Court fees let 5 5 -

(1539) 22 Vid 162 (163) Apeal to Governor in Council igainst decision of the Governor General's agent at Azzigi latum and referred by the Govern nent to the High Court for disposal, 15 1 at chargeal le under the Court fees Act Laference unter 5 29 of let VII of 150

(1596) 17 111 2"5 (240) 111eil from ( 1 5 under 5 714 of Act VI of 1992 (Indian Companie Act) is li lath dampel with a Court fee of R 2 (1970)

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(1555) 7 111 761 (763) Suit tot 110fit-11 jeil - Court fee to le cilculated on aggregate emount f profits class ! and not separately on the profits clume ! for each yen

(1855) 8 Mail 22 (24) Rejection of climn by Lorest Scitlement Officer 411 - 1 to Instruct Court under 8 10 (2) of Midras Lore t let of 1592- 11t 17 (c) and not hat 11 (a) of Sch ? 1]

[1582] 9 Cil "57 (158 "59) Smit for 1 nin tion separation in l king jo is sion of that shap after set it illon-Let 17 (6) Seh 2 Court fee let 12

(189-) I Wed 371 (377) Me ne 1 hts sub-equest to institution of the left to be determined in executi a -No Court fee on uch me 1 e ; ht

(1593) 16 Und 415 (415) Sunt for ic lent tion and for process of sout- braces n t

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1 (1918) 1918 Pat 496 (496) 3 Lat L Jour 159

(1932) 1932 Nad 433 (483) 32 2010 All

18 Applicability of the Order to other proceedings

1

It has been held by a Full Bench of the High Court of Midias1 that the provisions of this Order apply also t Original Side appeals. In the u dermentioned cases it was held that appeals under S 476 B iil the Code of Crammal Procedure should also be treated as civil appeals regulated by the provisions of this Order

The previsions of this Order 11ph to proceedings under the NW FP Lay and Justice Kigulation VII of 1901 S 89 and the Punjab Pre emption Act 1 of 1913 S 29 See al o the Agra Tenuncy Act 111 of 1926 Sch 2

R. 2. [5-542] The appellant shall not, except by leave of the Court nige or be heard in support of any te til i tili ground of objection not set forth in the memoriandum of appeal but the Appellate Court, in deciding the appeal shall not be confined to the grounds of objection set torth in the memorandum of appeal or taken by leave of the Court

Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground

[1877—S 542, 1859—S. 334. Cf S. 100, O. 6, R. 7 and O S. Ri Sand 91

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Sole So New case in appeal he Note 17 to R 1 1 Change of case in appeal ore Note 12 to 2

under this Rule .

Point not act forth in the memorandum of appeal Leave of Court to raise new point

Note No Point of limitation Point of jurisdiction Appellate Court shall not be confined by leave of the Court Party affected must have had an oppor

tunity of contesting the case

### Other Iomes

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3 Point not set forth in the memorandum of appeal

The penalty for not raising an objection in the memorandum of appear is that the appellant will not be entitled as of right to urge such an objection

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Under S 5 of the Court-Pees Act, 1870, the decision of the Trung

Officer as to the Court-fee required is final. Where however, no such decision has been given by the Faxing officer, the respondent can raise the que too at the time of the hearing of the appeal 2

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decined to be unlitte 9 (1898) 91 Mail 269 (270) (But cc (1899) lo 111 117 (118) ] 3 (1-88) 11 111 % (25)

4 (1-65) 10 Suth W R 242(1)(242) But where the appellint has valued his appeal it i luticulia amona t he camot be 

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is not chargeable under the Court fees Act Reservace under > 28 of let 1 II of 1570

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Note 17 1 (1918) 1918 Lat 4JG (4JG) 3 Pat L 452

(1932) 1932 Med 488 (439) so Med 641 , (1933) 1933 Oudh 170 (170) 7 Luck of [See also (1870) 14 Suth W R 47 2 [See (1920) 1920 Alt 54 (50)] (1932) 1932 Mad 438 (439) 55 Mad



**1** Under S 5 of the Court-Tees Act, 1870, the decision of the Taxing Officer as to the Court fee required is final Where however, no such decision has been given by the Faxing officer, the respondent can raise the question at the time of the hearing of the appeal 2

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4 (1565) 10 Soth W R 742(1)(747) But where the appellant las valued his appeal it a partienta amonat he cannot be

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(1895) 17 VII 2"5 (240) Vijed from id 5 under 5 214 of let VI of 15 1 (Indian Coupruse Act) i poperli stampel with a Court fee of R

(1953) T 411 of s (567) Decision of a just under S 367 B of the Civil 1 dure Code of 1582 - 121 if from dect tou- Il talorett Court ! 11

(1885) T 411 761 (763) Suit for profit -- 1 pest - Court for to le cilculate l'on iggregate minors t f profits chime! claime I for each year

(1950) 8 Mad 22 (24) Rejection of claim by Porest Settlement Officer 411 it to District Court unler S 10 (7) of Wider Torest tet of 1852 - Art 17 (6) and not hat 11 (1) of Sch 2 4 [ lied [ 158] \$ Cil 757 (158 (50) Suit for 1 att

tion separation and klins jo c ion of that shine after sel minion-Art 17 (6) Sch 2 Court fee Act apr t hes

(1999) 1 Mid 371 (379) Meie 1 1hts sub equent to institution of suit

(1893) 16 Vid 326 (327 3%) Suit to it liem 1 ortion of mort, to Cont fee should be extend ited on the 11 portionate part of the mortgage amount

Note 17 1 (1918) 1918 Pit 436 (496) 3 1 it L 3cur

(1932) 1932 Wail 439 (439) 55 Wid 64t (1933) 1933 Ondh 170 (170) 7 Luck 57

[See also (1870) 14 Suth W R 47] 2 [See (1920) 1920 All 54 (55)] (1932) 1932 Mad 438 (439) o5 Mad 641 18 Applicability of the Order to other proceedings

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[1877—\$ 542, 1859—\$ 334. Cf. \$ 100, O 6, R 7 and O 8 Rt 5 and 9 ]

#### Synopsis

3

New case in appeal 5 c \ote 12 t > R 1 1 Change of ease in appeal 5 c \ote 12 t > R 2 1 2 t > P 1 2

Point not act forth in the memorandum of appeal Leave of Court to raise new point Point of limitation Point of jurisdiction

Appellate Court shall not be confined by leave of the Court Party affected must have had an oppor junity of contesting the case

# Oll er Topics

All 10 neit or waiver-Williams objection in some Court-Effect See Note 12 to 1 to Appellate Can the Whether can set up a no.

"Appellate C a t-Whether can et an a nos ser la (6) Inconsistent plea ser la 12 tr (3), R 1
Olycota nost alla ishita fa do ement see la 12 f (6) m R 1

Objection is to 1 ther of pirtues and conse of action See Note 1? Pt (2) in R 1
Pless not illowed 1:1 ppend See Note 12
This (1) to (1) in R 1
Pless of law See Note 4 1 ts (2) and il o

Note 12 14 (13) is R 1

Her of lumitation See Note 5 14 (4) and also
Note 12 14 (14) in R 1

- 1 New case in appeal -5 Note 12 to R 1
- 2 Change of case in appeal -- 5 c Note 12 to R 1
- 3 Point not set forth in the memorandum of appeal

The penalty for not raising an objection in the memorandum of appeal is that the appellant will not be entitled as of right to urge such an objection

If the Court can order reful to of Court fees paid in excess — It is for revenue authorities to decide whe thereto pay

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Note No

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at the hearing of the appeal though he can do so with the permission of the Court 2

4 Leave of Court to raise new point

The Court has under this Rule, a direction to permit a new point, not raised in the memorandum of appeal, to be raised and argued at the hearing <sup>1</sup>. The leave may however, be express or implied <sup>15</sup>. But, unless such permission is taken the Court will not allow such a point to be argued at the hearing <sup>15</sup>. The mere fact that the respondent has had notice of the fact that the appellant intends to raise such point at 156 bearing cannot dispense with the Court's permission under this Rule <sup>2</sup>.

The Court will refuse to permit a new point to be argued where at the time of taking it, the period of himilation for the appeal had expired and where the allowing of such a point to be argued would practically amount the appealant to set up a new appeal. But where the point sought to be raised is involved in the points already raised in the memorandium of appeals or is a question of law depending on no new facts except those already on the records or is a point to which the other side cannot legitimately raise an

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1 (1924) 1024 111 fay (142)

(1926) 1926 Lth 11 (12)

(1928) 1922 Mad 11 (11)

(1929) 1929 Mad 573 (674)

(1926) 1929 Mad 573 (674)

(1926) 1929 Mad 573 (674)

(1921) 15 Ind Cas 576 (141)

(1911) 15 Ind Cas 576 (141)

(1920) 1920 Cal 106 (1072) (Oodl)

(1920) 1920 Cal 106 (1072) (Oodl)

(1920) 1920 Cal 106 (1072)

(1921) 17 Ind Cas 932 (238) (Inh)

(1922) 17 Ind Cas 937 (249) (Inh)

(1922) 17 Inh Cas 937
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Mad 856 Point as to jurisduction of executing Court not raised in lower Court—Nor in grounds of appeal from order—buch plac acamot for first time be raised in appeal]

2 (1918) 1915 Jan 449 (460)

(1921) 1921 A11 357 (339) 43 A11 193 (1900 1902) 1 L B R 184 (185) (1895) 8 G P L R 81 (82) Note 4

1 [See also (1923) 1973 Lah 115 (116) 3 Lah 382] [See also (1933) 1933 Lah 738 (739)]

Order 41, Rule 2- Note 3

1a (1931) 1931 Rang 314 (315) 1b. (1902) 29 Cal 355 (357) Especially a tech

1032) 1932 All 174 (176) (1932) 1932 All 174 (176) (1933) 1933 Lah 447 (447) (1869) 12 Suth W R 33 (34) (1919) 1919 Cal 358 (359) (1909) 3 Ind Cas 510 (511) (411) (111) (111) (111) (110) 6 Ind Cas 611 (651) (Ind.) (1916) 1916 P O 245 (546) (P C) (1918) 1918 P O 154 (1456) P O 1919 I un Re No 82 (P C) (1924) 1924 All 918 (1919) (1927) 1927 All 231 (292) 49 All 50 22 (1925) 1925 Pat 57 (59) 3 Pat 518 (1919) (1921) 1921 Lah 232 (229) (1916) 1916 Lah 452 (453) 1916 Pun Re No 7 (See also (1923) 1932 Lah 414 (416)

(1880 81) 5 Bom 621 (627)

[See also (1982) 1932 Lan 144 (119)

[See also (1891) 1891 All W N 100 (100) Pleas of invalidity of remand

> Unred uld not a time

of arguments]

objection on the ground of surprise 6 the Court may grant the appellant leave to raise it. The Court should, however, grant the permission only on such terms as would indemnify the opposite party for the loss caused to him by reason of the failure of the appellant to raise the point in time?

#### 5 Point of timilation

Under S 3 of the Limitation Act a Court is bound to reject a suit or appeal if it is barred by limitation even though the bar of limitation may rot have been raised in the pleadings 1 But this section does not apply where the plea is not that the appeal before that Court is barred by limitation but that the suit or appeal in the lower Court was barred by limitation 2 Hence, unless a plea that the suit or appeal in the lower Court was barried by limitation is taken in the memorandum of appeal preferred to the lugher Court under R 2, it cannot be urged at the hearing of the appeal without the leave of the appellate Court 3 As a general rule, the appellate Court will permit a point of himitation though not raised in the memorandum of appeal, to be raised at the hearing of the appeal, where it is apparent on the lace of the proceedings and does not involve any new question of fact 4 But it will not do so where such a plea involves an investigation of further facts 5

6 Point of jurisdiction

A point of jurisdiction not involving an investigation into other facts than those on the record will be allowed to be raised at the hearing of an appeal, though it was not raised in the memorandum of appeal. Thus a plea as to the jurisdiction of the Court to make a reference to arbitration or a plea as to the competency of the Court to grant the relief claimed2 or a plea of res judicata3 or a plea that the plaint does not disclose a cause of action against the defendants can be permitted to be argued at the hearing of the appeal.

by leave of the Court Appellate Court shall not be confined

An appellant is confined to the grounds set forth in the memorandum of appeal or taken at the hearing with the permission of the Court He

6 (1910) 8 Ind Cas 990 (991) (L B) can be decided without any further

6 (1910) o and case 500 (685) (15.50) 13.41 580 (581) (1931) 1931 Lah 390 (391) Lasse question on the face of the pleadings clear 7 (1911) 11 Ind Cas 497 (498) 38 Cal 629 G L B R 18 (P C)

Note 5 1 (1°02) '3 C41 167 (185) 29 Inc 1903 Pun Re No 25 (P C) 29 Ind App 51

2 (1884) 8 Bom 33 (537)

3 (1903 1904) 2 L L R 237 (239) (1902) 25 Mad 867 (378) 29 Ind App 76 (P C)

trial Court can be raised by defen

(1920) 1920 Cal 846 (848) (1916) 1916 Mad 535 (535) (1913) 18 Ind Cas 445 (447) (Lab) (1911) 13 Ind Cas 792 (794) 1911 Pun Re 18 of

(1929) 1929 Lah 432 (437) (1924) 1924 Lah 468 (469) (1921) 1921 Cal 661 (672) Note 6

1 (1919) 1918 Cal 336 (337) 2 (1920) 1920 Cal 239 (239 240) 47 Cal 733

(1933) 1933 All 892 (393) 3 (1831) 11 All W & 10 (11) See also Feot note (5) Note 4, above 4 (1039) 21 411 341 (315) (F L)

1911 Pun Re No 81 But appellate Court has option of refusing to listen to plea of limitation even though it cannot advance at the hearing a point not so raised or taken. But the appellate Court is not confined in deciding the appeal to the points so raised or taken It is cutified to base its decision on grounds neither set forth in the memo rai dum of appeal nor taken with the leave of the Court 1 Thus it can suo motu trase a point of hmitation2 or of jurisdiction3 apparent on the face of the record and decide the appeal on that point. Where alternative grounds of appeal are raised it can go into questions which are admitted for the purpose of an alternative argument and give a finding against the appellant 6 But a party cannot claim as of right that the Court must exercise power given under this Rule 5

The power given to the appellate Court under this Rule does not extend to the making out a new case for either party and to grant them rehef on that basis6 or to go behind a hiding of fact which is accepted by the appellant? or to interfere with a part of the decree which is not appealed from 8 Thus in an appeal by the defendants where there is no cross objection by the plannift the appellate Court cannot while dismissing the appeal, enlarge the relief granted to the plaintiff by the lower Court 9 The Court will not also be justified in taking up a new question under this Rule unless there can be no reasonable doubt on the record that the evidence on the new point had been completely given on both sides of the point is a pure question of law and it is expedient in the interest of justice to consider and decide it 10 An appellant can give up any of the grounds of appeal at the hearing11 and the appella c Court is bound to give a decision only on those pleas which are urged and argued to

8 Party affected must have had an opportunity of contesting the case

Although in appellate Court can under R 2 decide the appeal on a poin not raised in the memorandum of appeal or raised at the hearing of the

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(1675 20) 7 411 884 (857)
       But see (1969) 11 Suth W R 3.0
      (951) Such a plea does not rue a
      i testion of ruis liction]
              Note 7
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1 (137) 17 411 250 (281) [Sec [1919] 1918 Oudh 269 (270)]

2 (1808) 10 Suth W R 71 (71 72)

3 (1831) 13 111 37 (576) (1577 74) 3 Cal 612 (615 616) Hegalite of

But see (1875) 23 Suth W R 40% (40)) Objection to purediction not in ed in first Court-Suit tried on ments- ippellate Court cannot of

its own motion rat elsage as to juris diction lut upi est must be heard ou merats

4 (1921) 1921 Lah 201 (202)

5 (1891) 13 MI 391 (382 353) 6 (1893) 17 1 om 772 (773 774)

(18J1) 1891 Boni P J J1 (92) (1J2 ) 1J77 Cit 96 (87) (1918) 1918 Cal 686 (6ar) (190 ) 2041 W N 460 (103) (190 ) 2 041 W N 460 (103) (14,2) 17 Suth W R 407 (408) (1472) 17 Suth W R 881 (802) (1463) 2 Suth W R 2 (3) (1867) 7 Suth W R 61 (62) (1975) 24 Suth W R 268 (208) (1913) 18 Ind Cas 795 (735) (Lab) (1927) 1J27 Lali 96 (96) (1905) 1905 Pun Re No S9 pige 273 (1925) 1925 Mad 357 (377) (1894) 4 Mad L. Jour 14 (16) 17 Mad 69 (1913) 13 Ind Cas 411 (416) 1313 Pun Re

(1927) 1927 Lab 231 (233) (1909) 33 Rom 35 (38) 7 (1921) 1921 Lab 182 (183)

No 20

(1671) 16 Suth W R 300 (301) 8 (1911) J Ind C is 121 (122) (Cil) 9 (1870) 2 N W P H C R 14 (45)

10 (1920) 1920 Vind 83 (91) (1918) 1918 Lah 88 (95) 1918 Pan Re 31 Comt of law can be raised by appellate Court suo m to

the widow had in effect re married 11 (1315) 1915 Oudh 193 (194) 50 Ind C is 207 (20%)

12 (1921) 1921 Lah 229 (291) [See however (1869) 6 Hom H C R (1 C) 9 (11 12)

appeal with the permission of the Court, it cannot do so unless it gives an opportunity to the party affected thereby, to con est the case on that point 1

R. 3. [S. 543.] (1) Where the memorandum of appeal is Rejection of amend of the memoran the manner hereinbefore dament of memoran dam to the appellant tor the purpose of heing amended within a time to be fixed by the Court or be amended then and there.

(2) Where the Court rejects any memorandum, it shall record the reasons for such rejection.

(3) Where a memorandum of appeal is amended, the Judge, or such officer as he appoints in this behalf, shall sign or initial the amendment.

[1877—S, 543; 1859—S, 336, Cf. O. 7, Rr 10 to 13.]

# ALLAHABAD Local Amendments

Substitute the following for ni ink (1)

'8 (1) Where the memorandum of apped with the wanner herom before pre-crited or accompanied by the copies mentioned in B 1(1) it may be rejected or where the memorandum of apped is not drawn up in the manner 10 crited; it may be returned to the appelliant for the purpose of long amended within a time to efficiel by the Court or be amended then and there.

OUDH

ī

I as sub rule (1) substitute the following -

3 (I) When the memorandium of a pread is not deawn up in the minuter latter lefter presented or accompanied by the copies mentioned in R 1 sub rule (1) it may be rejected or where the memorandium of typel is not driven up in the minuter prescribed it may be returned to the appoint for the purpose of being mended within a time to be fixed by the Court of a commoded them and there

### Sunonne

May be rejected 1 Scandalous matters 4 Properties 2 Appeal 2 Second appeal 7

#### Other Lones

Appellate Court 1 2 as trial Court See A 14.1 Pt (2) and S 107

# 1 May be rejected

The power to reject a memor indum of appeal under this rule is initied to cases where it is defective in point of form or in respect of the grounds which it must contain. It cannot be interpreted as enabling the Court to reject a memorandum of appeal on the ground that it is ansufficiently

Appellate Court is not justified in Note 8 holding that a touch has leen along the table has not justified in 1 (1914) doned incret), because the value has not appeal to the specified in the sp

stamped1 or on the ground that it is barred by limitation 14 But independently of the provisions of this rule, the Court can, under O 7, R 11 read with S 107, reject an appeal if it is not sufficiently stamped provided that an opportunity is given to the appellant to make good the deficiency and he fails to do so within the time fixed 2 See S (2), Cl (2), Note 13, O 7, R 11 Notes 6 and 11 and O 7, R 13, ante

The rule does not impose any duly on the appellate Court to examine every memorandum of appeal immediately on presentation, and add proper parties if the appellant neglects to do so 3

The Court can evercise us power of rejecting a memorandum of appeal under this rule at any stage4 though, as a general rule, the proper time to do so would be the time of its presentation and not after it has been admitted 5

Or be returned to the appellant for the purpose of being amended '

Where the memorandum of appeal consisted of two documents, one, in the vernacular, containing the names of parties, and signed by the appellant, and the other in English containing the grounds of appeal but not signed by the appellant, it was held that the defect, if any, could be remedied by an amendment under this rule 1 A memorandum of appeal which merely states that the proceedings of the lower Court are irregular and contrary to law is too vague and general and requires amendment before the appeal can be heard 2 In this rule there is no limitation as to the time or stage when the memorandum of appeal may be returned for ameadment 3 But whenever a memorandum of appeal is returned for amendment the Court should fix 3 time for its ie presentation 4 The time that the Court allows for re-presentation of a memorandum of appeal is only by way of concession and cannot be demanded as a matter of right, at any rate after the cypiry of the period of himitation within which the appeal can be filed 42

A memorandum of appeal from the preliminary decree can be amended so as to constitute an appeal from the final decree also 5

3 Defect of parties

Where the respondent is wrongly named owing to a clenical error in the decree, the mistake is not a fatal one but can be rectified 1 A single appeal by different persons having different defences and reasons for appealing is pregular 2 As to whether an appeal filed against a dead person can be rectified by adding the legal representatives, see S 153, Note 5 and O 1. R 10 and also the case cited below 3

4 Scandalous matters

Where a memorandum of appeal contains irrelevant and scandalous

2 (1866) 11 Moo Ind App 1 (2) (P C) Order 41 Rule 3-Note 1

1 (1914) 1914 Born 249 (250) 2t Ind Cas 337 3 (1531) 7 111 79 (50) (337) 38 Bom 41 (1978) 1923 411 849 (t) (349) 4 (1876) 1 All 200 (261)

11 (1970) 1920 Pat 818 (820)

2 (1864) 1864 Suth W R G ip Vis 4 (1) 14) 3 (1313) 18 Ind Cas 87 (33) 1913 Pun Re

No 59

4 (1885) 7 111 79 (85) (1869) 13 Suth W R 351 (357) 5, (1867) 8 Suth W R 141 (143)

(1864) 1864 Suth W R Gap 13, (1) (135) Note 2

1 (1920) 1920 Lah 314 (314)

tion of the appeal] 41(1933) 19°3 Mad 359 (360) 5 (1J29) 1929 Cal 167 (168) Note 3 1 (19t8) 1918 Cal 582 (583)

2 (130t) 23 4H 137 (142) 27 Ind 4pp 168 (P C) 3 (1913) 21 Ind C1, "00 (307) 1 U B R 175

allerations which are separable from the rest a Court of appeal should not rejec. it, but should either expinge the objectionable part or return the memorandism of appeal for amendment and refuse to receive it back until such part is struck out 1 The Court will return a memorandum of appeal maker allegations of partiality against the Judge from whose decree the appeal is sought to be filed, and order the objectionable matter to be expunged therefrom ' See also Votes 2 and 6 to 0, 6. R 16. ante

# 5 Reasons for rejection

A Court rejecting a memorandum of appeal under this rule should record ils reasons for such rejection 1

# 6 Appeal

An appeal will be from an order rejecting a memorandum of appeal if it amounts to a decree As to the question whether it amounts to a decree, see to e 13 to S 2, Sub S (2), ante, and the case cited below 1 I rejection of a memorandum of appeal on the ground of limitation

amounts really to a dismissal of the appeal under R 11 intra and is. therefrom 2 See also Notes 2 and 6 to O 6 R 16 ante 7 Second appeal

An order returning a memorandum of appeal for presentation to the proper Court is appealable as an order and hence under \$ 104 sub-S 2 n second appeal hes therefrom 1 in the undermentioned case the High Court in second appeal refused to convert an order reacting a memorrandum of appeal into one returning it for amendment 2 The High Court in second appeal can interfere with the discretion of a lower appellate Court in admitting or refusing to admit an appeal after the expiry of limitation, where the lower Court has evercised at discretion arbitrarily and not accordmg to legal principles 3 See also Note 16 to S 100, ante Local Amendment.

# BOMBAY

After R 3 the following Rule hall be i serted namely -

34 Where an appulling arrives for delay to be excused note to show can go half a at once to man it the respondent and the matter lall f ally leaded iche e notice is a smed to the Coat from who e de ree the any il referr de ther H 13

R. 4. [S 544] Where there are more plaintiffs or more defendants than one in a suit, and the decree2 One of several appealed from proceeds on any ground common3

plantiffs or defen dants ne obte i re versal of who de cree alar it pro ceeds on Kround common to all

uny one of the plaintiffs or of the detendants may up end trom the whole decree and thereupon the Am ellate Comit may reverse or rary the decree

in favour of all the plaintiffs or defendants as the case may be

[1877—S 544 , 1859—S 337] Note 4

1 (1535) 22 Mai 17 (1 4 161) (18J1) 15 Bom 488 (48J) 2 (1838) 27 11 (1 ... (1.9)

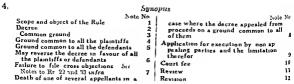
Note 5

Note 6 1 (1900) 3 Oudh Cis 231 (23) 2 (1970) 1970 Pit 518 (5-0) Note 7

to all the plaintiffs or to all the defendants,

3571

1 (1893) 15 All 967 (371) (18-") ) Bon; 452 (454) 1 h d Jur O S 12t



# Other Tomes

Note 3

1 2 parte decree See Note 2

Rules 4 and 33 distinction letween Ses

Abstement See Note 8

Appeal by some- \ unation in farous ci all See Note 6

Decree proceeding on common ground See

I Scope and object of the Rule

The general rule is that on an appeal by one of several plaintiffs or defendants, the appellate Court can reverse or vary the decree of the trial Court only in favour of the party appealing. This Rule and R 33 provide exceptions to the general rule, and give the Court ample power to make the appropriate order needed in the interests of justice 14 While R 33 of this Order provides that the appellate Court has power to make the proper decree even in cases where the appeal is as to a part only of the decree,2 this Rule provides that where a decree proceeds upon a ground common to all the plaintiffs or defendants any one of the plaintiffs or the defendants may appeal from the whole decree and thereupon the appellate Court can reserve or vary the decree in favour of all the plaintiffs or the defendants as the case may be 3 In such a case the appeal by one is virtually treated as an appeal on behalf of all, though they may not be parties to the appeal 4 The Rule therefore will not apply where the appeal is directed only against that portion of the decree which affects the appellant.42 or where the appealing plaintift or defendant cannot, under the circumstances of the particular case, be

considered as appealing on behalf of the non appealing plaintiffs or defendants, e. g. where one of the defendants appeals on his own behalf and impleads the non-appealing defendants as respondents 45 A decree passed by the ap-

Order 41 Rule 4-Note 1 1 (1927) 1927 All 311 (313)

1a (1920) 1920 Cul 428 (434)

2 (1920) 1920 Cal 428 (434) 3 [See (1916) 1916 Cal 654 (6.55)

(1975) 1935 Cal 24 (25) 61 Cal 91 + One

defendant may appeal without im pleading the others as respondents (1928) 1928 Mad 1144 (1146)

him alone-Such an appeal is not one against the entire decree at all (1918) 1918 Mad 665 (666 (67)

(1918) 1918 Lab 335 (337) (1889) 11 111 35 (39 40) The fact that

Court les is Jaid is on an appeal against the entire decree is im material

(1911) 12 Ind Cas 605 (606) (Lab) 1t was held in the case that the non appeal inglarties were satisfied with the docree against them

(1697) 1897 Born P J 419 (421) 4b (1916) 1916 Fab 113 (114 115, 117) (1917)

fore

pellate Court does not, as a matter of course, enure to persons who have not poined in the appeal merely because the lower Court's decree has proceeded on a common ground. The Rule will apply only where the Court consciously decides to apply it <sup>4c</sup>. The policy of the Rule is, firstly, to give the appellate Court full power to do justice to all parties, whether before it or not, provided the whole case is gone into at the instance of the parties representing all the necessary contentions in the case, and, secondly, to prevent contradictory decisions in the matter in the same suit.

The Rule does not become mapplicable merely because the non-appealing defendant has, in the meanwhile, obeyed the lower Court's decree? or because he has 'esparately appealed from the same decree and has failed in his appeal. But the Rule has no application where there are several suits, the decree in each of which, proceeds on a ground common to the defendants in alt the suits, unless such suits are consolidated. Nor will the Rule apply where the planniff who appeals has no locus stands to appeal. Where, for a suit under S. 92 of the Code, the consent of the Advocate-General has been given to three persons they all constitute in the eye of the law, one planniff and therefore one of them alone cannot appeal so as to make this Rule applicable 12.

Where a decree is passed against two defendants on a ground common to both and one of them appeals against the decree while the other files cross-objections to the decree, the appellate Court can transpose the latter defendant as an appellant and decide the appeal in his favour 13

Where there are several respondents before the lower appellate Court any one of them may maintain the second appeal on behalf of all under this Rule but he cannot represent a person who was not a respondent in the lower appellate Court <sup>18</sup> Nor can a person not a party to the first appeal prefer a second appeal under this rule <sup>18</sup>.

The Rule applies also to a cross-appeal by respondents 15 Decree

A decree may be reversed under this Rule in favour of all the defendants even if some of them allowed the decree to be passed ex parter against them, provided the other conditions laid down in the Rule are satisfied. But where a decree is passed against some of the defendants on

1 1 1 1 1 1 CO (COC) (Lah) In this held that the other defen

[But see (1873) 20 Suth W R 77 (77)]

10 (192) 1925 I om 290 (291) Several appeals

9 (1890) 13 Yird 21) (252) (191) 1313 Lat. .0\* (707) 1319 Pun Re No 116

10 (1970) 1920 Cri 428 (484)

Note 2

1 (1316) 1916 I at 400 (401) 1 Pat L Jour 143

(1921) 1921 All 6 (se) 43 All 220 Com be ration of several detrees against or it defendant—Rule does not (1829) 12 Suth W R 211 (211 212) conjession of judgment the deerce cannot be reversed in their favour under this Rule  $^2$ 

### 3 Common ground

It is essential for the application of this Rule that the decree appealed from should have proceeded on a ground common to all the plaintiffs or defendants. Otherwise the appellate Court has no jurisdiction to revirse or vary the entire decree except on the appeal of all the plaintiffs or defendants. Further the Rule does not apply unless the loner Court's decree proceeds on a common ground and not where the appellate Court wishes to proceed on a common ground and reverse or vary the lower Court's decree in favour of all the parties 1t is not necessary that all the grounds upon which the lower Court proceeds should be common to all the parties it is enough if it proceeds on any ground common to all the plaintiffs or defendants? It is not also necessary that all the defendants should claim an inforast in the property affected by the decree 3 The Rule will apply when the defendants put forward a common defence as against the plaintiff although they dispute each other sinchs.

In applying this Rule, the Court is entitled to consider the ground or finding upon which the judgment or decision is based, and not merely the operative portion of the decree 5

# 4 Ground common to all the plaintiffs

Where there are several plaintiffs and the suit is dismissed on a ground common to all of them the appellate Count may reverse the decree in favour of all the plaintiffs although only some of them have appealed  $^{1}A$  and B the alleged reversioners of one F such X for possession. The suit was dismissed as time-barred A alone appealed and the appellate Court came to the conclusion that the suit was not time-barred. The appellate Court reversed the decree in favour of B also although he had not joined in the appeal, maximuch as the lower Court's decree proceeded on  $\frac{1}{2}A$ .

(But > c (1913) 1915 Wed \*27 (229)
2 (1913)

lower Court consenting to the decises being executed as against him of which no order that passed can be given the benefit of the appeal preferred by other judgment debtors. Note 3

1 (1,77) 1927 MI 177 (178) (1896) 25 Bom 699 (702) (1893) 1893 Bom P J 821 (377) 1 Hay 183

1 Ha) 183 (1861) 1 Suth W R 203 (204) (1865) 2 Suth W R 170 (171) (1865) 2 Suth W R 227 (233 230) (1865) 2 Suth W R 227 (233 230) (1865) 2 Suth W R 237 (238) (1850) 6 Suth W R 92 (33) (4st X)

(1865) 2 S.th W R 227 (288) (1856) 6 S.th W R 32 (33) (4ct N) (1867) 7 S.th W R 366 (366) (1867) 11 Suth W R 239 (240) (1872) 17 Suth W R 239 (353 351)

(1872) 18 Suth W R 26 (27) (1872) 18 Suth W R 39 (40) (1875) 23 Suth W R 166 (167)

4 (1924) 1327 Pat 103 (101) 5 (1303) 4 Ind Cas 166 (167) (Cal)

Note 4
1 (1914) 1914 Lah 235 (215) 1914 Pan Ro

(1912) 15 Ind C14 403 (412) (Mad) (1324) 1527 N 65 406 (407) (1924) 1924 On th 385 (339) (1929) 1929 AH 393 (394) namely, that the sut was time-barred 2

Though an application for commutation of rent under the Bengal Terancy Vct must be mide by all the landlords, in appeal by some only of the landlords in such proceedings is maintainable.<sup>3</sup>

#### 5 Ground common to all the defendants

Under this Rule, where a decree is passed against several defendants and ille decree proceeds on any ground common to all the defendants, it is open to any of them to appeal from the whole decree and on such appeal the appellate Court can reverse or vary the decree in favour of all the defendants 1 A mortgaged certain properties to X and sold the same to B on 5--3-1925. On 10--3-1925, A paid X the whole of the interest due up to that date and it was arranged that the principal should be paid by 16-10-1925, failing which further interest would accrue from 10-3-1925 till payment. On 16-3-1925, B tendered to Y a certain sum as the principal amount due on the mortgage. On X refusing to receive the same, B deposited the amount in Court under S 84 of the Transfer of Property Act, 1882 on 22-10-1925 X thereafter filed a suit against A and B for the interest accrued due from 10-3-1925 to 22-10-1925 on the ground that no valid tender was made on 16-3-1925 A and B contested the suit on the ground that the tender was a valid one The trial Court passed a decree against both A and B overruling their plea B alone appealed against the decree It was held that the ground on which the decree of the lower Court proceeded, viz, that there was no valid tender Leing common to both A and B, the appellate Court could under this Rule reverse the decree against A also though he had not joined in the appeal 2

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(1924) 1974 Rong 3°6 (316) 2 Rong 4°C
2 (1922) 1977 Loli 57 (59)
3 (1911) 41 Ind Cas "5" (789) (1'11)
                 Note 5
1 (1930) 1 30 Mad 65 (6")
   (1J10) . Ind C . 388 (389) (C .1)
   (1897) 1562 AH W A 36 (81)
   (1 107) o Cal W N 194 (*96) Suit f r con
         tribution again t three 141 ons-
          Heibig-Allellite Court finding
              the plan tiff va not entitled to
                t tition may domis the
                     t il the defendants
   (IJ16) IJI ( ) 20 (4 0) Sile set aside
         guatia le Reseal of
         order in 11
                      1 1
                             it ued for
   1 In 1 Jur O S 32
   1 Hrs 833
   (1877 75) 3 Cal 734 (741) (1 B)
   (1891) 16 Mid 203 (234) L 1 1 f
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(837) 42: Sath W. R. 113 (118) (118) (137) 18 Sath W. R. 331 (332) (130) 14 Sath W. R. 331 (332) (130) 14 Sath W. R. 350 (234) (130) 14 Sath W. R. 350 (234) (130) 19 Sath W. R. 450 (500) (130) 19 Sath W. R. 450 (500) (130) 19 And 1475 (431) (133) 16 Sath W. R. 453 (147) (130) 12 And 1475 (431) (134) 10 And 237 (235) (191) 11 Lad Cas 507 (607) (101) 12 Lad Lad Cas 507 (607) (101) 10 Lad Cas 507 (607) (101) 10 Lad Cas 507 (607) (101) (101) 10 Lad Cas 507 (101) 10 La

Or c slone typeal ty-Appellate Court in doing it to the plaintiff had no title to the projecty-Whether R 4 11 lied or not under R 33 entire decree might be set a ide (1906) 1918 Vid 287 (287)

(1916) 1916 'Nad 587 (387) (1686) 6 Suth W. R. 104 (104 - 105) Cross-objections by one defendant—Common ground with other defendant—Decree varied as to latter al. o

(15.1) 7 Beng L R App 25 (29) (1932) 1932 All 710 (111)

(1919) 1918 Cal 76 (77) 2 (1929) 1929 Mad 200 (288) 52 Mad 822

#### 10 Court fee

Where one of several appellants takes a ground of appeal which goes to the root of the respondent's case so that if the ground succeeds the entire decree will be reversed and not merely that portion of it which concerns the particular appellant the appellant must pay the Court fee sufficient to cover the whole relief obtainable on such a ground 1 The entire decree can be reversed in an appeal by some of the defendants under this Rule though one of them appealing as to costs alone engrosses his appeal with only a stamp to cover the amount of costs 2

### 11 Review

This Rule does not apply to applications for review 1

# 12 Revision

5

Where in a case coming under this Rule the appellate Court refuses to reverse a decree in favour of non appealing parties while reversing it in favour of the appellants on the ground that it has no power to do so 15 decree can be set aside in revision as it amounts to a failure to exercise turisdiction 1

The power of the High Court in revision under S 25 of the Provincial Small Cause Courts Act is not less wide than under this Rule 2

# STAY OF PROCEEDINGS AND OF EXECUTION

R. 5. [S 545] (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed Stay by ippellate from except so far us the Appellate Court may order, nor shall execution of a decree be stayed by leason only of an appeal having been preferred from the decree but the Appellate Court may for sufficient causes order stay of execution of such decree

(2) Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom the Starby Coctalicl passed the decree Court which passed the decree may on sufficient

cause being shoun order the execution to be stayed

(3) No order for stay of execution shall be made under sub , ule (1) or sub , ule (2) unless the Court making it is satisfed-

(a) that substantial loss may result to the party applying

for stay of execution unless the order is made,

(b) that the application has been made without unies

sonable delay,8 and

(c) that security " has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him

> Note 11 11 01 P 1 Re No 41 page 11 not e Note 12 ١11 100 (100) 1 Nag LR 20

(4) Notwithstanding anything contained in sub-rule (3), the at may make an expaire order to stay of execution pending bearing of the application

[1877—S 545, 1859—S. 338]

### Local Amendment

# RAS

Sab littule the following for the existing ub rule (1) -

5 (1) inappeal shall not operate as a tax of proceedings under a decree or order appealed

decree and into when the oppeal is again to preliminary decree stay the making of a final decree in pursuance of the preliminary decree or the execution of with final decree if already made

	Syn	opsis	
\ote	No	Note 1	١0
islative changes	1	Security for performance of decree	11
pe and object of the Rule	2	Liability of surety	12
e does not apply where decree has		Right of surety to appeal Sec S 140	
en executed	3		13
e applies only when decree under			14
speal is capable of execution	3.		15
of proceedings	4		16
	5	Effect of uncommunicated order stay	
• •	6		17
	7	Costs of application	18
•			19
at unreasonable delay	8		20
idavit in support of the application	9		21
rce to decree holder	10	Review	22
_		<del></del>	

### Other Tonics

forcement of security bond. See Note 11 Power of trial Court to grant the See Note and S 143 secent power to st a See Note 2 It (9) Irresentation of the Trial force that the See Note 2 It (1) If resentation of the Trial force Note 3 It (1) If the See Note 3 It (1) If the

Legislative changes

(1) The words an appoint shall not operate so strop troccedus, under a decree or order appealed from except so far as the appellation countries make a under a under the best of the countries of the decree so well as execution of the decree can be stave by the appellatio Court See York 4.

(') Sub rule (4) 15 new It est esely authorises the Court to 1 san expaile o der of

stay jet ding the hearing of the main application for st a 2 Scope and object of the Rule

This Rule provides for-

- (1) A stay of proceedings under a decree or order appealed from and
- (2) A stry of execution of such decree or order

After an uppeal has been filed the appellate Court may order the star of proceedings under the decree or of execution of such decree? Where the application for stay is made to the appellate Court, it can grant stay of execution of the decree whether an application to execute it has in fact been made or not p oxided the conditions of sub-rule 3 are satisfied. \*\* \*B-fore\*\* an appeal

6 May reverse the decree in favour of all the plaintiffs or defendants

The word may in the Rule shows that the exercise of the power in der this rule is discretionary, and that the Court is not bound to exercise 11 1

There is a conflict of opinion as to whether this Rule applies to eases where one of the plaintiffs or defendants appeals without impleading the other plantiffs or defendants as parties to the appeal. The High Court of Calculta has held that it does,2 while the Lahore High Court and the Judicial Commissioner's Court of Peshawar hold that it does not 3 Opinion in the High tourt of Allahabad is conflicting, some cases holding that it does4 and some, that it does not 6 it is submitted that the Calcinta view is correct.

The Court may under this Rule, reverse or vary the decree in favour of all the plauntifs or defendants as the case may be. It does not enable a dictio to be passed against a person. Such a dicree may be passed under It is infru it the person against whom the decree is varied or reversed has been implested as a party to the initial 6. The reason is that it is a fundamental rule of law that no order can be passed against a person without his being given an opportunity of showing cause against it. It has however been held by the High Court of Bombay in the undermentioned case? that where A and If obtain a decree against C for a part of the cloun made in the suit, and in an appeal by R for the portion of the claim disallowed C filed crossobjections against the portion decreed, and the appellate Court dismissed the claim in tota, A was bound by the decision, notwithstanding he was not a party to the appeal, masmuch as B's appeal was on behalf of A also See also Note 13 to O 41, R 22 and Note 9 to O. 41, R 33, infra

Where a sult is partly decreed and partly dismissed and in an appeal by the plantiff against the part dismissed, no cross-objections are filed or agest the part decreed, the appellate Court cannot interfere with such portion. This Rule has no application to such a case 8 Where a decree is passed against A and H, and H alone appeals from the decree, the appellate Court cannot widle satting aside the decree against B pass a new decree against A.3

Where the appellate Court exencrates a particular defendant from the lower Court's decree and that defendant's interest is separable from that of the others, the appellate decree does not cours to the benefit of the latter 10

7 Fallura to file cross objections - See Notes to 11 12 and R 93, mfra.

B Death of one of saveral appellants in a case where the decree appealed from proceeds on a ground common to all of them

Sec () 21, Rr. 2, 3, 4 and 11, aute. The provisions of O 22 apply also to appeals, (Vide O 22, R. 11). Hence, on the death of one of several appellants, if the right of appeal survives to the surviving appellants alone,

# Nole 6

- 1 (1004) 1004 346 71 (71) (10.13) 10.13 (11.710 (711) (1815) 1815 Pau Ro No 8 page 11 (1913) 16 lul 1 oct 21 (621) (Nul) (10-0) 10-0 111 01 (04)
- (1013) Id to 1 1 to 1 J 1 (to 3] (Mad) (1914) 1911 111 (1 (75) 16 111 510
- 2 (101H) 131H C (1 287 (254) 3 (1928) 1924 Lah 43 (43)
- (1 135) 1 135 Pesh 100 (107) (10-8) 110 1nd Cas 250 (Lah) 4 (192)) 1 (2) (11 2)3 (214) 31 (11 A)
- (1927) 1927 \ld 311 (318) 5 (1924) 1921 \ld 1873 (874) 6 (1924) 1921 \ld 1873 (874) 6 (1825) 123 \ld 113 (244) 6 (1855) 12 \ld 180m 371 (375) (1914) 22 \ld 1ml C 15 \* 0 (92) (Ca1) (1\*\*03) 1 Cal L Jour 144 (137)
  - [See (1912) 1922 Pat 4 (4) In th ;
  - munt tineble in the at once of be other purlies]
  - 7 (1557) 11 Junt 5 % (534) 8 (1651) 11 111 15 (91, 40)
  - (1315) 1318 Cil 171 (175) 10 fint) 1 ut Pu 152 (153) 3 Pu L J at 16

the appeal may be proceeded with by the latter 1 Where the right of appeal does not survive to the surviving appellant alone the appeal will abate so far as the deceased appellant is concerned if his legal representatives are not brought on the record within the prescribed period of limitation

If the case is of such a nature that it cannot be disposed of in the absence of the legal representatives of the deceased the whole appeal will abute But if the lower Court's decree pro ceds in a ground common to the deceased as well as to the survivors then the latter can under this Rule appeal from the whole decree and the absence of the legal representatives of the deceased is no bar to the disposal of the appeal. Hence in such a case if the legal repre entatives are not substituted within the period of limitation the appeal abates only so far as the deceased is concerned and not as a whole 2 and if the appeal succeeds the appellate decree or order entires to the benefit of all the appellants including the deceased 3

Where one of several respondents dies and his legal representatives are not brought on the record within the period of limitation and the right of appeal does not survive against the surviving respondents alone, the appeal will abate against him Sec O 22, R 4 But if the presence of the legal representatives of the deceased is essential for the determination of the appeal the entire appeal will above and must fail by reason of defect of parties. This Rule does not apply to such a case so as to prevent the abatement of the appeal as the Rule applies only to apprllants and not respondents to an appeal 4

The death of an unnecessary party does not affect the validity of a decree passed in the absence of his legal representatives 5

9 Application for execution by non appealing parties and the limitation therefor When a decree is appealed from, limitation for an application for its execution runs from the date of the appellate decree, [see Limitation Act, Art 182 (1 (2)) Where there are several plaintiffs or defendants and the appellate Court reverses or modifies the lower Court's decice on the appeal of some of the plaintiffs or defendants under this Rule, time for execution runs from the appellate decree even as regards the non-appealing parties i But where this Rule does not apply to the case the appeal does not postpone the starting of limitation for an application for execution by the non appealing parties -

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Note 8
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(4CH)

(1905) 1 Cal L Jour 144 (147) (1307) 6 Cal W N 136 (197)

<sup>1 (1328) 1378</sup> Lak 737 (737)

<sup>2 (1918) 20</sup> In 1 Cas 9.2 (J54) (stad) (1933) 1933 31733 (734) (1J26) 1J26 Cal 462 (463)

<sup>(1</sup>J30) 125 Ind Cis 180 (Lahl (But see (1J34) 1934 Lah 20, (208)

<sup>15</sup> Lah 6671 3 (1325) 1325 Wid 910 (911)

<sup>(</sup>See however (193") 1932 C at 134 (1°5) 58 C.d 1341 Suit under 8 101 H. lengtl Tearney Act - Separate tuse of action)
[See also (1993) 1333 Cul 787 (727)

<sup>) (1926) 1326</sup> Vid 991 (994) Note 9

<sup>1 (1698) 20</sup> AU 493 (496 49") Allika 1 for execution by n nappear parts

<sup>(1867) 4</sup> All 137 (140) Application 1 com (1 10.) 1 Ind Cas 459 (460) 33 L = (1 10.) 1 Ind Cas was (251) (1670) 14 Suth W B 280 (251)

<sup>2 (1631) 13</sup> W1 (12) (FB) (1878) 2 C.1 L Rep 471 (173) (But see (1898) 22 L.2 lifed in ht I

#### 10 Court fee

Where one of several appellants takes a ground of appeal which goes to the root of the respondent's case so that if the ground succeeds the entire decree will be reversed and not merely that portion of it which concerns the particular appellant the appellant must pay the Court fee sufficient to cover the whole relief obtainable on such a ground 1 The entire decree can be reversed in an appeal by some of the defendants under this Rule though one of them appealing as to costs alone engros es his appeal with only a stamp to cover the amount of costs 2

#### 11 Review

This Rule does not apply to applications for review 1

#### 12 Revision

Where in a case coming under this Rule the appellate Court refuses to reverse a decree in favour of non appealing parties while reversing it in favour of the appellants on the ground that it has no power to do so 15 decree can be set aside in revision as it amounts to a failure to exercise turisdiction 1

The power of the High Court in revision under S 25 of the Provincial Small Cause Courts Act is not less wide than under this Rule 2

### STAY OF PROCEEDINGS AND OF EXECUTION

R. 5. [S 545] (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed Stav b. Appellate from except so fur as the Appellate Court may Court order, nor shall excention of a decree be stayed by reason only of an appeal having been preferred from the decree, but the Appellate Court may for sufficient causes order stay of

execution5 of such deer ee

(2) Where an application is made for stay of execution of an appealable decree before the expiration of Sta j by Co irt 1 1 ich the time allowed for appealing therefrom, the rassed the decree Court which passed the decree may on sufficient cause being shown order the execution to be stayed

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satished-

(a) that sub-tentral lo-s" may result to the party applying

for stay of execution unless the order is made,

(b) that the application has been made without umersonable delay,8 and

(c) that security 11 has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him

not recessarily rear appeal

which imperil the stre decree]

<sup>1 (1893) 15</sup> All 112 (115) 2 (1565) 9 Suth W R . 3 (.61)

<sup>1 (1935) 8</sup> Mad 192 (195) 2 (1921) 1921 \15 105 (106) 17 \1, LR J

(4) Notwithstanding anything contained in sub-rule (3), the et may make an exparte order for stay of execution pending rearing of the application.

[1877—S 545; 1859—S. 338]

IRAS

# Local Amendment

Sab fulute the following for the exiting sub rule (1)

5 (1) An apport shall not operate as a tay of proceedings under a decree or order appealed

decree and may when the uppeal is against a preliminary decree stay the making of a final decree in pursuance of the preliminary decree or the execution of uch final decree if alreads made

#### Synopsis Note No Note No gislative changes Security for performance of decree 11 ope and object of the Rule Liability of surety Right of surety to appeal See S 140 12 ile does not apply where decree has been executed Note 12 13 When respondent is insolvent ale applies only when decree under 14 appeal is capable of execution Insolvency of appellant and deposit 15 tay of proceedings Effect of stay order 16 tay of execution when may be granted 5 Effect of uncommunicated order stay Sufficient cause 17 18 19 20 21 ing execution Costs of application Appeal Letters Patent Appeal 9 Revision 10 Review

# Votice to decree holder

# Other Topics

Enforcement of courts land See Note 11 Power of truit Court to grant tax 30 and S 140 2 1 t (1) and Note 5 Pt. (1) to fu Lieventation of appe ! If of etales Inherest power to six See Note 2 Pt (J) and Note 5 Pt (4) Sec Note 4 It (1)

1 Legislative changes

III The wo d n apperil shall not ofe the as a star o proceedings under a co order appealed I om except so fir as the appellate Court ming order rule (1) the new and have been added to make it then that preced to . .. decree 1 w H : execution of the decree can be stite by the in he hote s

but (4) 1 1cm It expressly authorises the Court to pas an cz/2 1 id tall a hearing of the main all heation for state

2 Score and object of the Rule

This Rule provides for-

- (1) A stay of proceedings under a decree or order app. and
- (2) A stay of execution of such decree or order

After an appeal has been filed the appellate Court may , of proceedings under the decice or of execution of such decree application for stry is made to the appellate Court, it can grant tion of the decree whether an application to execute it has in land or not provided the conditions of sub-rule 3 are satisfied to Bare Order 41 Rule 5-Note 2

1 (1°09) 1 lod C1 \$12 (\$12) (C11)

11(19,3) 1,33 Lem 118(1), ....

is filed from an appealable decree, the Court which passed the decree may order the execution to be stayed but not of other proceedings under the decree. Nor, in such a case has the appellate Court any jurisdiction to order the stay of execution of the decree.

The object of the Rule is to see that the ultimately successful party gets not merely a burren success but is able to leap the fruits of his success. At the same time the decree-holder's right to leap the fruits of his decree should not be lightly interfected with 4. This Rule combines these two principles and, while it provides for the execution of a decree being stayed pending an appeal, it restricts the circumstances under which such stay may be granted.

The Rule applies to all decrees including decrees relating to moveable as well as immoveable property<sup>5</sup> and to decrees for the restitution of conjugal rights <sup>6</sup> But it does not enable the High Court to stay proceedings in a Court not subordinate to it <sup>7</sup>

This Rule is not oxhaustive of all the circumstances in which a stay of execution can be granted under the Code. Thus---

- (1) Under O 20, R 11 the Court which passed the decree can postpone the payment of the amount decreed 8
- (2) Under O 21, R 26 the Court to which a decree has been transferred for execution can stay execution under the circumstances mentioned therein
- (3) Under O 21 R 29 where a suit by the judgment-debtor against the decret-holder is pending execution of the decree mity be stayed
- (4) Under R 6 sub-rule (2), m/ra, the sale of immoveable property in execution of the decree appealed from may be stayed
- (5) Under O 45, R 13 the execution of a decree against which an appeal is preferred to the Privy Council can be stayed.
  (6) In cases not covered by any of the said provisions a sale or
  - execution can be stayed under the Court's inherent powers see also Note 2 to S 151 under the heading. Stay of execution and other proceedings.

3 Rule does not apply where decree has been executed

The Rule does not apply where a decree has already been executed?

But, where a respondent prevented an order for stay of execution being passed by representing to the Court that there was no application for execution, and immediately afterwards applied for execution in the lower Court and obtained a delivery of possession, it was held that the respondent was

174 3 (1992) 5 Cal W N 781 (737) 4 (1911) J Ind Crs 862 (863) 35 Cal 7 A 5 (1868) J Suth W R 448 (448)

6 (1634) 1894 Pun R. No 2 page 2 7 (1931) 1931 All 57 (58) 53 All 180

8 (1927) 1327 Visit 416 (419) 3 (1322) 1322 til 238 (238) 54 til 344 (1310) 71 G 1017 (1017) 1310 Pun ReN 3 82 (1913) 131 11 11 134 (344) 41 til J ar 341 by certain date is one under 5 111 and 5 148 applies to such or ler

[See also (1316) 1316 Cal -72 (27) 274) Receiver granted I we to brun for estable—Appeal tikel after guilty of over-reaching the Court, and that the delivery of possession could not be allowed to stand 2

3a Rule applies only when decree under appeal as capable of execution

This Rule will apply only when the decree under appeal is capable of execution. Thus, where an appeal is filed against an order overruling the objections of the judgment-debror to the execution of the decree and the appellant applies for stay of sale this Rule has no application. But the Court has power to stay the sale under its inherent powers apair from the proxisions of this Rule.

4 Stay of proceedings

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The mere thing of an appeal does not suspend the operation of a decree aid is no bar to proceedings being taken under the decree except so far its the appellate Court orders otherwise 1 Under the old Code there was no express provision for staying proceedings under the lower Court's decree, other than execution proceedings 2 It was, however, held that the appellate Court could, under its inherent power, stay such proceedings 3 The present rule now express-Is authorises the appellate Court not only to stay the oscention of the decice, but to stay proceedings under the decree as well 4 Thus in an appeal from an order directing the issue of a probate of a will, the appellate Court can pass an order staying the issue of probate 5 In an appeal against an order appointing a receiver, the appellate Court can hass an order duccting the receiver rot to act till further orders 6 In an appeal from a preliminary decree in a partition suit7 or in a mortgage suit8 further proceedings can be stayed under this Rule Similarly, in an appeal from a preliminary decree in a suit for iccounts an order can be made staying enquiry into the accounts pending the appeal though as a general rule no such stay will be allowed, unless ir-

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2 (1928) 1928 Pat 4J (J0) Note 3a

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1 (1015) 1918 P.C 151 (153) 46 Cil 670 36

(1915) 1918 P.C. 151 (13) 46 Cil 670 36 Ind App 52 (P.C.) 1924) 1324 Lak 360 (360) Mere first that

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(1921) 1921 U B 5 (7) 4 ( 1 R 43 (1930) 1930 Pat 227 (224)

[See (1908) 12 Cal W N SS 844 987)
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decree [Soo also (1933) 1939 Lith "24 (72) Appeal from preliminary de rective of firstler proceeding, depending in the first in additions of 0.41 R hotels, statisfied]

7) 1 Cil W N ...64 (264) Scc also (1906) 9 Cil T fent 23 (31

1 (1904) 31 C 11 722 (724) (F J ) (1906) 3 C 11 L J 111 29 (34) (1906) 33 C 11 927 (432) 4 (1900) 1930 L 16 108 (108)

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9 (1 301) 31 Cal 722 (724) (F 1.)

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2 (1921) 1931 4H 2H 42H 43 4H 5H3
(1921) 1971 4H 342 (344) 43 4H 198
(1872) 17 Suth W R 341 (342)
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<sup>(1866) 6</sup> Suth W R Vis 15 (15)

<sup>(1909) 4</sup> Ind Cas 309 (300) 5 L B R 174 3 (1902) 5 Cit W N 781 (797) 4 (1911) 4 Ind Cis 869 (563) 38 Cil 7.4

<sup>. (1868)</sup> J Suth W R 418 (418)

<sup>6 (1694) 1894</sup> Pan R. No 2 page 2

<sup>7 (1331) 1931</sup> All o" (55) -33 All 180 8 (1927) 1327 Wed 416 (419)

J (1332) 1332 All 238 (238) # 411 344 (1310) 71 C 1017 (1017) 1310 Lun Rc N : 67 (1313) 131 1 11 313 (344) 4 I at I I tr 3 1

<sup>(</sup>See also (1393) 1933 Mad Jad [504] Decree for possossion-Order 1: stry of delivery of pos e 101108 ditional on payment of kist and reat by certain date is one unler 5 1 1 and S 148 applies to such o let Note 3

<sup>[</sup>See also (1016) 1016 Cul -1- -274) Receiver granted feare trin fer e tale-ippeal ni i det

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4 Stay of proceedings

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Receiver had carried in the ider 2 (1917) 1 ( if W Y -64 (264) is infructuous? Sc 11 1 (1100) 9 Cil T 1 2 21 131 2 (1928) 1928 Pat 49 (a0) Note 3a 1 (1904) 31 C (1 722 (724) (E 1) 1 (1023) 1993 All GG4 (GC 2) (1906) 3 C il L J iii 29 (84 (1900) 38 C il 1927 (932) 2 (1033) 1933 All 664 (r65) The protein of this rule is to a major do not 4 (111°0) 1030 Lah 108 (105) (192t) 1311 1 t 328 (3.1 1:1 Note 4 1 1 ad ( 1 h93 (884) The 1 10ts) 1918 I' ( 1) 1 (1) 3) II ( (1 6 0 h vien tiken in the case that under Ind 1pp 52 (I C) Rule 5 the annell ite Court can only (114) 1024 Lah 260 (360) Mere lict that stan execution and not proceed ings under i derice and its nower opt all tending is notes in the fu t i sue winnut frine t to star proceedings under a decree 1 1 1) 1341 111 56 (958) 53 111 259 (8 17 and under Rule a but under its

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plustion to set iside e pist 11 (32) 1 13 1 I ab 2"1 (272) Mortgage 5 1 25) 107 11 d ( 15 48f (487) (Lab) derree) ~ (1005) 1035 Lah 181 (1)(181) [See also (1933) 1933 Lab 74 (72) appeal from trehini are de recto I minute decice appealed from-Stav of further pro coding d por 1 Merely because of appeal proceed ugs for final decree should not be njon particula futs f enditions of (I 4) R

staved-Noharmis tiused thereby] 1 (1 101) 31 Cal 722 (724) (1 1)

repreable many is likely to result to the appealant, by not passing such an order

The High Court can under this rule read with S 47, sub S (2) of the Provincial Insolvency Act suspend a sentence of imprisonment passed under that Act pending the disposal of the appeal from such sentence a

A proceeding for restitution on a decree being valied or reversed is ot a proceeding under the decre within the meaning of this Rule and cannot be stayed 12 But an application for possession is a proceeding under the order confirming a sale and the appellate Court can under this rule, order the same to be stayed pending appeal by the judgment-debtor against the order confirming the sale 13

Where proceedings as distinct from execution of a dicree, are stayed by an appellate Court, sub-rule 3 of this rule does not apply as such and theretere the furnishing of security is not compulsory though the Court has a discretion in the matter 134

The Court can make the payment of interest a condition for staying use up on of the decree 14

5 Stay of execution when may be granted

As has been seen in Note 2 above, an appellate Court has no power before an appeal is filed before it, to order the stay of execution of the decree of the lower Court It is the Court which passed the de ree that can in such a case, stay the execution of the decree 1 An application for stay of execution of a decree passed on the original side of the High Court in view of an intended appeal must ord name be made to the Judge who tred the case 2 It is, however, essential for the applicability of sub-rule (2) that the necree, the execution of which is sought to be stried should be an appealable one, and that the application for stay is made before the expiry of the period of limitat on for the appeal 3 Thus if a decree has become final and unappealable the Court has no power to stay the execution thereof in view of a pending application for review 32 The f ct that a preliminary decree has been appealed. aga not, does not empower the Court to order the stay of execution of the final decree in the suit from which no appeal is intended to be preferred to 4 Court cannot under this rule order the stay of evecution of the decree at the instance of a person not 1 parts to the suit, who claims immoveable properis Lable to be taken under the decree 3c

After an appeal has been filed from a decree it is only the appellate Court that can under this rule, stay the execution thereof, the lower Court has no power to do so,4 though it can grant time to the judgment-debtor to enable (1 10o) 33 C 11 927 (332)

10 (1 )21) 61 Ind C to 3 (13) (P tt) 11 (1320) 13 0 Bom of (55) 4t bom 673 12 (133) 1323 Nig 185 (133). (See il a (ts 3) 10 tom II Ch 111

Held on construction of the stay order that payment f interet wa uot a condition of the 133 | 13\_ ) 1327 Vid 327 (328) Or let for pas test finterest was excutable Note 5 1 (1-4) .1 ( 11 21 ( 164)

(t3tc) 1316 C il 272 (271) 2 (t32t) t321 ( i) 41 ( i) 48 ( ii i k

3 (1934) J VII 36 (41) (toyl) t0 C il 517 (513) 3at~~) J 111 3o (41)

3 (1 1-7) 1 12; Lah 60 ( 60 (133) 133 Vil 43 (40) 5 Vid 1lo Wr 5 orler it alling in wing de rie-

spied from such order-1 xicuti 1 of decree can be taved even thou, h no up pe il le se teen bled fr m deste

4 (15°8) 1 Cal L R p (8 (368) (1312) 17 In t (45°728 (429) 35 (II 112). (1- )15 VILLILO R 33 (31)

(1.00) 31 (-1.1373 (3-()

h.m o obtain a stay order from the appellate Court 5 The appellate Court may grant a stay even where an appeal has been filed in forma pauperis and the application for leave to appeal as a pauper is pending disposal 6a. But in order that the appellate Court may exercise its powers under this rule, it is necessary that there should be an appeal pending against the decree the execution of which is sought to be stayed. Thus, where an appeal is filed against an crite, retusing to set aside an exparte decree, the appellate Court has no power to stay the execution of the decree,6 though the original Court can rostpone the sale in execution of such decree, under the provisions of O 21. R 69 Similarly, the appellate Court cannot, in an appeal against an order filing an a vard stay the execution of the decree on the award 8 It has been, however, held by the High Court of Bombay in the case cited below. 9 that, in an appeal from an order refusing to set aside an award, it has utherent power to stay the evecution under the award

Rule 6, sub rule (2), utra, provides that the Court which passed the decree may stay the sale in an execution of the decree. This, however, does not affect the powers of the appellate Court under this rule to stay such sale 10 Nor does the refusal of a stay under this rule bar an application under R 6 n A stay may be granted though the decree may have specified a date within which the judgment-debtor should comply with it and such date has passed without the judgment-debtor doing so 12

It has been held by the High Court of Labore that no order staying execution of the decree appealed from can be made when no execution applicat on has been made or is pending before any Court 13 It purports to rely upua the underment oned case of the High Court of Bombay14 which was a case of a stay of a sale under the section corresponding to R 6, which requires an application for execution to be pending before the lower Court. The said decision of the Lahore High Court cannot be accepted as laying down the correct Law

#### 6 Sufficient cause '

A stay of execution under this Rule cuber by the appellate Court or by the Court which passed the decree, can be ordered only on 'sufficient cause being shown for such stay A stay will not be granted where the anneal does not raise fairly arguable questions? The mere fact that the period of h it mon for appeal from the decree has not expired is not a sufficient idering the stay of execution of the decree 3 The fact that the

judgment debur his been constructively guilty of contempt of Court in not having complied with a decree which specified a certain time within which he should have done so does not disentitle him to an order for stay 4 See 11 (1900) 25 Loui 243 (744)

12 (1903) 4 Ind C to 746 (745 750) (C tl) 13 (1920) 1920 Lab 373 (373)

(1321) 63 Ind C 14 897 (897) (L th) 14 (1301) 25 Bom 583 (383)

<sup>(1924) 1924</sup> I ali 602 (603) (1303) 1 Ind C is 812 (812) (C i) (1904) 27 Mrd GO2 (GOG)

<sup>[</sup>See viso (1923) 1323 Bom 200 (2001) 5 (1909) 4 Ind C ts 552 (302) (Lah)

<sup>51 (1879) 1879</sup> Pun Re No 70, page 191

<sup>6 (1916) 1916</sup> Pat 397 (335)

<sup>1 (1~68)</sup> J Such W R 448 (449) (1911) 9 Ind Cas 862 (865) 38 Cal 754 (1872) 17 Suth W R 6J (70) 2 (1912) 17 Ind Cas 219 (221) (Mad) 3 (1566) 5 Suth W R Mas 53 (53)

<sup>4 (1° 09) 4</sup> Ind U 15 746 (748 750) (Cal).

U, .... 14 112 1227 TA 444 518

security for the performance of the decree that may be ultimately binding upon him 1 Thus security may be ordered to be given for the restitution of mesne profits which may be ultimately declared due to respondent 2 A stay order on condition of security being given comes into operation only on security being given 3

The Court should not accept any security without inquiring into its sufficiency 4 The judgment-debtor must be allowed an opportunity to show that the security offered is sufficient 5 A security, the enforcement of which is likely to lead to litigation should not be accepted 6

Stay of execution is often granted on condition that the appellant deposits the amount of the security in Court In such cases if the appeal is dismissed the money so deposited is held to the credit of the decree-holder. The depositor cannot withdraw it? even if the decree-holder has failed to apply for execution within the prescribed period of limitation 8 A decree-holder attaching the amount in execution of his decree is not entitled to claim any portion thereof in preference to the decree-holder with reference to whose decree the deposit was made 9 If the sum so deposited exceeds the sum ultimately awarded to the decree-holder at should be applied towards the payment of the costs 10 Where, however, the judgment-debtor satisfied the decree otherwise, the sum deposited as security should be returned to him 11 See also the undermentioned case 112

A security bond hypothecating immovable property is chargeable with stamp duty under Art 40 of the Stamp Act, 1899 12 According to the High Courts of Madras13 and Rangeon14 such a bond for a sum exceeding Rs 100 15 compulsorily registrable The High Courts of Lahore16 and Bombay16 have on the other hand held that it is not

After execution has been stayed on giving security, it is not open to the judgment-debtor to cancel the security bond17 though, where it is no longer required the Court may cancel it 18

As to the enforcement of security bonds given under this rule, see Notes to S 145 ante and also the undermentioned case 19 As to the form of

#### Note 11

- 1 (See (1865) 1865 Bourke O C 103] (1935) 1J35 Vad 43 (46) 58 Mad 116 Pro vision as to sceurity is mandatory
  - (1934) 1934 Nag 160 (162) R 5 does not cinjower Court to impose terms prior to granting stay—But conditions imposed by sub c) (3) must be ful filled, or decree holder must consent -Siav order without making provi sion for security is silegal
  - (1920) 1920 Lah 464 (465) In feet it is tho duty of the judgment debtor to ask the Court to fix the amount of security
- 2 (1914) 1914 I un L R No J9 page 182
- 3 (1924) 1924 All 608 (699)

10 (1931) 1931 Cal 474 (4°6) 58 Cal 1 11 (1911) 12 Ind Cas 6,2 (693) (Vad) 11a (193) 1935 Bom 200 (200 201) Decree

> notes-Such suvestment increasing in value by date of appellate decree -Decree holder is entitled only to decretal amount and not what in

(1931) 1934 Lah 138 (142) Overrulu g 1313 Lah 8

16 (1928) 1923 Bom 42 (44) 32 Bom 72.

17 (1929) 1929 Lah '6J (7\*0) 18 (18 0) 13 Suth W It 40J (40J) 19 (1931) 1J31 Mtd I (3) 57 Vlad 218 Im

security bond, see Appendix G, Form No 2.

12 Liability of Surety

I.

See Notes to S 145 ante generally and also the undermentioned cases 1

13 Right of Surety to appeal -5 . S 145 Note 12

14 When respondent is insolvent

Where the respondent decici-holder was an insolvent and the appellant judgment-debtor applied for stay of execution as to costs, he was ordered to pay the costs to the respondent's solicitor on his personal undertaking that he would return the amount, if the appellant succeeded in the appeal.

15 Insolvency of appellant and deposit

Where execution is stayed on the appellant depositing in Court the decretal amount and the appellant is thereafter declared an insolvent, the amount deposited in Court is payable, on the appeal being dismissed, to the decree holder and not to the Official Assignce 1

16 Effect of stay order

The jurisdiction of a Court to deal with further proceedings under the decree ceases when the appellant Court stays such proceedings, and an order passed while the stay order is in force is without jurisdiction. Where the stay order is conditional on security being given it does not come into operation till such security is given and does not affect the validity of a sale held after the order for stay and before the giving of the security? Where an order for stay is set aside on the ground of fraud the effect is, as if the stay had never been ordered at all. Therefore a sale held while the order was in force, is valid? The appointment of a receiver does not operate as a stay of execution.

17 Effect of uncommunicated order staying execution

There is a conflict of decisions on the question whether execution proceedings held by a Court after passing of an order for stay, but before the communication thereof to the Court, are valid. It has been held by the Calcuita High Court that an order for stay of execution takes effect as soon as it is passed and not after it has reached the executing Court, and that therefore, a sale held after an order for stay has been passed but before it reaches the execution Court is invalid. According to the Madras High Court an order for

moveable property—Security given by judgment debtor as security for due jufformance of decree in pursuance of order of stay of execution under this Rule can be realized in execution

Note 12 t (1874) 2 Ind App 21J (234) (P C) Bond can

to entered in execution
(135) 133 Nng 16 (1) 3 1 Nng L R 172
So urity turnished — Smety undertking to be bound by detree that may be passed — Surety is bound even by consent decre that has passed unless fruid of collusion or decree compress mitters beyond hitiga

a security taken under the directions of the High Court

(1906) 8 Bom L R 557 (564) Bond was briding on the surety for the period during which it was allowed to operate (1924) 117 Ind Crs 65 (Inh) The hability

of surely 14 to-extensive with that of the judgment debter

Note 14 1 (1923) 1923 Mad 223 (230)

Note 15 1 (132 ) 1925 Cal 416 (41") 5t Cal 1010 Note 16

6 Pat L Jour

1 (1373) 1075 Cal 1073 (1074) (1323) 1925 I at 553 (555) (1327) 1927 Mad 4.0 (451)

2 (1924) 1374 All 638 (639) 3 (1916) 1318 All 381 (384) 4 (1321) 132t Pat 13t (187)

\_09 Note 17 1 (1906) 33 Cal 327 (934) stay of execution operates only from the time it is communicated to the executing Court and hence a sale held before such communication, is not invalid 2 A similar view has been taken by a Full Bench of the Allahabad High Court 3 But an epuny m was expressed there n that if the decree-holder himself was the purchaser the sale would not be valid as he takes the property subject to all orders made in the suit. The Bombay High Court has held that it is difficult to lay down a principle as to the moment of operativeness of the stay order According to that High Court a great deal depends on the nature of the order the question of good fath and other facts According to the Lahore High Court a sale held before the stay order reaches the anctioneer is valid 5 The Thigh Court of Kangoon has held that such a sale is illegal 6

### 18 Costs of application

It has been held by the High Centr of Bombay that in the absence of pecial circums in eathe general rule is that the class of the application for stry should be cests in the opport! The High Court of Calcutta has on the other hand held that the order for stay is only an indulernce shown to the appellant and therefore he should be made to pit the costs thereof even though he is su cossful in his application 2

### 19 Appeal

The question whether an order printing or refusing seas of execution is appealable or not depends upon the question whether such an order falls within S 47 \s to this see generally Notes 44 84 and 86 to S 47 and the undermentioned eases? It was held in the undermentioned case that an order reacting the se nexts offered and ordering execution to continue to 1 of on importing the refusal to stay the execution of the decree and is not, therefore uppenlible as a electee under S 472

### 20 Letters Patent Appeal

In order graning or refusing stay of execution is a judgment within the meaning of the Letters Patent and is appealable as such An order relating to the sufficence of the security tendered does not come within the purview of S 47 of the Code nor is it a judgment within the meaning of (F B)

. in

ł

2. (1858) 25 6 (1893 (591)

### Note 19

1 (1923) 1923 Lah 446 (446) Order reacting surety is only an interfocutory order and does not determine the rights of parties and is Therefore not appeal able as a decree under S 47

(1998) 1 Oudh Cas 102 (103) Order refusing stas as decree under S 47 and as

a perlule 2 (1927) 1927 Lah 527 (528)

Note 20

t person way be guilty of contempt although the order of Court which he alleged to have wittetly disobesed has not been officially communicated to him 1

4 (1928) 1928 Bom 189 (190 1911 J2 Born

5 (1930) 1930 Lah 17 (18)

1 (1932) 1932 Bom 12" (128) 56 Bom 2"6

order refusing stay a judgment J

C

the Letters Patent 2

Appeal to the Privy Council - An order refusing to stay execution is not a final order within the meaning of Cl (a) of S 109 of the Code 3

21 Revision

This rule does not apply to applications for revision 1 But, as has been seen in Note 2 above the Court has an inherent power of stay under S 1512

22 Review

An order of stay of execution made under this Rule is open to review 1

Security in case of order for execution of decree appealed fro

R. 6. [S 546] (1) Where an order is made for the execution of a decree from which an appeal is pending, the Court which passed the decree shall on sufficient cause being shown by the appellant, require security to be taken for the

restriction3 of an execution of the

or has been taken in of the value of such

Note No

9

10

11

12

decree or order of the property and for Appellate Court or the Appellate Court may for like cause direct the Court which passed the decree to take such security

(2) Where an order has been made for the sale of immovable property in execution of a decree, and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor to the Court which made the order, be stayed8 on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disrosed of

[1877—S 546, 1861—S 36]

Sunopsis

Note No Legislative changes Scope and applicability of the Rule Restitution -Sc. S 144 aute Secur ty Property which may be or has been

taken in execut on

band -See O 41 R 5 Mode of enforcement of security bond -2 See Notes to S 145 a le 3 Stay of sale of immovable property Petition to stay sale where to be made Appeal Form Revision

Other Tomes

Effect of stay of sile Sec Note 8 Pt (1) lovers of the appellate Court Sec Note ?

Registration and attestation of security

Pt (3a) and Note 9 1t (2)

Legislative changes —

The present Rule corre ponds to S .46 of the old Code subject to the following chauges -

2 (1927) 192" Mad 398 (401) 50 Mad 380 (See also (19. ) 1927 Mad 497 (592)

Order granting an immediou staying

execut on is appealable ] 3 (1911) 10 Ind Cas 444 (445) (Call

Note 21 1 (19 9) 1929 Lah 16" (16s)

[See (1911) 9 Ind Cas 373 (374) (Cal)] Note 22

1 (185:) 9 411 °6 (40 4 ) Order made without mrisdiction-Reviewed

- 1. The world "or has been taken" have been added in subrule (t) See hote 5, unfea
- 2 The words 'for money' which occurred effer the words 'in execution of edecree ' in the third para of the ill section (corresponding to sub-rule (2) of the present Rutel have teen emutted. Hence, suterule (2) applies to all decisions under the all seel n leading upon the meaning of the experim decree for ment a tre only et academic interest mov.
- 3 The weeds 'to the Court which made the order an end sub (2) are ten be Note 9 mfez

### 2 Scope and applicability of the Rule

In order that this rule may apply it is essential that an anneal should be pending as must the decree under execution, and an order should have been made for the execution of the decree Where therefore, no appeal has been filed against the decree t or where no order for execution has been made,? there can be no order for security for restitution under this rule. Where an appeal is only against a part of the decree, an order for security for resultation cannot be passed with reference to the portion not appealed against 3 It is competent for the trial Court as well as the appellate Court to pass an order for security under this rule There is, however, a distinction between the powers of the two Courts. The Court which passed the electric shall, on sufficient cause being shown, require security, while the appellate Court may for like cause, direct the trial Court to take security. The rule applies only to parties to the suit 3s

Pending an appeal to the Press Council the trial Court has no jurisdiction to pass an order for security under this rule. The matter is governed by the provisions of O 45 and not by this order 4

#### 3 Restitution - Sec 5 111 aute

#### 4 Security.

A surety is not discharged merely by reason of the death of the decreeholder! Where under a decree for redemption, the mortgagor decree-holder deposits the mortgage money in Court and applies for execution of the decree the money so deposited can be accepted as security for restitution under this tule 2 Where the holder of a decree for money is willing to give security for restitution, the Court should not ordinarily grant a stay of execution of the decree 3 As to the extent of the halnhty of the surety, see Note 8 to S 145 and the cases cited below 4

5 'Property which may be or has been taken in execution

The words in the rule 'or has been taken" are new and make it clear

Order 41 Rule 6-Note 1 1 (1898) 25 Cal 322 (323) Decree for arreats

of rent is decree for money'

not declared to be phargeable on any

specific immiovable property is a decree for money Note 2

1 (1886) 8 Att 639 (640)

(1887) 9 All 36 (41) (1866) 6 Suth W R Mis Rul 15 (1") 2 (1901) 25 Pom 583 (583)

7 (1890) 1890 Pun Re No 120 1ago 892 Ja such a case, stay of execution can

not be granted Ta (1932) 1932 Bom 326 (326) 4 (1925) 1925 Rang 254 (255) 3 Rang 155

Note 4

1 (1917) 1917 Cal 594 (595) 2 (1912) 15 I O 383 (383 381) (Mad) Per Abdur Rahma, J contra, Sundara Ayyar J

3 (1899) 13 Bom 241 (241) 4 (1993) 1893 Bom P J 528 (590) Suicty for ful

filling such orders or decrees as may to given in appeal - Held surety trable for costs awarded in appeal

that security for restitution may be ordered even after property has passed into the hands of the decree holder in execution of his decree. They give effect to the case cited below under the Code of 1882. The view seems to have been the same even under the previous Codes.

- 6 Registration and attestation of security bond -SeO 41 R .
- 7 Mode of enforcement of security bond Sec \ tes to \$ 145 a /
  - 8 Stay of sale of immovable property

Sub-R (2) is a mandatory provision It is, therefore incumbent on the Court to stay the sale of immovable property, on such terms as to giving security or otherwise as it thinks fit. An order for sity of sale can be passed even where the sale has already taken place provided it has not been confirmed? The sub rule applies also to sale of immovable property in execution of amortgage decree. Where a person has become hable as a surety for the performance of a decree and an order for the execution of such a decree by the sale of immoveable properties is made against him under S. 148 ante, he is a judgment debtor within the meaning of this rule and is therefore citized to notly for stay of execution.

The expression on such terms as to giving security or otherwise in bit rule, 2 of thus Rule incluse that the terms may be either giving security or any other term such as the deposit of the decree amount in the Court ordering the star. The Court has therefore jurisdiction to make it a condition that the stay would be given only on the judgment-debtor depositing the decree amount in Court 25.

An order for the stay of sale of immovable property under this tule does not preclude the execution of the decree in other ways, c g by proceed-

(1933) 1933 Mad 309 (310) Surety bond for allowing execution of 7 decree pend ing appeal — Appeal compromed giving time to Inneilal debtor — Surety not party to comprome o— Surety is discharged Note 5

1 (see (1928) 1928 Ust 157 (188 189) In the crist two hold that the Court has inhient power to order security in such a case The letrned Judges seem to have overlooked the first it mader the jesent Rule at set it a case the court to resort to inherent the court of 
2 (1 106) 33 Cal J (934) 3 (1563 66) 10 Moo Ind 1 p 197 (907) (P C) (1867) 8 Suth W B 144 (147) (F L)

(1807) 8 Suitt W. R. 241 (141) [17-5] (1872) 17 Suitt W. R. 241 (19) Spenal van such as waste to be proved (Dut see (1860) 7 from H.C.R. v.C. 122 (124) As power to order country for restriction after properly hapassed into hands of a successful party)

Note 8 1 (1J25) 1925 Lah 69 (69)

(1933) 1933 All 732 (733) 5 All 9s Where allilication for stay is made Court ought not to dismis execution application (1924) 1924 Lah 631 (631) (1924) 1924 Lah 63 (71 (672) (1929) 1929 Lah 63 (63) (1911) 9 Ind Cas 329 (324) (C il) (1928) 163 Ind Cas 2: 2 (Lah) (1911) 11 Ind Cas 2: (27) (11)

(But see (1932) 1932 '11 bol (502) Sub rule (2) is only complementary to R 5—There is no olligation to

gage suit-tpplication for execution

See also (1934) 1934 Lah 117 (117). Mortigue decrees—Properties decreasing in value and capable of condensating in value and capable of condensating in the decreasing sale 3 independ debtor 4 to 2 asked to furnish security 5 condensating that may occur in 22 condensating the decreasing sale 3 in a condensating the decreasing that may occur in 22 condensating the decreasing the d

ing against the moveables of the judgment-debtor 4 Where, on the rejection of i clum pention in execution proceedings, the claimant filed a suit for a declaration of his title and on its being dismissed, appealed from the decree and pending the appeal applied for a stay of sale, it was held that the sale could not be stryed masmuch as the rule applied only where the appeal was is unst the decree which was to be executed and not where the decree appealed from was different from the decree to be executed 5

### 9 Petition to stay sale where to be made

The words to the Court which made the order in sub-rule (2), which are new show that an application for stay of sale under that sub-rule should be made to the executing Court and not to the appella e Court 1 This is in a cordance with the following decisions under the old Code 14 But the Madras High Court has held that the appellate Court can direct a s'as of sale of immovable property by variue of its seneral powers under O 41, R 52

The Court cannot, under this rule stay the sale in execution of a decree passed by another Court in another sunt 3

### 10 Appeal

An order requiring security to be kiven for restitution is one falling within S 47 and is appealable (See Note 71-A Pt (21) to S 47, ante ] An order accepting or refusing to accept security is however, not appealable either as a decree or order under S 47 of the Code 1

I surety is anst whom a decree is sought to be executed under \$ 145 can by virtue of that section appeal from an order made against him in execution proceedings 14

\ undersent debtor it whose instance a sale was stayed cannot subsequently appeal from the stay order even assuming such an order is otherwise appealable 2

### 11 Form

Lor form of security bond see App. G. Form No. 3

# 12 Revision

Where the Court refuses an application under sub-R (2) of this rule. and declines to stay execution pending appeal, the High Court can under 5 115 revise the order and direct execution to be stayed on the judgmentdebtor farmsland security 1

4 (11.6) 13 6 Lah ii 3 (163) 5 (1922) 1J.2 I th a8 (aJ) I rojer remely 15

to ask for temporary munetion under O 3J (See Toverer (1 131) 1334 I at 637 (63") This rule does 1 of at 11 but

the Court can order stay under its inhere it jowers-Lien in such i case Court would be uting without must ction if it did not jut the plicar t on terms ]

1

Note 9

Note 10 1 (1332) 1932 Lab 1 0 (1.1) [See hovever (1,119) 1913 Cil 4 1 (1"2) But an order ecepting seen rits and breeting delivery of pos-Ms 100 is a fi sal order and is il peal al le 1 1a(1858) 1 Bom 71 ("4) 2 (1J30) 1930 Lah 130 (191)

> tionalno of the project) attached -Held order hable to be revis 1

No security to be required from the Government or a public officer in cer tain cases

Τ

R. 7. [S 547.] No such security as is mentioned in Rules 5 O and 6 shall be required from the Secretary of State for India in Council or, where the Government has undertaken the defence of the suit.

from any public officer sued in respect of an act alleged to he done by him in his official capacity.

[1877—S 547, 1859—S. 340]

R. S. [New ] The powers conferred by Rules 5 and 6 shall be O exercisable where an appeal may be or has been Exercise of powers in appeal from order preferred not from the decree but from an order made in execution of made in execution of such decree deerce

#### Sunovsis

Scope and object of the Rule Note No 1

1 Scope and object of the Rule

This rule is new and gives effect to the following decisions under the old Code 1 It makes the provisions of Rr 5 and 6 applicable mutates mutandes to cases in which the appeal is not from the decree (as contemplated by those rules) but from an order in execution of the decree 2

Under the rules framed by the High Court of Patna, the Registrar has no power to hear an application under this rule 3

### PROCEDURE ON ADMISSION OF APPEAL

R. 9. [S 548.] (1) Where a memorandum of appeal is admit- 0 ted, the Appellate Court or the proper officer of Registry of memo that Court shall endouse thereon the date of randum of appeal presentation, and shall register the appeal in a book to he kept for the purpose.

(2) Such books shall be called the Register Register of Appeala of Appeals.

[1877—S 548: 1859—S 341]

Madras

Local Amendment.

prescribed

Synopsis Note No Note No Registration of appeal Second appeal from order of rejection Ex parte admission of appeal-Power to Withdrawal of appeal after registra dismiss appeal subsequently on ground of limitation tion

Order 41 R 8-Note 1 1 (1901) 28 Cal 734 (736) (1888) 8 AH W N 245 (246) (1575 °6) 1 AH 178 (180) (F B)

In execution-Appeal against - Application for stay - Stay can be granted even after sale but before confirmation]

<sup>2 [500 (1</sup>J17) 1917 111 40 (10) Order for sale 3 (1932) 1932 Pat 21. (?18)

such time as the Court orders the Court shall reject the appeal. There again the 10. Court is given no discretion in the matter 1

Compare O 25, Rr 1 and 2

Under this rule security for costs can be demanded either before or after the respondent is called upon to appear and answer 2 Further, the security may be for the costs of the appeal, or of the original suit or of both 3

An order for security for costs can be passed under the rule only against the appellant. No such order can be passed against the respondent 8 Nor can the Court demand even from the appellant, security for the entire decree amount Thus the Court cannot while adoutting an appeal under R 11 of this Order issue notice to the respondent conditional on payment by the appellant of the decretal amount plus a sum of Rs 500 as security for the costs of the respondent 5

### 2 To what appeals the Rule applies

Thus rule applies to appeals from decrees By S 2, sub-S (2) an order determining any question under S 47 is also a deerce. It follows that this rule will apply to appeals from orders under S 471 By virtue of O 43, R 2 infra this rule will apply also to appeals from orders other than those falling under S 47

# 3 Appeals in forma pauperis

There is a contlict of opinion as to the applicability of the rule to appeals in forma pauperis According to the High Court of Madras' and Rangoon2 and the Judicial Commissioner's Court of Nagpur3 the rule applies to pauper appeals but the Court should not make an order for security except for very special reasons such as, the appeal being a speculative one and the pauper a mere puppet in the hands of persons well able to find security 4 The High Courts of Calcutta5 Bombay8 and Lahore7 have, on the other hand, held that O 41, R 10 does not apply to appeals by paupers

4 Insolvency appeals

This Rule applies also to an appeal from an order passed by a Judge of the High Court overcising jurisdiction in insolvency under the Presidency

Order 41 Rule 10-Note I 1 (1896) 18 411 101 (103 104) (F B)

Under the Code of 1809 there seems to have been some doubt on this 1 ount- See for instance the following cases -(1866) 6 Suth W R Mis 123 (124) Question

was left open in this case (1872) 18 Suth W R 102 (102) Court can order security at any time before

hearing of appeal (1870) 13 Suth W R 431 (432) (Do)

3 (1871) 7 Beng L R 4pp 59 (60) It was held under the Code of 1859 that security could be ordered only for the costs of the appeal and not of the original (1867) 8 Suth W R 217 (217) (Do)

4 [S e (18"0) 4 Beng L R (O C) 92 (93)] (18:1) 16 Suth W R 311 (311) o (1932) 1932 All 511 (511 512] (F B]

Note 2

1 (1900) 24 Bom 314 (316)

1 (1320) 1920

(1907) 17 Mad L Jour 583 (583) (1880) 3 Mad 66 (67)

[See also (1933) 1903 Mad 519 (520) 56 Mad 323]

2 (1923) 1923 Rang 244 (245) In this case however the judgment assures rather than decides that security for costs can be ordered in pauper ap peals-The actual de ision is that special reasons are necessary for requiring security for costs from a

pauper appellant 3 (1930) 1930 Nag 28 (32) 4 (1879) 3 Mad 66 (67)

(1933) 1933 Mad 519 (571) 56 Mad 323 Absence of prima facte good case on appeal by pauper as good ground for

security

5 (1913) 1918 Cul 618 (618)

R. 7. [S 547.] No such security as is mentioned in Rules 5 and 6 shall be required from the Secretary of No security to be State for India in Council or, where the Governrequired from the ment has undertaken the detence of the suit. Government or a public officer in cer from any public officer sued in respect of an act tain cases alleged to be done by him in his official capacity.

[1877—S 547, 1859—S 340]

R. S. [New ] The powers conferred by Rules 5 and 6 shall be exercisable where an appeal may be or has been Exercise of powers in appeal from or ler preferred not from the decree but from an order made in execution of made in execution of such decree decree

### Sunopsis

#### Scope and object of the Rule Note No 1

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This rule is new and gives effect to the following decisions under the old Code 1 It makes the provisions of Rr 5 and 6 applicable mutatis mutandis to cases in which the appeal is not from the decree (as contemplated by those rules) but from an order in execution of the decree 2

Under the rules framed by the High Court of Patna, the Registrar has no power to hear an application under this rule 3

# PROCEDURE ON ADMISSION OF APPUAL.

R. 9. [S 548.] (1) Where a momorandum of appeal is admit- 0 ted, the Appellato Court or the proper officer of that Court shall endorse thereon the date of Registry of memo randum of appeal presentation, and shall register the appeal in a book to be kept for the purpose

(2) Such books shall be called the Register Register of Appeals of Appeals.

[1877—S. 548: 1859—S 341 ]

### Local Amendment

Madras

Substitute the following for Sub rule (2) -

Registers in accordance with forms Nos 22, 23 24 and 25 in Appendix II are prescribed for use in all Civil Courts having jurisdiction over the classes of suits specified therein

Sunopsis Note No. Second appeal from order of rejection Withdrawal of appeal after registra tion

Order 41 R 8-Note 1 1 (1901) 23 Cal 734 (736) (1588) 8 MI W N 245 (246)

in execution- appeal igainst - application for stay - Stay can be granted even after sale but before

<sup>(18&</sup>quot;5 76) 1 All 178 (180) (F B)
2 [See (1917) 1917 All 40 (40) Order for sale confirmation] 3 (1932) 1932 Pat 214 (218)

9.

# Other Topics,

Power of Sub Judge to disiness on ground of limitation See Note 2 It (3)

1 Registration of appeal

The registration of an appeal is a purely ministerial act. The Court can reject an appeal after it has been registered 1

A memorandum of appeal which has not been registered is not to be regarded as an appeal that is before the Court, but only as a memorandum of appeal presented to it. Therefore the provisions of law as to how an appeal can be dealt with after admission do not apply it the stage before registration of the appeal 2.

2 Ex parte admission of appeal-Power to dismiss appeal subsequently on ground of limitation

Where an appeal is presented after the expiry of the period of himitation along with an application to excuse the delay under S 5 of the Limitation Act, the question of excusing the delay ought to be determined at the stage of admission of the appeal after notice to the respondent 1 Where, however co. parte order is made admitting such an appeal the Court can argain go into the question of limitation at the hearing of the appeal and dismiss it if there is no sufficient ground for excusing the delay 2 Where a District Judge admits such an appeal ex parte, and the appeal is thereafter transferred to a Subordinate Judge for disposal the litter has power to dismiss the appeal on the ground of limitation 3

3 Second appeal from order of rejection

An order refusing to admit an appeal under this rule and rejecting it is a decree and is open to appeal i See Note 13 to S 2 Sub-S (2), ante

4 Withdrawal of appeal after registration

See also Note 3 to O 23, R 1 Where an appellant apples for leave to withdraw the appeal after notice of hearing has been served on the respondent, the respondent should be given notice of the application. If is always entitled to lus costs when leave is granted for withdrawal of the appeal 1

Appetiate Court discretion, I de either before the respondent is appeting a peting to forcats on the application of the respondent, demand from the application of the respondent, demand from the application of the costs of the application of the oliginal sunt, or of both

Order 41 Rute 9—Note 1 1 (1870) 13 Suth W R 851 (3\(\delta\)2 2 (1938) 1933 Mad 358 (359)

1

<sup>1 (1904) 8</sup> Cal W N 64 (65) Note 4 1 (1869) 3 Mad H O R 868 (867)

Provided that the Court shall demand such security in all O cases in which the appellant is residing out of appellant British India, and is not possessed of any resides out of Bri

tish India sufficient immovable property within British India other than the property (if any) to which the appeal relates.

(2) Where such security is not furnished within such time as the Court orders the Conit shall reject the appeal.11

[1877-8 549; 1859-8 342,]

### Local Amendments

ALLAHABAD

I.

471 the fell wit a 1: viso to sub rule (1) and also C1 (2) -

(1) I coviled also that in case of every appeal other than a paulic appeal from any decree or order passed in appeal by any Court subordinate to the High Court confirming the decice or order of the Court below or modifying it only infavour of 1 reasons

2 It the a nd pass a totl (1) of this Rule costs of the appeal means advocate a teral mirica on the valution of the appeal together with a sum of Rs 2 for Court fee on I akal thama to be filed by the respondent Re I mercinon fee and in of a single Judge a lurther sum i dent Orige int Cl (2) of the Itula

		Syn	opsis						
								Note	a No
1	Scope and object of the rule	1	VIII	1, .		•			
11	To what appeals the rule applies	2	i		,				11
	(a) Appeals in forma gaugeris	3	1 IX	2					12
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ш	Grounds for demanding security	6	l XI	Appe	al				14
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	security	10	í						

### Other Tomes

In its discretion See Note 7 It (1) See Note I, Pt (I) and security Revason See Note 11, Pt (9) Respondent- At what stage should apply for

1 Scope and object of the Rule

In Lekha v Bhauna, 1 L R 18 All 101, which was a case under S 549 of the old Code corresponding to this rule, Edge, C J, observed as follows -

The object of that section was to secure the respondent in an appeal from the rik of having to meur lurther costs which he might never succeed in getting out of the It was intended under the first paragraph that the Court should have entire discretion in all cases not coming under the second paragraph in making or relusing an order for security for cost. Under the second paragraph which is the provise to the first, the Court is given no discretion in the matter In cases falling within that provise the Court has to follow the mandate of the statute and make an order for security for costs. An order for security for costs liaving been made under either the first paragraph or the second, it is by the third paragraph of the section enacted that if such security be not lurnished within

0, such time as the Court orders the Court shall reject the appeal. There again the Court is given no discretion in the matter.

Compare O 25, Rr 1 and 2

Under this rule security for costs can be demanded either before or after the respondent is called upon to appear and answer? Further, the security may be for the costs of the appeal or of the original suit or of both?

An order for security for costs can be passed under the rule only against the appellant. No such order can be passed against the respondent hor can the Court demand even from the appellant, security for the enlire decree amount. Thus the Court cannot while admitting an appeal under R. 11, of this Order issue notice to the respondent conditional on payment by the appellant of the decretal amount plus a sum of Rs. 500 as security for the costs of the respondent.

### 2 To what appeals the Rule applies

This rule applies to appeals from decrees By S. 2, sub-S. (2) an order determinang any question under S. 47 is also a decree. It follows that this rule will apply to appeals from orders under S. 47 By vartue of O. 43, R. 2 mira this rule will apply also to appeals from orders other than those falling under S. 47.

#### 3 Appeals in forma pauperis

There is a conflict of opinion as to the applicability of the rule to pipeals in forma pauperis According to the High Court of Madras¹ and Rangoom² and the Yuddical Commissioner's Court of Nagpur³ the rule applies to pauper appeals but the Court should not make an order for security except for very special reasons such as, the appeal being a speculative one and the pauper, a mere puppet in the hands of persons well able to find security ⁴ The High Courts of Calcutta³ Bombay³ and Lahore³ have, on the other hand, held that O 41, R 10 does not apply to appeals by paupers

#### 4 Insolvency appeals

This Rule applies also to an appeal from an order passed by a Judge of the High Court oxercising jurisduction in insolvency under the Presidency Order 41 Rule 10-Pote 1 (1997) 17 Mad L Jour 539 (538)

1 (1896) 18 All 101 (103 104) (F B)
2 Un for the Code of 1859 there seems to

have been some doubt on this point—See for instance the following cases— (1866) 6 Suth W R Mis 123 (124) Question

was left open in this case (1872) IS Suth W R 102 (102) Court can order security at any time before

1 earning of appeal (1870) 13 Suth W R 431 (432) (Do) 3 (1871) 7 Eeng L R App 59 (60) It was hald under the Code of 1859 that security

under the Code of 1859 that security could be ordered only for the costs of the appeal and not of the original peals—The actual de mon is that special reasons are necessary for requiring security for cost, from a pauper appellant

3 (1930) 1930 hag 28 (32) 4 (1879) 3 Mad 68 (67)

(1880) 3 3134 66 (67)

56 Mad 373]

(1939) 1933 Mad 519 (521) 56 Mad 323
Absence of 1ris a facts good case on
appeal by pruper 18 good ground for

2 (1923) 1923 Rang 244 (245) In this case however the judgment assures

[See also (1933) 1953 Mad 519 (520)

rather than decides that security for

costs can be ordered in pauper ap-

5 (1918) 1918 Cal 618 (618)

Note 2 1 (1900) 24 Born 314 (316)

Note 3 1 (1J20) 1920 Mad 318 (318) 6 ( 7 (1922) 1922 Lah 87 (88) 3 Lah 30

2637

Towns Insolvency Act, 1909 1

5 Letters Patent Appeals

The rule applies to appeals under Cl 15 of the Letters Patent1 unless the rules framed by the particular High Court are inconsistent therewith in which case the former will override the latter R 736 of the Bombay High Court which requires an appellant to deposit Rs 500 as security for costs in all cases is not inconsistent with this Rule and an appellant may be called upon under that Rule to furnish any additional security for costs that may be consudered proper 2 Similarly R 354 framed by the Madras High Court is not inconsistent with this Rule 3

6 Grounds for demanding security

As has been seen in Note 1 above the Court has in cases coming under the first paragraph of sub rule (1), a discretion in the matter of demanding security for costs. But in view of the fact that the Rule tends to restrict a party's right of appeal, it should be applied with great caution, and very satisfactory grounds should be shown before making an order for security under this Rule 2 The discretion is not an arbitrary one but must be exercised in accordance with sound judicial principles 3 The appellate Court may well be guided in exercise of such discretion by the provisions of O 25 R 14 The following have been held not to be sufficient grounds for making an order for security under this Rule -

> (1) The mere fact that the appellant may lose and may not pay the costs of the appeal5 or that the appellant is an undischarged insolvente or is a poor man from whom, if the appeal fails it would be difficult to recover costs of the appeal 7 It was never intended by the Legislature in enacting this rule to

Note 4 1 (1917) 1917 Cal 626 (6°6) 43 Cal 213 [But are (18.0) 5 Beng L R 179 Note 5

1 (1021) 1021 P C 80 (82) 43 Cal 481 48 1nd App 76 (P C) Overruling (1904) 27 Vad 121 (123) (1925) 1225 Mad 1132 (1133)

(1924) 1924 Cal 781 (781) 51 Cal 695 (1923) 1923 Bem 393 (399) 2 (1923) 1923 Bem 399 (399)

(1926) 1926 Bom 49 (43)

[But see (1912) 17 Ind Cas 739 (740) 37 Bom 5"2 1 (See also (1938) 1933 Born 120 (120)

The fact that costs of appeal are likely to be heavy is no ground for deminding further security ]
3 (1925) 1925 Mad 1132 (1133)

for order for security-Unsworn statements of very vague character -- Security should not be ordered-Applicant may apply again filing a satisfactory affidavit in support of his application

3 (1589) 13 Bom 458 (461)

(1928) 1923 Bom 309 (30J) (See however (1928) 1923 Bom 264 (264) Where Mincleod C J observed that the Court being given an absolute discretion no Bonch of Judges can lay down Rules fettering the dis cretion of other Judges-It is sub mitted that His Lordship could not have meant by this to lay down that discretionary power need not be ex-ercised in accordance with legal principles but may be exercised arbitrarily ]
4 (1903) 5 Som L R 661 (662)
5 (1923) 1923 Hom 399 (399)

6 (1890) 24 Q B D 655 Cook & Whellock-Peferred in 30 Vad 145 and 1,419 Cal

71) 7 (1921) 1921 Pat 233 (233)

(1923) 1923 Vad 204 (205) (1920) 1930 Lah 629 (600) (1930) 1930 Lah 882 (383) (1930) 1930 Lah 381 (384)

(1894) 21 Cal 576 (527) (1587) 14 Cal 533 (536) Security for costs of suit

(1579) 3 Bom 241 (247) (1556) 8 411 203 (204) (1%6) 1506 All W N 256 (256) (1881) 4 111 1/ 1/ 99 (99)

(1853) 1859 All W \ 147 (149)

derogate from the right of appeal given by law to every person who is defeated in the Court of first instance 8

- (2) The mere fact that a third person has incited the appeal? or that the appellant has parted with a portion of his interest in the subject-metter of the suit for the purpose of obtaining funds for the carrying on of the hitgauon<sup>10</sup> or that a relative of the appellant is assisting the appellant financially in the hitgauon<sup>11</sup> or that the appellant has rich relations who can afford to pay the decree amount <sup>12</sup>
- (3) The mere fact that the appellant has not paid the costs of the original sunt 12
- (4) The fact that one of the appellants as a female 14

From the above cases it is clear that mere poverty is no ground for ordering security. But poverty along with other circumstances may justify an order under this Rule 13. Thus where the appellant is proved to be a mere pupper in the hands of others who are promoting the hitigation from behind the secness of where there is evidence of facts which cast doubts on the honesty and bona fides of the appellant, or the appeal is vexatious, it the appellant may be ordered to furnish security under this Rule. Where the parties have agreed that security for costs should be given, the Court should pass an order for security under this Rule 14.

Although mere poverty of the appellant is no ground for ordering security for the costs of the appeal it is also on the other hand not a ground for dispensing with security where such security is necessary in the circumstances of the case 19

Security for costs should not be ordered where the consequences of such an order would be unduly penal  $^{20}$ 

#### 7 Delay in applying for security

The respondent should be prompt in taking advantage of this rule and must apply for security for costs, before he himself or the appellant incurs

(1888) 1888 All W N 46 (49)

pellant may in proper c sos bo ordered to give steurily—Court can also go into matters which were not gone into when giving leave to appeal as a pauper

Lourke 4 O C 40

a ground for ordering him to give security for costs

(1805) 1865 bourke O C 110 Appellant who has no available property must if required give security for the costs of an appeal before proceeding with

8 (1885) 7 All 542 (546) 9 (1886) 6 111 W N 280 (286)

10 (1887) 14 Cal 533 (536) 11 (1923) 1973 Rang 244 (245) 12 (1915) 1915 Gal 595 (595)

12 (1915) 1915 Cal 595 (595)
13 (1931) 1931 Lah 70 (70)
(1933) 1933 Mad W N 263 (264)
(1903) 5 Bom L R 661 (662)
14 (1880) 1886 All W N 286 (286)

15 (1923) 1323 Bo n 264 (264) (1933) 1933 Mad W N 263 (264) Pauler sp (1876 77) 2 Cal 233 (259) 4 Ind Apr 23 (P C) (18:2) 18 Suth \v R 102 (103)

(1881) 3 Vad 66 (07) (1921) 1921 Pat 2.3 (233)

18 (1866) 1 Ind Jur N S 223 19 (1923) 1923 Wrd 204 (205) 20 (1930) 1930 Nac 28 (29) cosis in the appeal 1 Any delay on his part will be construed as a waiver by O him of his right under this rule 2

#### 8 Notice to show cause

It is a fundamental principle of law that no order can be passed against a person without giving him an opportunity to be heard in defence Hence, an order for security for costs of an appeal cannot be passed against a person without giving him notice to show cause why such an order should not be made 1 A mere notice to show cause does not amount to a demand and if the order for security is passed in his absence, he cannot be held to have failed to comply with the order if it was not communicated to him 2

#### 9 Amount of security

An order under this Rule may direct specified amount to be paid into Court as security for costs 1 It is, however, not necessary in all cases to specify the sum for which security must be given. It is enough if the order directs security to be given for the costs of the appeal, or of the original suit or of both 24 A surety under thus Rule is discharged as soon as the appeal is allowed, the liability is not revived merely because the appellate order is reversed by a higher Court 2 The Taxing Officer's decision as to the amount for which security should be given is subject to revision by the High Court 3

In Bombay, the practice is not to require security proportionate to the estimated costs of appeal but to require generally a security of only Rs 500 4 See also the undermentioned case 5

#### 10 Extension of time for furnishing security

The Court may, in its discretion, enlarge the time allowed for furnishing the security ordered1 and this may be done even though the period originally fixed has expired 2 (See S 148) But when once an appeal has been rejected for failure to give the security ordered, it is not thereafter open to the Court to extend the time for furnishing security 3

As to the circumstances which would justify extension of time it is a matter purely in the discretion of the Court 4 Thus, when the period fixed expires on a day on which the offices of the Court are closed for business, the security

Note 7

surety without inquiry on report of mamlatdar-The delegation of tak ing security does not prevent the appellate Court from inquiring into its sufficiency

1 (1683) 5 411 380 (351)

2 (1882) 5 Vind 265 (266) Note 9

1 (1330) 1930 Mad 355 (356)

14 (1836) 18 All 101 (105) (E B) Overruling (1887) 9 All 161 (166)

2 (1927) 1,327 All 523 (523) (1,324) 1,324 Cal 525 (528) 3 (1927) 1927 Lom 493 (501) 4 (1883) 13 1 om 458 (462)

o (1331) 1931 bom 13 (15 10) Security tor costs directed to be taken by lower Court—That Court accepting a

1 (1932) 1932 Vad V N G55 (553) (1888) 1888 Ali W N 211 (242) (1889) 17 G21 1(3) (P C) 2 (1839) 17 G21 (3) (P C) (1837) 17 G21 (515) 17 Ind 1p 1 (P C) (1837) 10 Bom 546 (519) (1831) 16 Bom 263 (256) Case of amend ment of ploudings

(1837) 19 All 240 (248)

The following decisions to the contraru are obsol te

(1888) 11 Mad 190 (191) (1885) 11 Cal 716 (717)

(1675 78) 1 111 687 (G88) 3 (1923) 1923 Cal 817 (316) 4 (1990) 17 Cal 1 (3) (P C)

(1890) 17 Cal 516 (517) 17 Ind App 9 (P C )

10, may be accepted on the re-opening day.5 Similarly where the appellant applied for extension of time on the ground that, on account of the prevalence of plague in Bombay he was not able to arrange for the security, it was held that time should be extended 6 That the appellant is a wandering Fakir is no excuse for not furnishing the security in time, it is the duty of every higgant to keep in touch with his case 7

# 11 Dismissal of appeal for failure to give security

On appellant's failure to give the security within the period fixed, the Court is bound under sub-R (2) to reject the appeal 1 A special application by the respondent to have the appeal rejected is not necessary, and he can raise the objection at the hearing of the appeal 2 Where the period fixed for giving security expired during the long vacation but the Court office was open during the vacation, it was held that it was not a compliance with the order if the security is given on the reopening day and that the appeal should be rejected? Where the security bond furnished was not drawn up in the terms of the Judge's order, it was held that there was a failure to give security and that the appeal should be rejected 4 But an appeal should not be rejected merely for a clerical error in the security bond and the error should be allowed to be corrected 5 In the underment oned case8 where it was objected that the executant of the security bond had not been duly authorised to execute it on behalf of the appellant, the Privy Council held that the case should have been adjourned till a proper bond was executed and that the appeal should not have been summarily rejected. The appeal should not be rejected if the order for security has been passed without giving notice to the appellant 7 (See Note 8 supra) A mere notice to show cause does not amount to a demand for security and where an order for security is passed in the appellant's absence, the order must be communicated to him before he can be held to have failed to comply with it 8 Reasonable opportunity should be given to the appellant to furnish the security and where it is not given and the appeal is dismissed for the appellant's failure to comply with the order for security, the High Court can interfere in sevision 9

Once an appeal is dismissed for failure to give security for costs, the Court cannot afterwards extend the time for giving security 10

12 Restoration of appeal so rejected

Under S 107 (2) read with O 25, R 2 (2) the Appellate Court may,

Discretion not to be lightly inter fered with

[But see (1883) 1883 Att W N 254 (254) Period expring during vaca tion-Court open for such husmess during vacation-burnishing secu rity on re opening day is not enough] 6 (1897) 21 Bom 576 (579)

7 (1922) 63 Ind Cas 306 (307) (Lah)

5 (1876 77) 2 Cal 272 (273)

view of the clear language of sub rule (1) this ruling is of doubtful correctness]

<sup>3 (1983) 1893</sup> All W N 254 (254)
4 (1881) 1881 All W N 35 (85)
5 (1925) 1925 Outh 402 (403)
6 (1927) 1927 P O 254 (265) (P C).
7 (1883) 5 All 380 (381)
8 (1883) 5 Mad 205 (205)
9 (1115) 1915 M 133 (134)
10 (1923) 1923 Cal 317 (318)

hot permissive (1875-78) 1 All 687 (688)

an its discretion, restore an appeal which has been rejected for failure to give security for costs 1 But where the appellant application for extension of time has been heard and dismissed, on the merits, an application for restoration of the appeal rejected for failure to furnish security will be barred 2 An order restoring an appeal rejected under sub-R (2) will not bind the respondent if it is made without notice to him 3

#### 13 Limitation for application for restoration

It has been held by the Madras High Court that Art 168 of the Limitation Vct applies to an application for the restoration of an appeal dismissed for failure to furnish security under this rule 1 Even if Art 168 be held not to apply the application ought to be made within a reasonable time and ordinarily would be too late after thirty days from the date of dismissal 2

#### 14 Appeal

Τ.

We order rejecting an apreal for failure to furnish security for costs is not appealable ether as an order under S 104 or as a decree \(^1\) Nor is such an order covered by Ss 109 and 110 ante so as to be appealable to the Privy Council \(^2\) No appeal hes against an order restoring or refusing to restore an appeal rejected under sub-R (2) for failure to give security

Letter Patent Appeal — In order dismissing a petition asking the Court to receive a sum of money as security for the costs of an appeal is a judgment within the meaning of Cl 15 of the Letters Patent and is appealable as such §

#### 15 Slamp and registration

1 (1J22) 1J22 C 1l 246 (246) 49 C 1l 8aa (18J3 1900) 18J3 1900 L H R 55t

C P C 331 & 332

See Arts 15 and 57, Sch I of the Stamp Act. 1899<sup>1</sup> and Art 6, Sch II of the Court Fees Act 1870 In cases where a security bond is compulsorily registrable, it is not necessary to register the bond until the security has been accepted <sup>2</sup>

#### 16 Practice

The usual procedure followed when ordering security for costs under this rule is that the respondent first obtains a rule mist on affidavat as to the facts on which he rehes. On the day fixed for hearing, the appellant shows cause and the respondent then replies. The respondent has a right of reply though the appellant has used no affidavit? If neither party appears on the day fixed

(1307) J Ind Cas 748 (748) 14 Oudh Cas 40 Note 12 1 ( from (1895) 18 Vit 101 (104) Occiruling (1583) 5 111 350 (1910) 3 Ind C to 425 (437) (Mad) (1.03) 30 VII 143 (145 t46) P () (1922) 1922 Lih 87 (67) 3 Lah 20 Contra (1674) 6 N W P H CR 172 (227 (176) This case is obsolete le to ited is application for ieva w]
2 (19 '0) 1 129 Rung 289 (230) 7 Rung 44; 2 (1.214) 1914 411 54 (54) 36 411 325 (1J10) 1 Ind Crs J10(J41) 13 Oudh Cas JJ. 3 (1J.0) 1J '0 All 112 (114) 3 (1914) 1318 C (1812 (813) Nole 13 4 (1916) 1916 C il 227 (224) 1 (1932) 1932 Vad 170 (170) (1905) "O All 143 (145) (1102) 2 Mrd 654 (655) (1308) 1908 U B R : According to in old beersion of Upper Burmi The uticle applicable was Art 178 of 1877 Act 1 (See also (1889) It All to (17) (F L)] (now 111 181) 2 (1315) 1318 Cil 812 (813) 2 (1-70) 13 Suth W R 41 (43) Note 14 Note 16.

I (1-71) 7 Long L R 11p 57 (60).

11

10, for hearing the rule uss and the rule is discharged in consequence, it can be restored if a sufficient cause for the non-appearance of the applicant be shown 2

17 Enforcement of security

Under S 145 of the Code, the hability of a surety under a security bond given under this rule can he enforced by summary proceedings in execution and a separate suit is not necessary for the purpose. But the remedy by suit is also available and a suit against the surety is maintainable though execution of the decree against the judgment-debtor is baried by limitation. See Note 11 to S. 145 unter.

18 Form -See Appendix G. Form No 4.

R. 11. [S. 551.] (1) The Appellate Court, after sending for the records if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleaders and hearing him accordingly if he appears on that day, may dismiss the appeal so preferred and without serving notice on the respondent or his pleader.

(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed 11

(3) The dismissal of an appeal under this Rule shall be notified to the Court from whose decree the appeal is preferred.

[1877—S. 551.]

#### Sunopsis. Note No mortuage decree Sec O 34, R 3 1 Legislative changes 11 Scope and object of the Rule Dismissal for default under sub rule (2) After sending for the record " Readmission of appeal dismissed for 12 'May dismiss the appeal" 4 13 5 Review Notice to appellant Judgment, if should be written 14 6 Reference 15 7 Revision Time barred appeal 16 Order of dismissal if a decree Second appeal Restriction of grounds of appeal on Effect of dismissal- Amendment of 17 admission decree 18 Effect of dismissal of appeal from Insolvency appeals

# Other Topics

Dismissal after issue of notice to respondent, whether legal See Note 2, Pt. (4a).

2 (1995) 7 All 542 (544)

Note 17

effect prior to the present Cole — (1877-78) 3 Cul 318 (319) (1889) 16 Cul 328 (326) (1906) 1906 Pun Re No 103, page 337 (F B).

The following are decisions to the same

ī.

### 1 Legislative changes

The words in sub-r (1) after sending for the record if it thinks fit so to do are This makes it clear that the Court is not bound to send for the record in any case (See Note 3)

In sub r (2) the words the Court may make an order that the appeal be dis mis ed have been substituted for the words the appeal shall be dismissed for default make it clear that when an appeal is dismissed under sub r (2) the order is merely an order of di mi sal for default and not a decree and hence is not appealable (See S 2 sub s (2) )

#### 2 Scope and object of the Rule

This rule refers to a stage after the memorandum of appeal has been admitted and the appeal has been registered under R 9, ante 1 lt applies also to Letters Latent Appeals where the rules of the High Court do not prohibit its application to them 2 But the rule does not apply to the summary dismissal of an appeal under S 476 of the Crampal Procedure Code 3 An order of dismissal for the appellant's failure to make the necessary deposit for printing may be covered by this rule or R 16 4 The procedure of the rule is not applicable to a case where notice of the appeal has been issued to the respondent 42 The rule contemplates the dismissal of an appeal. Hence pending an appeal by the defendant the summary dismissal by the appellate Court, of plaintiff's suit as not being properly stamped is irregular 5 The rule applies also to proceedings under the Agra Tenancy Act III of 1926 but the Board is not bound under that Act to hear any party before rejecting an appeal summarily it applies also to appeals under the Bengal Tenancy Act of 1885 6

#### 3 After sending for the record

The words in sub-R (1) after sending for the record if it thinks fit so to do are new But even prior to the present Code it was held that it was not obligatory on the appellate Court to send for the record in every case in which it summarily dismissed the appeal 1 But when the record has been lost and the appeal has been dismissed in consequence, the appeal should be retried when the record is found 2

#### May diamies the appeal

The discretion given by this rule is a judicial discretion and not an arbitrary discretion 1 It should be very sparingly used and only in exceptional cases 2

A pre-emption suit was decreed on condition of plaintiff paying the pre emption money within a month from the decree. The plaintiff appealed against the condition but the appeal was dismissed on the ground that the money had not been paid within one month. It was held that the suit should not have been dismissed on that ground masmuch as the condition of payment of money within one month was itself the subject of appeal 3 Where the High Order 41 Rule 11-Note 2 Note 3

1 (1893) 15 All 367 (36J) (1J05) 30 All 290 (292 (293) 2 (1970) 1370 Pat 509 (509) 4 Pat L Jour 695 Patna High Court Rules per

mit of summary dismissal of Letters I stent Appeals 3 (1930) 1330 Cal 282 (284)

4 (1916) 1916 Mad 473 (474) 4x (1906) 1906 All W N 150 (156) 5 (1692) 15 Mad 258 (28J)

6 (1934) 1934 Cal 6 (17) Appeal under 5 174 of b T Act—Court las lower to dismi s under this Rule

1 (1909) 2 Ind Cas 405 (406) (Cal) (1676) 16 6 Pun Re No 48 page 89 2 (1831) 1851 All W N 26 (27)

Note 4 I (1916) 1916 U B 9 (10) 2 Upp Bur R 92 2 (1883) 1883 41 W ~ 221 (221)

[See (187) 80) 4 Bom 462 (465) Held that the lower appellate Court had gone wrong in disposing of the appeal by ex parte order under R 11 summarily]

3 (191") 17 In I Cas SoS (1) (SS) (All)

Court in dismissing under this rule, an appeal from an order of remaid, reframed a certain issue it was held that the procedure adopted, though irre gular, was not ultra vires 4

If an appeal is severable, it is open to the judge hearing the appeal under this rule to dismiss it in part and admit it in part, just as at the final hearing the Court may dismiss the appeal in part and allow it in part 3 But it is not open to the Court to admit the appeal and at the same time to restrict the grounds on which the appeal should be heard. See Note 17 infra

### 5 Notice to appellant

An appeal should not be dismissed under this rule unless nouce of the day of hearing has been given to the appellant or his pleader? The mere fact that the appellant on the day of filmg the appeal may say that he does not intend to appear at the preliminary hearing, is no justification for the failure to mic notice 2

6 Judgment if should be written -Sec O 41, R 31 Note 9

#### 7 Time barred appeal

An appeal cannot be rejected on the ground of lumitation at the time of admission, without fixing a date for hearing the appellant. If the Judgo thinks that the appeal is too late, he should admit the appeal if it is otherwise valid, and fix a date for hearing the appellant on the question of limitation under R 11 before assuing notice to the respondent ! The rejection of an appeal under R 11 as being time barred is equivalent to a dismissal thereof and such an order is appealable 2

### 8 Order of dismissal if a decree

The dismissal of an appeal under this rule is a decised and appealable as such2 even if a formal judgment is not written under the provisions of R 31. mira

9 Effect of dismissal-Amendment of decree

The dismissal of an appeal under this rule amounts to a decree which supersedes the decree of the lower Court Hence after the dismissal, the decree can be amended only by the appellate Court and not by the lower Court 1 The Bombay High Court has, however, held that the dismissal of an appeal under this rule leaves untouched the decree appealed from and the lower Court alone

4 (1932) 1982 111 16 (18) 5. (1934) 1934 Born 207 (211) 38 Born 397 and 406 (f B) For instance if appeal relates to two survey numbers held under distinct titles Court may dis miss the appeal as to one and order notice as to the other survey number

(1935) 1935 Lah 34 (35)

Note 7

1 (1909) 2 Ind Cas 309 (360) " L L R 1) (1925) 1925 Oudh 643 (643 644) Apperl rejected as time barred without fix ing date for hearing illellant-Order of rejection m ; be set i ide on resiew

2 (1920) 1990 Pat 818 (890)

1 (1926) 1926 Cal 638 (63J) (1897) 24 Cal 759 (762)

> 101 erer Note 9

appeal was treated as a revision

1 (1108) \$0 All 290 (202) (1839) 22 \Tad 293 (294) (1897) 24 Cal 759 (762) (1906) 4 Cal L Jour 506 (a67)

(1J10) 5 Ind C is 261 (262) (Cil) [See also (1900) 1900 1 un Re No 9 [368 31]

(See further (1895) 18 Mad 214 (216) (F B) Decree confirmed on appealappellate Court done can amend can amend the decree notwithstanding such dismissal 2 The High Court of Patna3 and the Judicial Commissioner's Court of Nagpur4 have taken a sımılar view.

### 10 Effect of dismissal of appeal from mortgage decree - See O 94 R 3

#### 11 Dismissal for default under Sub R (2)

If the appellant or his pleader does not appear when the appeal is called on for hearing, the appeal may be disnussed for default 1 But when no ronce of the date need for hearing has been given to the appellant the appeal cannot be dismissed for default under sub-R (2) 2 A dismissal for default implies the absence of the party or his pleader-so where the pleader of the appellant is present but is unable through a physical disability to argue the ease, and the appeal is dismissed, such dismissal is not for default 3 Where an appeal is dismissed for default, it is the lower Court's decree that is the executable decree in the case 4

#### 12 Re admission of appeal dismissed for default

Under R 19, infra, an appeal dismissed for default under this rule may be re-admitted See R 19, infra

#### 13 Review

The disnussal of an appeal under sub R 1 precludes the lower Court from entertaining an application for review of the decree because it cannot be said in such a case that no appeal was preferred within the meaning of S 114 and O 47, R 11

But it is open to the appellate Court to review its order dismissing an appeal under sub-R (1), and it is not necessary to send notice to the respondent before doing so 2 In order granting a review of such an order of dismissal without notice to the respondent cannot be questioned by a different bench from that which granted the review 3 When the dismissal of an appeal is set aside on review, the hearing of the appeal cannot be restricted to the grounds on which review was asked for 4 Conversely the grounds urged in the application for review which were not raised in the original memorandum of appeal, cannot be argued at the hearing of the appeal after its restoration on review b The summary rejection of an appeal as being time barred without fixing a date for hearing the appellant is in contravention of the law and forms a good ground for review 5

When a second appeal is dismissed under R 11 (1) no application is maintainable for review of the order on the ground of the discovery of new and important matter as the High Court in second appeal is bound by the

<sup>(1917) 1317</sup> Cal 417 (419) decreel 9 (1897) 21 Bom 543 (5a1) 2 (1916) 1916 Cal 741 (743) 43 Cat 178 3 (1932) 1932 t'at 238 (239 240) 11 Pat 409

<sup>4 (1933) 1933</sup> Nag 117 (118) Note 11

<sup>1 (1802) 1892</sup> Pun Re No 4 page 7 (Rev)

<sup>2 (1892) 1892</sup> Pun Re No 19 page 47 (Rev) 3 (19tt) 9 Ind Cas 857 (857 858) (111) 4 Sec Note 5 to 5 38 ante

Note 13

<sup>1 (1906) 30</sup> Bom 625 (6°0) (1906) 4 Cal L Jour 566 (567) (1922) 1922 Lom 130 (131) 46 Bom 1

<sup>[</sup>See also (1903) 1903 Pun Re No S. page 28 Application to set aside a decree passed under S 551 (now

- findings of fact of the lower Court 7
  - I4 Reference See the undermentioned case I
    - 15 Revision

Where no decree is drawn up on the dismissal of an appeal under sub-R (1) the so called appeal from the order of dismissal may be treated as an application for revision 1 In the undermentioned case2 where the dismissal was due to a mustake of fact a revision was allowed

### 16 Second appeal

Summary rejection -At the time of admitting a second appeal the admission Judge is entitled to consider whether any of the grounds mentioned in S 100 and raised in the memorandum of appeal in fact exist and apply to the case before him, and if they do not, to reject the appeal summarily without fixing any date for hearing the appellant

# 17 Restriction of grounds of appeal on admission

A Court cannot on admission of an appeal under R 11, restrict the grounds on which the appeal is to be heard finally and any such restrictive order is ultra tires 1 Where an appeal summarily dismissed under R 11 is restored on review the appellant is not confined at the hearing of the appeal to the grounds taken by him in his application for review 2

### 18 Insolvency appeals

The High Court has concurrent jurisdiction with the District Judge to grant leave to appeal under S 46 of the Insolvent Debtor's Act (11 and 12 Vic C 21) and if the District Judge refuses leave to appeal the High Court may grant the same in which the appeal may be taken as admitted and there is no necessity to make a further application under O 41 1 There is nothing in the Provincial Insolvency Act (III of 1907) to interfere with any right of appeal to the Privy Council that might otherwise exist 2

R. 12. [S 552] (1) Unless the Appellate Day for hearing Court dismisses the appeal under Rule 11, it appeal shall fix a day for hearing the appeal

(2) Such day shall be fixed with reference to the current business of the Court, the place of residence of the respondent, and the time necessary for the service of the notice of appeal so as to allow the respondent sufficient time to appear and answer the appeal on such day

[1877—S 552, 1859—S 244 ]

7 (1915) 1915 Cal 71 (71) 41 Cal 809 (1922) 1922 Cul 165 (165) Note 14

1 (1878) 2 411 S19 (823) (F B) Note 15

1 (1914) 1914 Lah 174 (175) 2 (1914) 1914 Lah 174 (175)

Note 16

allega che co e a original summarily dismissing the appeal under R 19 Board's Circular S-II without giving notice to the juite ]

1 (1911) 11 1nd Cas 212 (713) (Cal) (1934) 1334 Bom 207 (211) S Bom 80, and

(1916) 1916 Cal 741 (743) 43 Cal 178 2 (1916) 1916 Cal 741 (743) 43 Cal 178

Note 18

1 (1915) 1915 Cal 447 (477) 2 (1913) 19 Ind Cas 435 (+36) 40 Cal 65.

# Synogens Day for hearing appeal Note No 1

I Day for hearing appeal.

Care should be taken not only in fixing the original date for the hearing of a case, but in altering the date of hearing so that none of the parties is taken by surprise But there is nothing illegal in a ljudge taking up an appeal on any day he chooses to fix so long as the parties or their pleaders have sufficient notice and no prejudice is caused. When fixing a date for the hearing of the appeal under this rule, the appellate Court is not entitled to restrict the appeal to one or more of the grounds specified in the memorandum of apreal?

Appellate Court to give notice to Court whose decree appeal ed fro: R. 13. [S 550] (1) Where the appeal is O not dismissed under Rule 11, the Appellate Court shall send notice of the appeal to the Court hom whose decree the appeal is preferred

(2) Where the appeal is from the decree of a Court, the records of which are not deposited in the Appearance of late Court, the Court receiving such notice shall

Transmission of papers to Appellate Court

late Court, the Court receiving such notice shall send with all practicable despatch all material papers in the suit, or such papers as may be for by the Amellate Court

specially called for by the Appellate Court

(3) Either party may apply in writing to the Court from whose deeree the appeal is preferred, specifying any of the papers in such Court of which he requires copies to be made, and copies of such

papers shall be made at the expense of and guen to, the applicant

Legislative changes

[1877-8 550, 1859-8 343]

[1877—8 550, 1859—8 343

Note 1 o Form

Note >0

Scope of the Rule

Otler Topics
rds Se Note o Pts (1) d (3)

Records Se Note Pts (1) d (3)

The vords less the appeal is not do mosed under R to 11 have he betituted for the ford 1 the menorandum of a peal integer to ed

2 Scope of the Rule

If any part of the record has not been sent up by the lower Court and the appellant wishes to bring it before the appellate Court he should ask, the appellate Court to send for it before the day of tral. When a notice of appeal is sent by the High Court to the Court below with instructions to make a return within a specified lime the appellant is entitled to the whole of the

> on which the application for review of order summarily dismissing the appeal under O 41 R 11 was based Order 41 Rule 13—Note 2

.... 1 (1°C3) 11 Suth W R 245 (249)

### 1. findings of fact of the lower Court.7

14 Reference -- See the undermentioned case 1

### 15 Revision

Where no decree is drawn up on the dismissal of an appeal under sub-R (1) the so called appeal from the order of dismissal may be treated as an application for revision 1 In the undermentioned case2 where the dismissal was due to a mistake of fact a revision was allowed

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Day for hearing appeal

R. 12. [S 552] (1) Unless the Appellate Court dismisses the appeal under Rule 11, it shall fix a day for hearing the appeal.

(2) Such day shall be fixed with reference to the current business of the Court, the place of residence of the respondent, and the time necessary for the service of the notice of appeal, so as to allow the respondent sufficient time to appear and answer the appeal on such day.

344]

Nate 14 1 (1878) 2 All 819 (823) (F B)

Note 15 1 (1914) 1914 Lab 174 (175)

2 (1914) 1914 Lah 174 (175) Note 16

1 (1593) 15 AM 367 (369)

(Compare (1917) 40 Ind Cas 139 (129) (Oudh) This was a decision of the United Provinces Board of Revenue It was held in it that an allegation that there is no evidence to support a specific finding of fact is a ground summailly dismissing the appeal under R 19 Board's Cucular 8-11 without giving notice to the larties] Note 17

1 (1911) 11 Ind Cas 212 (213) (Cal) (1934) 1984 Bom 207 (211) 58 Bom 59" and

(1916) 1916 Cal 741 (743) 43 Cal Lis 2 (1916) 1916 Cal 741 (743) 43 Cal 178 Note 18

1 (1915) 1915 Cal 477 (477) 2 (1913) 19 Ind Cas 435 (436) 40 Cal 653

o

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### Sunopsis Day for hearing appeal

Note No. 1

1 Day for bearing appeal.

Care should be taken not only in fixing the original date for the hearing of a case, but in altering the date of hearing so that none of the parties is taken by surprise. But there is nothing illegal in a Judge taking up an appeal on any day he chooses to fix so long as the parties or their pleaders have sufficient notice and no prejudice is caused 1 When fixing a date for the hearing of the appeal under this rule, the appellate Court is not entitled to restrict the appeal to one or more of the grounds specified in the memorandum of appeal 2

Appellate Court to give notice to Court whose decree appeal ed jrc

Transmission papers to Appellate Court

R. 13. [S 550] (1) Where the appeal is O not dismissed under Rule 11, the Appellate Court shall send notice of the appeal to the Court from whose decree the appeal is preferred

(2) Where the appeal is from the decree of a Court, the records of which are not deposited in the Appellate Court, the Court receiving such notice shall send with all practicable despatch all material papers in the suit, or such papers as may be

specially called for by the Appellate Court

Capies of exhibits in Court whose dec

ree appealed fro

(3) Either party may apply in writing to the Court from whose decree the appeal is preferred, specifying any of the papers in such Court of which he requires comes to be made; and comes of such papers shall be made at the expense of, and

given to, the applicant

[1877—\$ 550, 1859—\$ 343]

Legislative changes Scope of the Rule

Sunorsis Note 1 o

Note No

Other Tonics Records S a Note 2 Pts (1) and (3)

1 Legislative changes The words here the appeal is not dism seed under Rule 11 lave been substituted for the words he a the me norandum of apacal is registered

2 Scope of the Rule If any part of the record has not been sent up by the lower Court and

the antellant wishes to bring it before the appellate Court, he should ask the aprellate Court to send for it before the day of trial 1 When a notice of appeal is sent by the High Court to the Court below with instructions to make a return within a specified time the appellant is entitled to the whole of the

or which the application for review of order summarily dismissing the appeal under O 41 R. 11 was based Order 41 Rule 13-Note 2

1 (1803) 11 Suth W. R 218 (249)

Order 41 Rule 12-Note 1 1 (188J) 9 VII W > 20 (21)

<sup>2 (1911) 11</sup> Ind Cas 212 (213) (Cal) (1316) 1916 Cal 741 (741) 43 Cal 148 Nor is appellant restricted to the ground

ary to serve other than

less he has wer in the case

time allowed and may deposit his talabana and cause service of the nonces any time within the period limited. Where the appellant is denied this liberty by the lower Court he ought to come before the High Court with a substantial application for orders 2

When the record has been lost at the time of the determination of an appeal, the appeal should be retried when the record is found again 3

3 Form

For form of notice to the lower Court of the admission of an appeal, see Appendix G, Form No 5

R. 14. [S 553] (1) Notice of the day fixed under Rule 12 shall be affixed in the Appellate Court-house Publication and and a like notice shall be sent by the Appellate service of natice of day for hearing ap Court to the Court from whose decree the peal appeal is preferred, and shall be sorred on the respondent or on his pleader in the Appellate Court in the manner provided for the service on a defendant of a summons to appear and answer, and all the provisions applicable to such and to proceedings with reference to the service summons

thereof, shall apply to the source of such notice (2) Instead of sending the notice to the Court from whose

Appellate Court may itself cause notice to be served

decree the appeal is preferred the Appellate Court may itself cause the notice to be served on the respondent or his pleader under the provisions above toferred to

[1877-8 553, 1859-S 345]

### Local Amendments

#### ALLAHABAD

CALCUITA

4dd the following sub rule (3) --

(3) Notwithstandin

notice of any a person imble appeared and a

of a second appeal in the lower appellate Court or has appeared in the appeal

Insert the following as Clause (3) --(3) It hall be in the discretion of the appellate Court to make an order at any

stage of the appeal whether on its own motion or cz parte dispensing with ervice of such notice on any respondent who did not appear either at the hearing in the Court whose decree is complained of or at any proceeding subsequent to the decree of that Court or on the legal rep esentatives of any such respondent

Provided that-(a) The Court may require notice of the appeal to be published in any nes paper

or newspapers as it may direct (b) No such order shall preclude any such respondent or legal top esentative from appearing to contest the appeal

MADRAS

appeal is preferred '

<sup>2 (1869) 11</sup> Suth W R 138 (139)

O

### NAGPUR

tild the following sub rule -

(3) The appellate Court 1333 in its di cietion di genee with notice to any resiondent igain t whom the nit was heard ex sarte

NWFP

11d the following piors o to sub rule (1) -Provided that with the permi sion of the Court no notice need to served moon a respondent who was a proforma defendant in a suit which was decided exparts

HQUO

a, ainst him " 4a I the foll wing sub rule (3) -

(3) Provided that in a case where a sel udent are not appeared all a luring the hearing of the ca e in the Court from whose decise or order the appeal is preferred r at any proceeding sub equent to that decree it shill only be nece and the tourt to make one attempt to effect personal errice on such re | ndent r if such re pondent i dead on his legal repre entative and, thereafter service may be effected by affixing a natice in some con account place in the t art hou e I the Di ti et Jule within whose prisdiction the suit r proceeding with tituted along with me or other of the following methods ramely just he has the a tree in a new page or offixing it to the vall or door of the claspal of the village where the I porlent fast is idel or it of hor method as the times direct

RANGOON

171 tle foll wn a ab 1 (3) -

(9) Nothing in the e Bules requiring in notit to envel or to an opposite farty or respondent shall be decided to reduite inv notice to be served on or given to an opposite party or respondent who did not appear either it the hearing in the Court whose decree is complained of or it any proceedings sub-equent to the decree of that Court or on or to the legal representative of any such of posite farty or re fondent if decea ed

SIND

idd the following as sub-rule (3) -

'(3) The appellate Court may however, in its di ciction dispenso with the service of notice of the appeal or interloculors application therein on a restondent or opponent who has made no appearance at the trial Court

Synopsis. Vote No Note No notices as not served Dismissal of appeal after return of

1 Service of notice

Service of notice

An appeal cannot be heard and decided without fixing a date for such hearing or without giving the respondent due notice of such date 1 But failure to give notice to an unnecessary respondent does not viriate the appeal 2 It is the duty of the appellant to give the correct address of the respondent. The latter is not bound to communicate his address to the Court or to the appellant and his omussion to do so is not an abuse of the provisions of the Code 3

The service of nonce on the respondent should be in the manner provided for the service of summons on a defendant 4

Order 41 Rule 14—Note 1 1 (1895) 1895 Pun Re No 10 | 21 (Rev) This principle applies also to a

Revenue Court [See (1917) 1917 Lah 399 (400) 41

Ind Cas 889 (890) Appellate Court

(1690) 1690 1 un Re No 8 p 11 (Rev) (1916) 1916 Cal 513 (514) 1 Judge ernnot

decido an al peal exparte when notice of appeal does not specify the date on which the appeal will be heard

(1974) 11 Oudh L J 376 (376) 2 (1909) 1 Ind Cas 604 (606) 1909 Pun Re

(1923) 1973 Cal 221 (228) 49 Cal 1048

3 (1917) 1917 Lah 899 (400) 41 Ind Cas 889

See the following cases -4 (1871) 15 Suth W R 31 (31) Respondent residing outside British territoryService of notice of appeal on the respondent's pleader is sufficient suffered a guardian ad litem of a minor has been appealed by the Court, notice of the appeal may be served on the guardian sufficient suffi

2 Dismissal of appeal after return of notices as not served

Under O 9, R 5, af a summons is returned unserved and the plaintiff does not apply for fresh summons within three months thereafter, the suit must be dismissed unless within those three months, the plaintiff satisfies the Court that there is a sufficient cause for extending the period for applying for fresh summons. This Rule does not apply to appeals. Hence, although the appellant has applied neither for fresh nonces nor for extension of time within the time allowable under O 9 R 5, the appeal need not be dismissed and the Court can excuse the delay and order fresh notices to issue 1 Conversely, the appellant cannot claim to be entitled, as of right, to apply for fresh notices within the period allowed under O 9, R 5 If the appellant fails to take out fresh notices within the time ordered by the Court, the appeal can be disposed of under O 17 R 3 notwithstanding that the period allowable under O 9, R 5 has not expired 2 If after the return of a notice of appeal as not served the appellant makes undue delay an applying for fresh notices the appellate Court may refuse to issue fresh notice 3 Where an appeal against a decree for joint possession of land is dismissed as against some of the respondents for failure to serve notice of appeal on them the appeal cannot proceed even as against the others 4 See Note 5 to O 9 R 5

For form of notice to respondent see Appendix G Form No 6

Notice may be served by being sent

by registered post
[1909] I Ind Cas 158 [161] 26 Cal 226
Resignment hving n England-Pest
way would be to make over notice to
appellant's pleader for service on
respondent through an agent in
England to be appointed for the pur

(1973) 20 Suth W R 62 (62) Affixing on outer door of 1et onderts house when his address is known as shight (1888) 15 Cal 681 (683) Person refu ma registered letter is estopped from

pleading ignorance of contents
[1869] Il Suth WR 306 [4969] When res
pondent is not found in the place
where he resided at the commence
ment of the suit the substituted
service may be ordered

(19°1) 1921 All 52 (52 53) 43 All 411

of his house — Substituted service should be applied for if is condent curnot be served personally 922) 1922 Oudh 268 (200)

(1922) 1922 Oudh 268 (260)
(1903) 30 Cal 758 (760) Order in winding
up of computy under Companie, let
— 't peal against order — Notice of
appeal must be given within three
weeks from the date of the order
complained of

(1879) 4 Gal 704 (\*01) (Do) (1905) 27 All 509 (510) (Do)

5 (1912) 15 Sulb W R 200 (200)

6 (1926) 1976 Cal 1105 (1107) O 41 R 14 read with O 5 R 12 does not mean that the sorpre must be on the minor himself and not on the guir dian al litem

Note 2.

1 (1921) 1927 Bom 68 (69 70) 50 Bom \$15 Single Judge of High Court can

fresh date and direct additional err vice by registered Post (1560) 6 Suth W. R 13 (14) Nation no.

(1°GC) 6 Suth W R 13 (14) Notice not served on respondent personally or on his recognised agent must be served by being affixed on the outer door

4 (1915) 1915 Cal 786 (186)

within the period specified in R 5 ] 3 [See [18:3] 20 Suth W R 62 (63) ]

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#### Local Amendments

PATNA

٦.

Add the following as R. 14-4 .-

"11-1 The appellate Court may, in its discretion, dispense with the service of notice hereintefore required on a respondent, or on the legal representative of a deceased respondent, in a case where such respondent did not appear, either at any stage of the proceedings in the Court whose decree is appealed from or in any proceedings subsequent to the decree of that Court and no relief is claimed against such opposite party or respondent or his legal representative either in the original case or appeal "

SIND

All the following as R 11 1 -

14 A Subject to the leave of the appellate Court nothing in these Rules requiring any notice to be served on or given to an opposite pirty or re-pondent shall be deemed to require any notice to be served on or given to the legal representative of any deceased opposite party or deceased re-pondent where such opposite party or re-pondent did not appear, either at the hearing in the Court whose decree is complained of or at any proceeedings sui sequent to the decree of that Court

R. 15. [S. 554] The notice to the respondent shall declare O. that, it he does not appear in the Appellate Contents of notice Court on the day so fixed the appeal will be heard ex parte

[1877—S 554: 1859—S. 345]

Synonsis Contents of the notice

1 Contents of notice An appeal cannot be decided ex parte if the notice served on the respondent did not specify the date of hearing 1

Note No. 1

PROCEDURE ON HEARING.

R. 16. [S 555] (1) On the day fixed,5 or on any other O.

day to which the hearing may be adjourned, Right to begin the appellant shall be heard3 in support of the

appeal

(2) The Court shall then, if it does not dismiss the appeal at one hear the respondent against the appeal, and in such case the appellant shall be entitled to reply.

[1877--- 5 555]

Synonsis Note No Nota No Right to begin absence of the other Respondent's failure to appear on day Hearing of appeal before day fixed Effect of non compliance with the 5 specified in notice of appeal "Shall be heard" 3 Rules relating to appeals Hearing counsel of one party in the

Other Topics.

Failure to make necessary deposit for printing See Note 3, F. N. (1)

1 Right to begin

The mere fact that the respondent challenges the right of the appellant

16, to appear does not give the respondent the right to begin 1 In the Calcutta High Court when the appellant's right to appeal is challenged, the practice is to require the respondent at the outset to indicate briefly the grounds upon which his objection is based 2

In every appeal the burden is on the appellant to show that the judgment of the lower Court is wrong3 and this is so notwithstanding the fact that the records of the suit have been destroyed 4

Where there is a slip in the order in an appeal heard ex parte, the error will be attributed to the appellant 5 Where an appeal is heard ex parte, it is the duty of the counsel for the appellant to bring to the notice of the Court all the authorities on the point, adverse as well as favourable 6

2 Respondent a failure to appear on day specified in notice of appeal

A respondent who had not appeared on a date need for hearing but on which the appeal was not heard is not precluded from appearing on any subsequent day to which the hearing may stand adjourned 1

Shall be heard An appellant is not entitled to be heard on the ments, if the appeal is

hable to be dismissed on a preliminary ground 1 The appellate Court 1, bound to hear the respondent before determining an appeal unless it dismisses the appeal at once 2 The Rule does not compel the Court to permit written arguments to be

filed 3 4 Hearing counsel of one party in the absence of the other

The Court cannot having regard to the provision contained in sub-

rule (2) hear the arguments of the respondent's pleader alone in the absence of the appellant or his pleader and proceed to judgment without giving the latter an opportunity to reply If the Court does so it acts illegally and the judgment is not valid 1

5 Hearing of appeal before day fixed

Where, subsequent to the adjournment of an appeal the hearing of the appeal is advanced without notice to the respondent, and the appeal is decided ex parte before the date to which it was adjourned, the respondent

Cal 573 11

(Doubted)] Note 3 1 (1916) (1926) 1926 P C 77 (79) 4 Rang 518 (P C) 2 (1925) 1925 Oudh 224 (224) Equal possi bility of judgment on either side being right 13 not enough.

(1926) 1326 Oudh 38 (39) Equal possibility of either view being right is not cnough (1921) 1921 P C 55 (56) 17 Nag L R 72 (PC) Some balanco in appellant s favour must be established

Note 4 [Sec also (193°) 137 Ind Crs 301(Lah)]
4 (1898) 3 Cal W V 23 t 1 (1921) 63 Ind Cas 915 (916) (Lah) can have the ex parte decree set uside 1 But the irregularity of deciding an O appeal before the day fixed, will be condoned if the pleaders of both the parties were present and argued the case 2

If an appellate Court decides an appeal before the usual hour of commencing Court business and refuses to hear the appellant's counsel on his appearing in due time it acts with grave irregularity 3

6 Effect of non-compliance with the Rules relating to appeals

If the Rules of the Court relating to appeals have not been complied with and no adequate evenue is offered the appeal should be dismissed 1

R. 17. [S 556] (1) Where on the day fixed, or on any of other day to which the hearing may be adjourn-Dismissal of appeal ed, the appellant does not appear3 when the for appellants de fault appeal is called on for hearing, the Court may

make an order that the appeal be dismissed 2

(2) Where the appellant appears and the Hearing appeal er respondent does not appear, the appeal shall be \_art heard ex parte 13

[1877—5 556, 1859—5, 346]

## Synorses

Note No Note No Legislative changes ex parte decres 9 Dismissal for default of appearance 2 Effect of dismissal for default Appearance Meaning of S Notice of date for hearing appeal 10 0 3 R 1 Restoration of appeal dismissed for de Dismissal on merits illegal 4 fault See R 19 post 11 Re hearing of appeal decided ex parte Compromise after dismissal for default Dismissal for default of prosecution Dismissal for default if affects cross See R 21 below 12 Hearing of appeal ex parte Sub R (2) 13 objections See Notes under O 41 R 22 Appeal 15 Dismissal for default of appeal from ex Letters Palent Appeal parte decree -Application to set aside Revision 16

# Other Tomes

Amendment of decree after dismissil of appeal Lamitation for restoring anneal di missed for for default See Noie 9 1 ts (3) and (4) default See Note 9 to R 1J post

I Legistative changes

The words the Court may make un o it that the appeal be discussed sul tituted for the words the appeal shall be dismissed for default As to the effect of the change are Notes 4 and 14 anfra Also Note 16 to S 9 sub

2 Dismissal for default of appearance

Under the old Code where the appellant did not appear when the appeal was called on for hearing the Court was bound to dismiss the appeal Urder the present Rule the Court is not bound to dismiss an appeal for default but may do so 1 The Rule applies not only to the date originally fixed for hearing the appeal but also to any date to which the hearing may have been

1 (18%) 3 Bom H C R 63 (64) Order 41 Rule 17-Note 2 1 (1929) 1999 Rang 11 (12) 6 Rang 613

Note 5 1 (1920) 1926 Lom 424 (475)

<sup>2 (1864) 1</sup> Suth W R 246 (246)

<sup>3 (1964) 1</sup> Suth W R 246 (746)

 adjourned But it does not apply when the hearing has been completed and the case is merely adjourned for pronouncing judgment in

An appeal cannot be dismissed for default, if the appellant is dead at the time because the Orders and Rules dealing with the case of the non-appearance of a suitor are not appheable to the situation which arises when the suitor is  $\mbox{dead}^{\,2}$ 

Applicability of Rule to remanded appeal —The Rule applies also to a remanded appeal, and if the appellant fails to appear on the day fixed for the hearing of the appeal after remand, the appeal may be dismissed for default <sup>3</sup> But where the appellate Court remands a case for further enquiry and fixes a date for the return of the report, it cannot dismiss the appeal in default, before that date for non-appearance of the appellant in the lower Court on the date fixed for the enquiry <sup>4</sup> Where, however a case is remanded to the lower appellate Court for disposal that Court is entitled to dismiss the appeal for default if the appellant does not appear before it on the date fixed for the hearing <sup>8</sup>

## 3 Appearance -- Meaning of -See Notes to 0 3 R 1

### 4 Dismissal on merits illegal

It was held under the former Code that the appellate Court had no power, in the absence of the appellant or his pleader, to dismiss the appeal on the ments but could only dismiss it for default <sup>1</sup> In the present Rule, the words the Court may make an order that the appeal be dismissed have been substituted for the words the appeal shall be dismissed for default which occurred in the corresponding section wz. 5 556 of the former Code This change in the language of the Rule has given rise to a conflict of decisions as to the power of an appealate Court to dismiss an appeal on the ments, if the appellant does not appear at the time of hearing On the one hand it has

3 (1909) 4 Ind Cas 816 (817) UBR 1907 02 CP C p 27 4 (1926) 1926 Lah 574 (574)

4 (1926) 1926 Lah 574 (574) (1895) 8 C P L R 69 (70) 5 (1874) 21 Suth W R 65 (65)

(1889) 2 C P L R 32 (33) Parizes to it manded appeal should apply to Court to which it has been it manded to fix a date for further hearing of the case

# Note 4

1 (1881) 3 AH 519 (520) (1886) 8 AH 277 (278 279) (1873) 20 Suth W R 425 (426) Appeal

sion

though purporting to be dismissed on ments is to be considered as dis missed only for default

(1895) 1835 All W N 140 (140) Decision of Court dismissing on merits in such circumstances regarded as dismissil

L Jour 17 It is desirable to accommodate hitgants to some extent if their pleaders happen to be absent in another Court and have a chance of attending within a short time so as not to disturb the business of the Court |

[See also (1927) 1927 Cal 98 (100) 53

(See also (1927) 1927 Cal 98 (100) 53
Cal 827 Held that under the circ cumstances of the case the appellate
Cout was fully justified in dismissing the appeal for default 1
1a (1894) 7 C P L H 1 (2)

(1905) 8 Oudh Cas 261 (263) Rule does not apply when arguments have been

> 96 Order of dismissal for default should be set aside on application of legal representative

been held by the High Courts of Mlahabad, Calcutta, Madras and Rangoons that the fact that the Court is not bound to dismuss an appeal for default does not enable it to dismuss the appeal on the merits, but only to adjourn it to another date. The High Court of Patna has, on the other hand, held that the powers of an appellate Court under the present Rule as altered in the new Code are wide enough to include the power to dismuss the appeal on the merits if the appellate Court should think fit to do so 6

### 5 Compromise after dismissal for default

An appeal was dismissed for default of both the parties. Subsequently the appellant applied to the Court for restoring the appeal and pending the disposal of the application both the parties filed a pention of compromise praying for a decree in terms of the compromise. The Court subsequently rejected the application for restoring the appeal. It was held that in the circumstances of the case the Court ought to have restored the case and given effect to the petition of compromise filed.

#### 6 Dismissal for default of prosecution

Where the materials essential for the progress of an appeal such as supplying translations of vertiacular documents preparation of Bench copies, etc. are wanting owing to the appellant's default the Court can dismiss the appeal for default of prosecution.

In the undermentioned case<sup>2</sup> the High Court of Madras has held that under R 105 of the Madras Appellate Side Rules, the High Court can dismiss a second appeal for failure to translate and print the necessary records Such an order of dismissal is not ultra vires and does not contravene the provisions of this order.

- 7 Dismissal for default if affects cross objections See Notes under O 41 R 22
- 8 Dismissal for default of appeal from ex parte decree—Application to set aside ex parte decree

The dismissal of an appeal for default is not a decree and therefore, the decree of the Court of first instance is not superseded by or merged in the order of the appellate Court. Hence after an appeal from an ex parts decree has been dismissed for default the first Court can allow an application to set aside the ex parts decree 1 See Note 11 to 0 9. R. 13. ante

#### 9 Effect of diamissal for default

An order dismissing an appeal for default is not a decree and hence the decree of the lower Court is not superseded by or merged in it <sup>1</sup> see Note 16 to S 2 sub S (2) It will follow from this that the decree to be executed in such a case is the decree of the lower Court <sup>2</sup> (see Note 5 to S 38)

Order treated as one for dramasal for default though jurporting to be one of dismissal on ments 6 (1921) 121 Fa 3 23 (3-2)

Note 5 1 (1923) 1923 Cal 819 (319)

Note 6 1 (1919) 1919 L B 139 (140) 9 L B R 266 (1896) 23 Cal 33J (346) Order dismissing appeal for failure to deposit cost of preparing taker look

proparing later book
(1690) 17 Cal 289 (783) Fulture to deliver
copies to Registrar according to
rules

2 (1916) 1916 Mad 473 (474) Note 8

1 (1917) 1917 111 392 (333) 39 411 393

It will also follow that an application for amendment of the decree must be made to the lower Court and not to the appellate Court 3 A contrary view has, however, been expressed by the High Court of Madras in the undermentioned case 4 It is submitted that the view is not correct. On the dismissal of an appeal for default a fresh appeal from the same decree may be entertained, provided the period of limitation has not expired 5

The decision of the lower Court operates as res judicata although the appeal against it has been dismissed, not on the merits, but for default 6

10 Notice of date for hearing appeal

The appellant must have due notice of the date of hearing 1 Where no date has been fixed for the hearing of an appeal the appellate Court has no power to dismiss the appeal for default (See R 12 mira) 2 Where an appeal has been remanded for hearing, it is the duty of the parties to apply to the Court to fix a date for the hearing of the appeal or to ascertain from the Court what date has been fixed therefor 3 An appeal may be taken up and disposed of before the appointed day if the pleaders of the parties are present and argue the case without objection 4 Notice of the date of hearing must be given to the respondent before the appeal can be decided er parte (See R 14 ante)5

- 1f Restoration of appeal dismissed for default See R 19 past
- 12 Re hearing of appeal decided ex parte See R 2f below
- 13 Hearing of appeal ex parte-sub rule (2)

The absence of the respondent on the date fixed for hearing is not by itself a ground for deciding the appeal in appellant's favour The Court must go into the ments of the case and record a judgment 1

14 Appeal

Under the Former Code there was a conflict of decisions as to whether an appeal lay against an order dismissing an appeal for default, some cases holding that such an order was a decree and as such appealable1 while other

- 3 (1917) 1917 Nag 24 (24) 4 (1911) 10 Ind Cas 96 (97) (Mad) 5 (1923) 1923 Pat 514 (514) 2 Pat 739
- 6 (1323) 1923 Nag 1 (2)

Note 10

1 (1866) 5 Suth W R Mrs 23 (22) (1919) 1919 Cil 1038 (1039) Apeal trans forred to another Court without

notice to any party — Apellants misled—Appeal di mis-ed for de fault—Appeal should be restored

(1915) 30 Ind Cas 139 (200) (Oudh) ti perl adjourned-Notice of date to which appeal was adjourned not properly served on appellant—appellant not apperring—appeal not to be dis missed for default

(1916) 1916 All 326 (327) Date of hearing postponed-Dato not communicated Dismissal of appeal for default— Held that there was sufficient cause for appellants absence and that upperl should be restored [See ilso (1865) 3 Suth W R tet X 104 (104) I org holder intersening —Case on list lut not taken up be fore the holidays-New late to it fixed for hearing after the holidays!

2 (1924) 1924 Lah 979 (280) (1865) 2 Suth \\ R 254 (254)

[See also (1934) 1334 Lah 984 (954) On date of hearing judge absent and clerk of Court adjourning appeal— Dismissal of appeal for default on the adjourned day—Di mis also not proper) 3 (1889) 2 C P L R 32 (33)

(1908) 4 Nag L R 106 (165) 4 [See (1864) 1 Suth W R 246 (246)] 5 (1917) 1917 Lah 399 (400) appellant must give correct aldress of respondent-Respondent not bound to com municate his addie s

Note 13 1 (1920) 36 Ind Cas 986 (356) (U 1 B B) Failure to do so is an irregularity within S 21) of U P I and Resente

Note 14 1 (1905) 30 Cal EGO (665) (1 1) Overruling (1896) 23 Cal 827 (823) and (1898) 23 Cal 11 (116 117)

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cases I olding contrary view 2. The definition of a decree in S. 2 (2) in the present Code expressly provides that an order of dismissal for default does not amount to a decree Also, in the present Rule the words 'the Court may make an order that the appeal be dismissed have been substituted for the words the appeal shall be dismissed for default which occurred in the old section Reading S 2 (2) and O. 41, R 17 together, it is clear that an order dismissing an appeal for defau is not a decree Nor is it one of the appealable orders referred to in S 104 Hence no anneal lies from such an order 3 The proper procedure to set aside the order is to apply under R 19, infra

Where an appeal is dismissed on the ments, the order is a decree and is ap, calable as such notwithstanding that the Court ought to have dismissed the appeal for default and not on the ments 4 But in some old decisions it was held that in such cases, the order, though dismissing the appeal on the ments, must nevertheless be regarded as an order dismissing the appeal for default \*

An an cal was dismissed as a cainst some of the respondents on the ground of want of proper service of nouce on them. When the appeal came on for hearing against the other respondents it was dismissed on the ground that it was not maintainable against them alone Held that in an appeal against the decree of dismussal the previous order dismissing the appeal against some of the respondents could be attacked under S 105 8

An order dismissing an appeal for failure to pay the deficiency in the stamp for the appeal is an order of rejection of the appeal and as such constitutes a decree 7 See S 2 (2) It has been held by the Oudh Judicial Commissioner's Court's that when an appeal is dismissed under an erroneous impression as to procedural law, an appeal lies from the order of dismissal because the effect in such case is that of dismissal on a preliminary point (Sce Notes under R 11 supra )

See also Note 12 to S 96, ante

(1912) 14 Ind Cas 823 (523) 39 Cal 311 (1925) 1925 Nag 2°6 (238)

C P C 333 t 334

(1909) 4 Ind Cas 816 (817) Lin Bur R

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15 Letters Patent Appeal
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No appeal lies under the Letters Patent from an order dismissing an
   (1900) 93 Cal 81 (83)
                                                                   1907 09 Civ Pro Code 1 age 27
(1913) 20 Ind Cas 1 (1) (Cal) An order dis
   (1897) 16 Lom 23 (20)
[See also (1864) 1864 Suth W R 1°6
                                                                           missing suit for default -No apport
2 (1893) 1.5 All 3 9 ( 63)
(1891) 3 All 319 (,70)
(1891) 3 All 397 (383)
(1898-80) 2 All 616 (617)
                                                                           lies from order-The fact that a decree
                                                                            as drawn up cannot alter the nature
    (1892) 1892 All W N 2 (2)
   (1879) 1879 I un Re No 113 page 319
(1907) 31 Vad 157 (160)
    (1897) 10 C P L R 32 (32)
    (1900 1907) 1 L B R 183 (181)
(189, 1°01) 2 U B R 206
                                                                            R S) although it was erroneously
passed as one of dispus al for de
fault)
             [bee also (1898) 22 Mad 221 (223)
                                                                5 (18 3) 20 Suth W R 125 (126)
            Decision dismissing stat in default
                                                                    (18, t) 15 Suth W R 143 (143)
            of appearance by plaintiff is an order
                                                                    (1895) 1835 VII W N 140 (140)
(1854) 1854 VII W N 16; (167)
            and not a decree and there is no
 fir t or second appeal therefrom]
3 (1916) 1916 411 376 (326)
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6 (1929) 1929 Pat 209 (610 611) 7 (1922) 1932 Pat 251 (282) 6 Pat L Jour

675

8 (tat4) 1914 Oudh 303 (304)

It will also follow that an application for amendment of the decree must be made to the lower Court and not to the appellate Court 3 A contrary view has, however, been expressed by the High Court of Madras in the undermentioned case 4 It is submitted that the view is not correct. On the dismissal of an appeal for default a fresh appeal from the same decree may be entertained, provided the period of limitation has not expired.

The decision of the lower Court operates as res judicata although the appeal against it has been dismissed not on the merits, but for default 6

### 10 Notice of date for hearing appeal

The appellant must have due notice of the date of hearing 1 Where no date has been fixed for the hearing of an appeal the appellate Court has no power to dismiss the appeal for default (See R 12 utria) 2 Where an appeal has been remanded for hearing it is the duty of the parties to apply to the Court to fix a date for the hearing of the appeal or to ascertain from the Court what date has been fixed therefor 3 An appeal may be taken up and disposed of before the appointed day if the pleaders of the parties are present and argue the case without objection 4 Notice of the date of hearing must be given to the respondent before the appeal can be decided ex parte (See R 14 ante )8

- 11 Restoration of appeal dismissed for default See R 19 sost
- 12 Re hearing of appeal decided ex parte See R 21 belo v

### 13 Hearing of appeal ex parte—sub rule (2)

The absence of the respondent on the date fixed for hearing is not by itself a ground for deciding the appeal in appellant's favour. The Court must go into the ments of the case and record a judgment.

### 14 Appeal

Under the Former Code there was a conflict of decisions as to whether an appeal lay against an order dismissing an appeal for default some cases holding that such an order was a decree and as such appealable! while other

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3 (1917) 1917 Nag 24 (24)
4 (1911) 10 Ind Cas 96 (97) (Mad)
5 (1923) 1923 Pat 514 (514) 2 I at 739
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(1919) 1919 Cal 1008 (1009) Appeal truss ferred to unother Count without notice to unw party — Appellunts uncled—Appeat dissussed for de

fault—Apjeal should be restored
(1915) 30 Ind C's 199 (200) (Oudb) 't perl
adjourned—Notice of date to which
upperl was adjourned not properl'
served on 'upellimit—Apjeal and to
apjeuting—Appeal not to le dis
missed for defutil

(1916) 1916 Ul 292 (2021) Date of herving portponed—Date not communicated—Dissums all of uppeut for default—Held that there was sufficient cau o for uppellunt's absence and that upped should be restored the communication of the communicatio

fore the 1 ol days - New late to it fixed for hearing after the holiday ]

2 (tJ24) 1324 I ah 279 (280) (1865) 2 Suth W R 254 (254)

[See also (1934) 1934 Lah 984 (984) On date of hearing sudge absent at lekel of Court adjourning appeal Dismissal of appeal for default of the adjourned day—Dismis also not

3 (1889) 2 C I L R 32 (33)

(1905) 4 Nug L R 10( (165) 4 [See (1864) I Suth W R 246 (246)] 5 (1917) 191° Lah 999 (400) Appellar t must

(1917) 191\* Lah 999 (400) Appellat undu give correct a lidre s of re joi letter Respondent not bound to com municide his addite s Note 13

1 (1920) 56 Int Cis 386 (3%) (U P PR) Failure to do so is an irregulant; within S 21 of t I Lind Reve up Act

Note 14 1 (1963) 30 Cal 500 (66 ) (E 1) Overrul 5

(1596) 23 Cal 927 (%\_J) and (1996) -3 Cal 11, (11C 117)

<sup>6 (1923) 1923</sup> Pat 514 (514) 2 Pat 6 (1923) 1923 Nag 1 (2)

Note 10 1 (1860) 5 Suth W R Vis 22 (22)

cases lolum, contraty vew <sup>2</sup>. The definition of a decree in S. 2 (2) in the present Code expressly provides that an order of dismissal for default does not amount to a decree. Also in the present Rule the words the Court may make an order that the appeal be dismissed have been substituted for the words the appeal shall be dismissed for default which occurred in the old section. Reading S. 2 (2) and O. 41. R. 17 together it is clear that an order dismissing an appeal for default is not a decree. Not is it one of the appealable orders referred to in S. 104. Hence no appeal les from such an order <sup>3</sup>. The proper procedure to set aside the order is to apply under R. 19. infra

Where an appeal is dismissed on the ments, the order is a decree and is ap, calable as such notwithstanding that the Court ought to have dismissed the appeal for default and not on the ments? But in some old decisions it was held that in such cases, the order, though dismissing the appeal on the ments, must nevertheless be regarded as an order dismissing the appeal for default?

Mup, cal was dismissed as a lainst some of the respondents on the ground of want of proper service of notice on them. When the appeal came on for hearing a lainst the other respondents it was dismissed on the ground that it was not man tainable a lainst them alone Held that in an appeal against the decree of dismissal the previous order dismissing, the appeal against some of the respondents could be attacked under S 105 °

An order dismissing an appeal for failure to pay the deficiency in the stamp for the appeal is an order of rejection of the appeal and as such constitutes a decree  $^{7}$  See  $^{8}$  2 (2). It has been held by the Oudh Judicial Commissioners Court that when an appeal is dismissed under an erroneous impression as to procedural law an appeal hes from the order of dismissal because the effect in such case is that of dismissal on  $^{9}$  prehiminary point (See Notes under R 11 supra.)

See also Note 12 to S 96 ante

C P C 333 t 334

# No appeal lies us (1,00) 28 Cal 81 (89)

(1,00) 93 Cd. 181 (69) (1892) 16 Born 3 (1-2) (See also (1864) 1864 Suih W B 1 6 (See also (1864) 1864 Suih W B 1 6 (2 (1893) 15 All 3,0 (63) (1991) 3 VII 1,00 (20) (1891) 3 All "9,2 (93) (18 5 80) 7 All (166 (61.) (18 9) 1897 All (16 (61.) (18 9) 1897 All W P NO 113 | 24,8 319

No appeal lies under the Letters Patent from an order dismissing an

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(1925) 1925 \ag 286 (288) 675 (1909) 4 Ind Cas 816 (814) U1p Bur R 8 (1914) 1914 Oudh 303 (304) appeal for default 1

16 Revision

An application for revision may be against an order dismissing an appeal for default 1

Dismissal of appeal where notice not ser ved in consequence of appellant s failure to deposit costs

R. 18. [S 557] Where on the day fixed,2 or on any other dry to which the hearing may be adjourned, it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit, within the period fixed, the sum required to definy the cost of serim!

the notice, the Court may make an order that the appeal be dismissed

Provided that no such order shall be made although the notice has not been served upon the respondent, if on any such day the respondent appears when the appral is called on tor hearing

[1877—S 557, 1861—S 5]

MADRAS

# Local Amendment

ifter the wo do cost of serving the notice a sert the words or if the notice is returned unserved to depo it within any a bacquent per of fixed the sum required to delray the cost of any further attempt to e e the not ce

### Synopsis

Note No Dismissal for default in depositing cost of notice Appeal cannot be dismissed before day fixed for hearing Effect of dismissal of appeal against one of several respondents

Dismissal for failure to supply identi Re admission of appeal dismissed Sco R 19 belo v Appeal Revision

1 Dismissal for default in depositing cost of notice

This Rule enables the appellate Court to dismiss an appeal only when the process fees for service of nonce on the respondent have not been deposited But it does not warrant the dismissal of an appeal merely because the appellant has not filed the notice required to be filed by the circular orders in the Court for the purpose of issuing process 1 An appeal is liable to be dismissed for default in depositing the cost of notice although the default was committed by an ignorant business agent of the appellant 2

An order of dismissal cannot be made under this Rule unless the appellate Court has fixed a date by which the cost of notice is to be paid?

Note 15

1 (1893) 15 \11 359 (363) (1892) 14 411 361 (361)

Note 16

1 (1925) 1925 Nag 236 (998) (1806) 18 All 119 (120)

Order 41 Rule 18-Note 1 1 (1912) 13 Lt d Cas 604 (694) (Cul)

2 (1869) 11 Suth W R 417 (419) 3 (1919) 1919 Lah 203 (708) 1919 Lun Re No 163

(18-0) 18 0 l a 1 Re \o 13 p 29 [S e also (1869) 11 Suth W R 230 [290]

2 Appeal cannot be dismissed before day fixed for hearing

An order of dismissal cannot be made under the Rule before the da e need for hearing, merely because the appellant has failed to deposit the cost of not counting the time timed by the Court 1

3 Effect of dismissal of appeal against one of several respondents

Where a decree for joint possession is passed in favour of three respordents, and the appeal from the decree is dismissed as against one of them for failure to serve notice on limit the appeal cannot proceed against the other two respondents the reason is that even if the decree is set aside in the appeal against them the entire decree which is a joint one, can be executed by the other respondent so its mullify the decree of the appellate Court?

4 Dismissal for failure to supply identifier

The default referred to in the Rule is default in prying the cost of rotice before the time fixed. Hence an appeal crannot be dismissed under the Rule on account of the appellant's failure to supply an identifier for identifying the re-pondent to the pro-ess serier.

5 Re admission of appeal dismissed - he R 13 below

6 Appeal  $\sim$  oppoal les against an order under this Rule. The proper remedy is under R  $~19^{\,3}$ 

7 Revision

Before an appellate Court can dismiss an appeal under this Rule it must fix a date by which the process-fees are to be paid. If it does not do so, its order of dismissal can be set aside in reusion. Where, however the appellant fails to pay the process-fees even on the date of the hearing of the appeal and also omiss to plead that the non payment was due to the fact that he had not been directed to pay by any fixed date, the order of the appellate Court will not be interfered with in revision.

R. 19. [S 558] Where an appeal is dismissed under O Rule 11, sub-rulo (2) or Rule 17 or Rule 18, the appellant may apply to the Appellate Court for the re-admission of the appeal, and where it is proved that ho was prevented by any sufficient

cause<sup>3</sup> from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit<sup>2</sup> the appeal on such terms as to costs or otherwise as it thinks ht

[1877-5 558; 1859-5 347]

Note Z 1 (1904) °5 Cal 535 (331)

Note 3

1 (1915) 1915 Cut Tool (780)

See also (1926) 1930 Cut 346 (\*17)
but for possession is mist fixedelen
dust — but driven; ed — typeal by
place of the control of the control
in 1 5 not provid and hence appeal
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dents 4 and 5 were necessary parties
and lence who expeat stood dis-

mis ed] Note 4

1 (1923) 1923 Put 114 (115) See atso (1929) 1929 Put 603 (610) Future to file identifier a cyclemco— O 41 R 18 does not apply] Note 6

1 (1919) 1919 Lah 203 (203) 52 Ind Cas 179 (171) 1919 Pun Re No 109 Note 7

1 (1919) 1919 Lah 203 (204) 1919 Pun Re No 169

6

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### MADRAS

### Local Amendment

t 1909 shall uply to

# Sunopsis

Scope and applicability of Rule Shall re admit the appeal Sufficient cause Court to which application for restoration is to be made

Dismissal for failure to deposit cost of

paper book or to pay Court fees 2 Inherent power to restore appeal dis 3 missed for default See S 151 Note 2 Other remedy Limitation Appeal 10

## Other Tomes

Summary rejection of application to restore-If proper See Note 3 I t (1)

1 Scope and applicability of Rule

This rule applies only where an appeal has been dismissed under any of the rules specified therein 1 O 41 R 17 does not apply when the arguments have been heard. Hence the dismissal of an appeal in default when the arguments have been heard is not covered by Rule 17 and this rule does not therefore apply to such a case 2

Shall re admit the appeal

The expression used in the corresponding section of the former Code, S SS8 was may re admit the appeal Nevertheless it was held by the Madras High Court under the old Code that the Court was bound to restore the appeal if sufficient cause was established 1 In the present rule legislative offect is given to this view 2

3 Sufficient Cause - See Note 8 to 0 9 B 9 ante

When an application is made to restore an appeal dismissed for default the Court should not reject the application summarily, but should give the applicant an opportunity to substantiate his allegations, as to sufficiencause A summary reject on without enquiry is improper 1

### Order 41 Rule 19-Note 1

1 [S e (1868) 10 Suth W R 4.0 (451)] (Sce also (1915) 1915 Cal 622 (623) Consent decree passed due to appel lant's fraud-Re hearing of appeal-

R 19 does not apply]
(1898) 1899 All W N 155 (156) Dismissal

Note 3

1 (1927) 1927 Cal 888 (889) (1935) 1935 I esh 110 (110) (1J29) 1929 Cul 102 (102)

(1925) 1925 Cal 500 (501) (1925) 1925 Cal 269 (269)

(1920) 1920 Cal 663 (663) (1971) 15 Suth W R 80 (80) Judge reiu 1 5 to had

Application to readmit stamped with Court fee of Rs 2-Application is entertainable under O 41 R 19 rend with S 151 and is sufficiently stamped]
2 (1905) 8 Oudh C is 261 (262)

Note 2 1 (100) 26 Mad 599 (661) 4 (500 (1912) 15 h d Cus 359 (308 354) (L B) able or not [See also (1931) 1881 111 W \ 2' ('2) -

Before disinissing application for re admission of appeal Court should enquire into the appellints alle tions)

(19a0) 132 Ind C is 5 (5) (Lali) (1919) 1919 Lah 2 6 (217) (19.3) 1933 Lat 123 (129)

As to what amounts to "sufficient cause," see the undermentioned cases 2

4 Court to which application for restoration is to be made The application must be made to the Court which dismissed the appeal for default 1

5 Notice

Order 9, R 9 lays down, that notice must be given to the defendant before a suit dismissed for default of plaintiff's appearance is restored. In the underment or ed casel it was held by the Allahabad High Court that even if O 9, R 9 be held to apply to appeals by force of S 107 sub-S (2), not ce is not necessary for the restoration of an appeal dismissed for default owing to the absence of both the parties. But the propriety of an ex parte order setting aside an order of dismissal for default may be questioned at the hearing of the appeal 2 The dismissal of an appeal for failure to pay the deficit Court-fee on the memorandum of appeal is not a dismissal for default. An application for restoration in such a case is not covered by this rule but is an application for review under O 47 and notice to the opposite party is nece-sary 3

ibsence of tleater in anotier Court-Viscalculation of time-May to sufficient

(1032) 10°2 Lah 65 (6a)

(1926) 19\_6 Cal 1231 (1231) (1923) 79 Ind Cas 504 (2) (505) (Lah) Coun sel turning up immediately and satis fying that his failure to arrear was

unintentional

[But see (1923) 1923 Lah 97 (97)] (1914) 1914 Cal 763 (764)

(1925) 1925 Oudh 234 (231 230) Appeal unexpectedly called carlier than

expected is a liferent cause — (1J32) 1032 Lah 357 (288) [But see (1924) 1924 Lah 189] (1°07) 1907 Puu W R 69

(1926) 1926 Rang 109 (110) 4 Rang 18

[But see (1908) 31 Mad 157 (159) Arpeal taken up at an earlier dato but ample notice given-Not a suffi cient causel

> MITT. 218

to inform party of transfer of appeal to another Court

Other cases in uluch it was held there was sufficient cause

(1910) 8 Ind Cas 226 (227) (Lah) leider a ab enco in a caso need not be satisfactorily explained if the appellant can give a revenable exen o

for his own absence (1908) 35 Cal 7J9 (802 806) Plender being ill had transferred his brief to an other pleader whom the Judge dec luied to hear as his name did not

as pear in the tal alat tama (1930) 1500 Mil 217 (218) 52 All 536 Appel ppcals iature

of the pleader as to date of hearing (1689) 1899 All W N 125 (126) Illness of

pleader Illness of one of several appellants-Not

a sufficient cause -(1968) 1688 Pun Re No 83 page 94 Laches of advocate or carelessness of his

(1933) 1933 Lah 1013 (1043) Fulure of counsel to enquire what cases he has

> r 65 (See also (1910) 5 Ind Cas 120 (121) (AIII)

(1926) 1926 Cat 1152 (1152) Ploader arriving late owing to rain-Not a sufficient

Note 4 1 (1661) 1664 Suth W R 315 (316) District Judge car not restore appeal dismissed in default by Subordinate Judge

(1690) 15 Eom 107 (109) Appeal transferred by District Judge to Assistant Judge under S 17 of Lombay Civil Courts Act for trial-Assistant Judge dis mi sing appeal for default-Appli cation for re-adinis ion of appeal to Judge

Note 5 1 (1912) 17 Ind Cas 292 (293) (All)

2 (1J-0) 1020 Sind 34 (35) 14 Sind L R 239 3 (1922) 1022 Pat 281 (283) G Pat L Jour 625

#### 6 Dismissal for failure to deposit cost of paper book or to pay Court fees 19

This Rule applies, as has been stated in Note I above only where the dismissal has been under any of the rules specified therein. Hence the Rule does not apply where an appeal has been dismissed under the High Court rules for failure to deposit the cost of preparing the paper book. The remedy in such a case is not by an application under this rule but an application for review 1 Similarly, where an appeal is dismissed for failure to pay deficit Court-fees within the time allowed by the Court, the appeal cannot be restored under this rule 2

# 7 Inherent power to restore appeal dismissed for default -See S 151 Note 2

When an appeal is dismissed for default the applicant may present a fresh appeal provided the period of limitation for an appeal has not expired He is not confined to his remedy under this rule 1 An appellant whose appeal has been dismissed for default may also apply for review in a proper case The Allahabad High Court has held that when the appellant has allowed his remedy under this rule to become time-barred, he cannot come by way of an application for review 2 But the Puniab Chief Court has held a contrary view 3 In an application for restoration under this rule the only thing that

the Court can consider is whether there was 'sufficient cause for appellant's default. Questions as to the legality of the order of dismissal can only be raised in an application for review 4

# 9 Limitation

An application for restoration of an appeal under this rule is governed by Art 168 of the Limitation Act and must be filed within 30 days from the date of the dismissal of the appeal 2 The Court has no power to enlarge the said period 2 Proceedings taken on an application filed after the period of limitation are invalid 4 An application for re-admiss on made not under

Note	6	

rruling

Order of dismissal in such a case to covered by R 11 or R 18 of O 41] [See however (1932) 1932 Cal 641 The application does not full under O 47 R. 1-Court fee of Rs 2 13 sufficient for the application]
2 (1922) 1922 Pat 281 (282) 6 Pat L Jour 625 (1920) 1920 Pit 608 (609) 55 Ind Cis

Note 8

502 (503)

(1915) 1915 Mad 1111 (1111 1112) Question of competency of Judge to pass order under R 18 not to to rused in ap pli ation under R 19

(1921) 1921 Bom 20 (20) 45 Bom 648 (1867) 8 Suth W R 361 (361) (1868) 10 Suth W R 437 (137) Under 5 817

of Act VIII of 1859 also the period of lumitation was 30 days (FB) that

ses of 1 835 based on the language of S 559 of

the Code of 1877 and is not good law under the pre ent Codo 2 (1903) 31 Cal 150 (151) Notice that at pli cation would be made on further

date does not present limitation (1967) 4 Boin H C R ( \ C) J2 (92) Lader

S 347 of Act VIII of 1809 where ap selleni salender had diel and ap

Note 9

1 (1933) 1933 Rang 96 (97]

4 143747 43 . . . . .

S 558 (O. 41, R. 19), but under the rules of the Court, is not governed by Art 168 and is not subject to any law of limitation.

Where the order of dismissal is ultra ures Art, 168 does not apply of Thus, an appeal cannot be dismissed for default where the appellant is dead. Where an appeal is dismissed for default under such circumstances, the appellant's legal representatives need not apply for restoration within the period of 30 days allowed under Art, 168. The order of dismissal is no bar to the application of the legal representatives to be brought on the record and such an application is governed by Art. 176 of the Limitation Act 7 The provisions of S 5 of the Limitation Act or of S 6 of that Act 9 do not apply to an application under this rule.

See, however, the amendments of this Rule by the High Court of Madras.

### 10 Appeal

I.

No appeal lies against an order granting an application for restoration of an appeal under this rule. An order refusing such an application is appealable under O 43 R 1 (t). But no appeal les against an order refusing an application for restoration to which this Rule does not apply.

5 (1836) 23 Cal 339 (317)

5 (1936) 23 Cil 339 1917) (1920) 1920 Mad 974 (974) Fren Art 181 does not apply to such a case

6 (1724) 1924 Kah A'1 (230) Date of hering not fixed—No notice of date of her ming—Order of dismissal for default—Ai collaints not informed of dismissal order of dismissal is after a result of the collaints of

7 (1918) 19 Ind Cas 526 (527) 35 4H 331 16 Oudh Cas 134 40 Ind tpp 151 (PC) (1919) 1913 Lah 447 (447) 1318 Pun Re

No 90 (Lut see (1920) 1920 Sind 34 (36) 14 Sind L R 239 It is submitted that the rise expressed in this case that an order of distanced for defending the case that an order of the second for defullint elegal representatives lefore expire of limitation for application to be

1 1ght on record is wrong)
(1879) 18 3 I un Re No 141 page 409
(1933) 10-1 Raig # (98) Inheient powers

cannot be invoked in such cases unles there would be sufficient cause had S 5 Limitata n Act been made applicable

9 (1921) 1921 Bom 20 (20) 45 Bom 649 Note 10

1 (1902) 24 All 464 (465)

(1880) 5 Cal 711 (712) 2 A right of appeal was given in such a case by the Codes of 1832 and 1877 at o Sie for instance the following cases— (1890) 3 CP L R 106 (167) S 538 1832 Code

890) 3 CPL R 166 (167) S 558 1832 Code (now O 41, R 19) applies to appeat from orders S 588 gives a right of appeal against order refusing to restore appeal against an order of disms al for default (1879) 4 Cal 825 (828) Case under Code of

1877 (1879) 1879 Pun Re No. 141 page 409 Ca e

under Codo of 1877
There was a conflict of decision under the Code of 1859 regarding the applicability of an order refusing to restore an appeal dismissed for default. See for instance the following cases which held that no appeal the

(1868) 10 Suth W R 160 (162)

(1868) 10 Suth W R 29 (30) (1867) 8 Suth W R 351 (361) Previous rul ings allowing special appeal from order under S 347 Act VIII of 1859 corre ponding to O 41 R 19 fol

1 ... ...

3 (1896) 18 411 119 (120) Order of diamics at not covered by R 17-R 19 does not apply—Order refusing to restore to not appealable

(1900) 27 Cal 529 (531) No default of ap pearance—Rr 17 and 19 do not

Court not having jurisdiction to pass order—R 19 does not apply— Order refusing to restore as not appealable

(1925) 1925 all 57 (a<sup>q</sup>) 47 All 1 Application for review dismissed for default—Refusal to restore is not appeal able

[See also (1917) 1917 All 397 (397) Application to set aside a decree—

An appeal les against an order refusing to restore an insolvency appeal dismissed for default, because by virtue of S 5 of the Provincial Insolvency Act 1920 the general procedure applicable to insolvency cases is that laid down in this Code 4 Similarly, an order refusing to re admit an appeal under S 109 A of the Beng il Tenancy Act which was dismissed for default is appealable 5

An order rejecting an application under this Rule is a Judgment within Cl 10 of the Letters Patent (Lahore) and is appealable as such 6

R. 20. [S 559] Where it appears to the Court at the hearing2 that any person who was a party to Power to adjourn hearing and direct the suit3 in the Court from whose decree the persons appearing in appeal is mejeried, but who has not been made terested to be made a party to the appeal, is interested in the result respondents of the appeal.4 the Court may adjourn the hearing to a future day to be fixed by the Comt and direct that such person be made a respondent 5

[1877—S 559, 1859—S 73]

Synopsis Note No Note No. Scope and applicability of the Rule 1 1 Adding party for the purpose of cross At the hearing 1a objections-Sec Nota 21 to 0 41 Any person who was a party to the 8 2 Inherent power to add parties Interested in the result of the Power to pass decree against party-See R 4 a ite and R 33 post 3 appaal 10 The Court may Effect of non joinder direct that 11 such person be mada a respondent 4 Limitation Addstson of parties in second appeal Adding appellant 6 Adding respondent

1 Scope and applicability of the Rule

This rule does not apply to the addition of fresh parties by the Court of first instance after the case is remanded to it by the appellate Court for re trial 1 (See also Note 4. infra )

la At the bearing

The power to add parties under this rule is to be exercised at the hearing for, it is necessary that before acting under this rule the Court should have before it all the circumstances of the ease 1 The rule does not contemplate the addition of a party after the judgment has been pronounced 2

Dismissal of application-Applica above cated? tion to restore it refused-Order of 6 (19°5) 1925 Lah 617 (61,) Order 41 Rule 20-Note 1 1 (1931) 1931 Bom 408 (409) Note 1a d-to 1 (1893) 1893 VII W N 35 (36) (1926) 19 6 Cal 533 (535) 53 Cal 2 0 (1916) 1916 Cal 630 (630) Application to add part es mide before that date is mco npetent (1912) 16 1ud Cas 903 (90J) 40 Cal 323 -6 Cul 510 This decision is not referred to in the later de mon 2 (19 1) 1991 Cal u34 (u35)

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2. 'Any person who was a party to the suit'

I.

The rule applies only when the proposed party respondent was a party to the suit in the Court from a hose decree the appeal is preferred 1 On the question whether, apart from R 20, the appellate Court has power to add as respondent to the appeal persons who were not parties to the suit in the Court below, there is a conflict of decisions. According to the High Courts of Calcutta2 and Patna3 the appellate Court has such power independently of this Rule to add as respondents to the appeal persons who were not parties to the suit in the Court of first instance. The High Courts of Allahabad,4 Bombays and Lahores have, on the other hand, held that the appellate Court has no such power The High Court of Rangoon also seems to be of the same view? It is submitted that the Calcutta and Patna view is correct However, there is nothing to prevent the appellate Court, in a proper case, to remand the case to the lower Court with a direction to add the omitted part es 8 Further in a case where a person can be added as a respondent to an appeal by virtue of the provisions of O 22, R 10, there is no objection to his being so added though he was not a party to the suit in the lower Court.º Persons who were parties to the suit in the lower Court originally but whose names were struck off before the passing of the decree are nevertheless part es to the suit within the meaning of R 20 10

The words "any person who was a party to the sun include the representative of such a partyll (See also Note 12, below)

## Note 2

- 1 (1912) 16 Ind Cas 208 (202) 40 Cal 323 (1922) 1923 Rang 114 (115) 4 Upp Lur R 150 (1935) 1335 Ondh 329 (331) 2 (1321) 1921 Cat 722 (724) Has inherent
  - (1910) 6 Ind Cas 912 (914) (Cal) (Do) (1915) 1318 Cal 608 (609) Has power under
  - O 1, R. 10 (1903 04) 8 Cal W N 404 (401 406) (Do) (1982) 1932 Cal 448 (44J, 450) 5J Cal 329,
  - (1912) 16 Ind Cas 203 (202) 40 Cal 823. (But see (1864) 9 Suth W R 259
  - (267)] 3 (1919) 1918 Pat 525 9 Pat L Jour 400
  - 4 (18JC) 18 All 332 (333) (1925) 1325 AN 769 (768) 47 AN 853 [Compare (1878 80) 2 All 467 (489, 432) Party re-pondent can be added under O 1, R 10 read with S 107]
  - 5 (1929) 1929 Bom 358 (354) 53 Bom 536

(1933)

off on application of plaintiff-Appleal against decree - Plaintiff cannot cleum as agrinst the person struck off or make him a respondent in apreal

whom appeal has abited is not a person interested and Court has no

jun diction to add him as party-

Nor can Court act under R 33 (1931) 1934 Prt 589 (591) Plaintiff a claim diaminsed against A but decreed against B-B appealed not joining A-17pcal allowed against Plaintiff -Plaintiff appoaled unitleading A

and B-Time for appeal against A

(1933) 1933 Ang 156 (156) [See also (1598) 20 All 38 (39) In this case it was held that O 22,

R 10 does not apply to an attach ing creditor But this case must be regarded as superseded by sub rule (2) of R 10 now] 10 (1916) 1916 Vid 493 (493)

[Compare (1920) 1926 Lah 499 (500) 8 Lah 161 Person party to suit but not party to decree and not inter-ested in result of appeal.- He cannot te added under R \_01

11 (1916) 1916 Cal 690 (690) [Contra 1923 Rang 114 (115)]

the order which the tiral Judge should make when he tries the case in the presence of proper parties] 9 (1901) 23 All 831 (335)

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(1935) 1935 Mad 175 (178) Person agruest

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An appeal Les against an order refusing to restore an insolvency appeal dismissed for default, because by virtue of S 5 of the Provincial Insolvency Act, 1920, the general procedure applicable to insolvency case is that laid down in this Code Similarly, an order refusing to re admit an appeal under S 109 A of the Bengil Tenancy Act which was dismissed for default is appealable S

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R. 20. [S 559] Where it appears to the Court at the Power to adjourn hearing and direct the sunt's in the Court from whose decree the appearing in the sunt's in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, is interested in the result of the appeal by the Court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made

[1877—S 559, 1859—S 73]

Sunopsis Note No Note No Scope and applicability of the Rule Adding party for the purpose of cross At the hearing objections-See Note 21 to O 41 la Any person who was a party to the suit 2 Inherent power to add parties Power to pass decree against party-See B 4 aute and R 33 10st Interested in the result of the 3 appeal 10 11 The Court may direct that Effect of non sounder such person be made a respondent Limitation Addition of parties in second appeal Adding appellant Adding respondent

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Dismissal of application-Applica above cited! 6 (1975) 1925 Lah G1" (61s) tion to restore it refused-Order of Order 41, Rule 20-Note 1 1 (1931) 1931 Bom 408 (409) Note 1a 1 (1893) 1893 All W > 35 (36) d-1p (19 6) 19 6 Cal 533 (535) 53 Cal 2 0 (1916) 1316 Cal 630 (650) Application to add parties made before that da e is incompetent (1912) 16 Ind Cas 903 (903) 40 Cal 3 3 of Cil 510 This decision is not referred to in the later de ision 2 (1921) 19 1 Cal 34 (35)

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2 Any person who was a party to the suit'

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The rule applies only when the proposed party respondent was a party to the suit in the Court from whose decree the appeal is preferred 1 On the question whether, apart from R 20, the appellate Court has power to add as respondent to the appeal persons who were not parties to the suit in the Court below, there is a conflict of decisions According to the High Courts of Calcutta2 and Patna3 the appellate Court has such power independently of this Rule to add as respondents to the appeal persons who were not parties to the suit in the Court of first instance. The High Courts of Allahabad.4 Bombay5 and Lahores have, on the other hand, held that the appellate Court has no such power. The High Court of Rangoon also seems to be of the same view? It is submitted that the Calcutta and Patna view is correct However, there is nothing to prevent the appellate Court, in a proper case, to remand the case to the lower Court with a direction to add the omitted part es 6 Further in a case where a person can be added as a respondent to an appeal by vartue of the provisions of O 22 R 10, there is no objection to his being so added though he was not a party to the suit in the lower Court 9 Persons who were parties to the suit in the lower Court originally but whose names were struck off before the passing of the decree are nevertheless part es to the suit within the meaning of R 20 10

The words 'any person who was a party to the suit include the representative of such a party11 (See also Note 12, below)

Note 2

1 (1912) 16 Ind Cas 905 (909) 40 Cal 323 (1373) 1023 Rang 114 (115) 4 U1p bur R 1.0 (1935) 1935 Oudh 329 (331) 2 (1J2t) 1921 Cal 722 (724) Has inherent

(1910) 6 Ind Cas 912 (918) (Cal) (Do) (1915) 1J18 Cal 668 (609) Has power under O 1 R 10 (1903 04) 8 Cal W > 404 (404 40a) (Do)

(1932) 1J32 Cal 448 (44J 450) 5J Cal 329,

(1912) to fud Cas 903 (909) 40 Cal 323, [But see (1868) 9 Suth W R 259

[Compare (1878 50) 2 411 457 (489 under O i R. 10 read with S 107] 5 (1929) 1929 Bom 3,3 (354) 53 Bom 538

the order which the trul Judge should make when he trues the case on the presence of proper parties]
9 (1901) 23 All 331 (335)

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(1935) 1935 Mad 175 (179] Lerson against

whom appeal has abited is not a person interested and Court has no jun diction to add him as party-Nor can Court act under R 33

(1934) 1334 Pat 580 (501) Pluntiff's claim di missed against 4 but decreed aguns. B-B appealed not joining t- tope if allowed agrinst plunting -Plantif appealed impleading A and B-Tune for appeal agumst A have g expired he cannot be added piety - Moreover alleal against d is not jermis ible direct to High Court

from decision of Sub Judge (1933) 1933 Nag 66 (67) Suit against two persons—Name of one of them struck off on application of plaintiff-Appleal against decree - Plaintiff can not claim as against the person struck off or make him a respondent

in apperl (1933) 1933 Nag 166 (166)

[Sec also (1898) 20 All 38 (39) In this case it was held that O 22, R 10 does not apply to an attach ing creditor but this case must be re, arded as superseded by sub rule (2) of P 10 now] 10 (1916) 1916 Ved 499 (493)

[Compare (1976) 1926 Lah 439 (500) 8 Lah 161 Person party to suit but not part; to decree and not inter ested in result of appeal—He cannot te added under R 20] 11 (1)16) 1916 C 11 690 (690)

[Contra 1023 Rang 114 (115)]

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20, Interested in the result of the appeal

Before the Privy Council decision in Chokalingam v Seethar there was a conflict of decisions as to the meaning of these words. One set of decisions proceeded upon the view that the fact that the presence of the proposed party respondent before the Court was necessary for the adequate disposal of the appeal or cross objections on the merits was enough for making him a respondent under this Rule Thus, it was held that where the constitution of an appeal was impeached on the ground that the recessary parties lad not been impleaded, the defect could be cured by their being added under this Rule 12 Similarly where in a suit filed by A against B and C, a decree was passed against B but was dismissed against C and B appealed from the decree making A alone a respondent, and the appellate Court finds that C and not B is hable to A, it was held that the appellate Court could make C a respondent to the appeal under this Rule and that, in allowing B's appeal, it can pass a decree against C 2 On the other hand it was held in another set of cases that the Rule was intended to protect parties to the suit who had not been made respondents in the appeal from being prejudiced by modifications made behind their backs in the decree under appeal, and that the party whom it was sought to bring on record must be shown to be interested in the result of the appeal before he is brought on the recorded. Hence where a defendant had been exonerated in the lower Court and no appeal was filed against him, it was held that he was not interested in the result of the appeal filed against other parties and could not be added as a respondent to such an appeal under this Rule unless it could be shown that the decree that might be passed in the appeal as framed might projudice his interests in some way or other 3 According to this group of cases the mere fact that the presence of a party before the Court is necessary for the disposal of the appeal or cross objections on the ments was not sufficient justification for making him a party respondent under this Rule

In this state of the authorities it was held by the Privy Council in

Note 3 1 (1927) 1927 1 C 2,2 (200 256) 55 Ind 11 p 7 6 Rang 29 (P C) 14 (1926) 1926 Cal 335 (336) Rule is ordi narily intended to apply to case, wi ere the Court fit ds tlat it cannot proceed with the suit without the presence of a parts who was not

made a party to the appeal (1912) 15 Ind Cas 995 (295) (All) Defect due to want of parties can be cured

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dant has expired 0 741

[See also (1901) 1901 Pun Re \o 23 For instances of Interest to Ilis

leal against the exonerated del u

(1927) 1927 Cal 394 (395) 54 Cal 490

(1892) 15 Mad 3G2 (3G5) Decree against defendants 1 to 4-Defendant 1 ap pealing-Defendants 2 to 4 tryin-to come in subsequently-11e deci dant he I would affect the nut i ests of defendants 2 to 4-Latt r are interested

(1599) 26 Cal 114 (121) Sunt decreed in part against several defe dinte-

(1453) 50 [11 60 (-67)

Chokalingam v Scithar that where a defendant had been experated in the O lover Court and no appeal had been filed against him within the period of Lustat on, he was not interested in the result of the appeal filed by the plaintiff against other defendants, and that in any event, it was for the plaintiff appellant who sought to make him a respondent to show what was the nature of the interest he had in the appeal. Their Lordships reached this view in spite of the fact that the presence of the proposed party respondent was necessary to enable the Court to decide on their merits certain questions that arose in the appeal. This shows that in their Lordships' view the test for the addition of a party respondent under this Rule was not, whether his presence before the Court was necessary for the adequate disposal of the appeal on its ments, but whether the proto ed party is one whose interests are likely to be prejudiced by the determination of the appeal as framed So interpreted, their Lordships judgment accords with latter of the two views set forthabove. Hence the o her view viz. that it is enough for the application of this Rule that the addition of the proposed party is necessary for the adequate disposal of the appeal on the merits should be regarded as no longer good law. It may be noted in this connection that their Lordships judgment confirmed the judgment of the Rangoon High Court in the undermentioned cases and that in this judgment the Ran geon High Court followed the Madras decision in Subramania v Veerabhadras which contains the clearest exposition of the second view referred to above so that the Privy Council may be taken to have adopted this view in preference to the other view 7 Some decisions of the High Courts8 though pronounced subsequent to the above Pray Council case have adopted the view overruled by the Privy Coun il and hence must be regarded as not correct. The decisions in the undermentioned cases accord with the view approved by the Privy Council and may be taken as correctly representing the law on the subject now But where a person can be added as a respondent under any other

provision of law, his not being interested in the result of the appeal within the mun ng of this Rule is no objection to lus being so added 10 (See Note 8, inira)

Appeal in this Rule includes also cross objection 11

4 The Court may direct that such person be made a respondent The power given to the Court under this Rule is a discretionary one

titled by some those-Cross objections by platial-H suit likely to affect interests of other defendants-

They are n tere ted 4 (192 ) 1977 P G 2:2 (255 256) C Rung 29 (P C)

5 (1975) 1975 Ring 103 (109 110) 2 Ring 541 6 (1903) 31 Mad 412 (444 44.)

7 See Votes of Indian Cases is (1928) of Mad L Jour (VIC) 50

8 (1923) 1929 Cal 315 (917) (1930) 19 °O Lah 29 ; (296)

(1378) 1928 Lah 202 (20o) (19\_-) 1928 Lah 120 (120)

(1933) 1933 Nag 66 (67) (See also (1982) to h a L J 173 (175 10 (1921) 1921 Med 172 (174) 44 Mad 60 (F B)

Purty may be added under O 1 R. 10 read with S 107 (1920) 1929 Mrt 170 (120 121) Re pon

dent min beadded under O 1 R 10 read with S 10:

(1912) 13 Ind Cas 906 (906) (Mad) (1928) 1928 Pat 343 (345) 7 Pat 510 Res pondent may be added in exerci e of

inherent pov er [See ulso (1979) 1929 Mad 343 (3.4) ] (1921) 1921 Cal 722 (724)

(1882) 1842 Pun Re No 20 page 75

11 (19°0) 1920 Mad 120 (120) (1931) 1931 Cal 738 (140) 58 Cal 923. to be exercised in view of all the circumstances of a case 1 Strong grounds are necessary to induce the Court to exercise its discretion in favour of an appellant who has failed to implead any party within the period of limitation.2

It will not be exercised in favour of an appellant where he has deliberately3 or out of extreme negligence4 failed to implead any party. But where he has not been gulty of any neglect the appellate Court may very well exercise its power under this Rule in his favour.5

The power under this Rule cannot be exercised so as to negative the provisions of O 22. Hence, where a respondent has died and the appeal has abated as against him owing to his legal representatives not being brought on the record within the period of limitation, the legal representatives cannot be added under this Rule. Where, however, the legal representative was actually brought on the record in the suit, but was not impleaded in the appeal, he may be added under the provisions of this Rule.7 There is a conflict of opinion as to whether this Rule can be applied where a party who is necessary for the very constitution of the appeal is not impleaded in the appeal with the result that the period of limitation for an appeal against him has expired. According to the High Court of Patna and the Judicial Commissioner's Court of Peshawar the Court has no power to add the non-impleaded party, as a party to the appeal 8 The Lahore High Court has held that the Court has such power 9 The High

Note 4 1 (1926) 1926 Cal 893 (895) 59 Cal 752

(1934) 1934 Lah 402 (404) Attested copy of judgment omitting name of party though decree giving same-Party omitted in appeal by oversight-

> Application for addition of parties not to be arbitrarily refused ] (See also (1933) 1933 Lah 301 (304) ]

2 (1928) 1928 Lih 947 (948) (1929) 1929 Vind 479 (480)

(1932) 1932 Sund 220 (221) 26 Sund L R 261 Discretionary power should be refused if pirty is deprised of his

taluable right (See also (1927) 1927 P C 252 (253, 256) 6 Rang 29 (P C) The right of a decice holder against whom an appeal has not been aled within the period of limitation to hold the decree in his favour is a substantive right of a very valuable kind of which he should not lightly be de

prived ] 8 (1929) 1929 Sind 120 (120) (1925) 1925 Oudh Cob (CO7) Omesion to impled not due to oversight— Court refused to add re-pondent under R 20

4 (1920) 1920 Cil 264 (267) (1927) 1927 Lah 189 (18J, 110), (1923) 1323 Lah 503 (504) (1320) 13.0 Lah 72 (73)

. . . .

(1926) 1928 Lah 202 (206) (1928) 1928 Lah 120 (120)

[See also (1921) 1921 Nag 12 (13). Certain parises omatted due to mistake of pleader-They may to added under R 20

6 (1926) 1926 Cvi 335 (336) (1935) 1936 Oudh 52.1 (331) (1926) 1926 Cvi 893 (894, 895) 53 Cvi 752 (1927) 1927 Pat 22 (24) 5 Pat 755 (1931) 1931 Nag 184 (186) 27 Nag L R 220

[But compare (1921) 1921 Cal 722

dent has acquired valuable right as against lerson sought to termpleaded

9 (1927) 1927 Lah 738 (730)

Cour, of Allahabadia and the Judeial Commissioner's Court of Sindia seem to O be of the same view. Where, however, the only person that could be impleaded in the appeal is not impleaded, and there is consequently no valid appeal at all, this Rule will not apply.

The power under the Rule may be exercised by the Court on its own motion or on the application of any party. If the Court finds the presence of any party not already joined necessary it may direct the appellant to apply for bringing him on the record and if he fails to do so may dismiss the appeal. 14

### 5 Adding Annella

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The present Rule provides only for the addition of a party as a respondent. On the que tion whether an appellant can be added or substituted under O 1 R 10 read with S 107 see S 107 Note 16 and O 1 R 10, Note 11

### 6 Adding Respondent

In appellate Court can add a person as respondent who in the trial Court, was arrayed on the same side as the appellant 1

7 Adding party for the purpose of cross objections See Note 22 to O 41 R 27

### 8 Inherent power to add parties

The power of an appellate Court to add party respondent is not confined to eases falling under O 41 R 20 In cases to which this Rule does not apply the appellate Court can under O 1, R 10 read with S 107 or by virtue of its inherent power, add parties respondents to the appeal? Thus where owing to a bena fulle mistake caused by a similarity of names of two persons who were part es in the lower Court the names of those persons were left out in the appeal, it was held that the appellate Court had power to correct the mistake and have the memorandum of appeal amended by inserting the proper name 2 But the inherent powers of the Court should be invoked only in exceptional circumstances 3

9 Power to pass decree against party -See R 4 ante and R 33 gost

### 10 Effect of non joinder

The principle of O 1, R 9 applies to appeals No appeal should be made to fall merely on the ground of the non joinder of any parts, but the Court may deal with the matters in controversy so far as the parties actually

10 (180.) 1-33 MI W N 35 (36) The application at 1 order tas 10 under this Bible—It was conceled that if it is at 1 der this Rule thencessary just in high have been added

11 (1929) 1,770 Sind 120 (120) It vas assumed that the Court had a discretion to idd the just but vas not exercised by reason of the deliterate omission

of the appellant 12 (1913) 19 Ind Cas 37 (39) 1913 Pun Ro No

ly Court even in absence of apple

(1926) 1J2C Lah 689 (690) 14 (1 2)) 1C2 V(ad 2J5 (286) Note 6 1 (1891) 13 \t11 +8 (87) (1892) 15 Med 3F2 (364)

(1921) 1921 Mrd 172 (174) 44 Mrd 605 (1920) 1920 Mad 120 (120 121)

Note 8

(1920) 1920 Vad 120 (120 121)

Bit see cases cited in Note 2 supra,
foot notes (3) (5) and (6) and in Note 12
unfra foot note (1)
2 (1229) 1929 Vad 343 (344)

3 (1923) 1923 Lah 4'0 (191) Note 10

1 (1916) 1916 Cal 516 (p19)

0. before it are concerned. In this connection, reference may be made to the difference between proper parties and necessary parties (Vide Notes under O 1, R 10) If the non-joinder is not of necessary parties, the appeal may proceed with reference to the parties actually before the Court 2 But if necessary parties have not been joined, the effect of the non-joinder on the appeal is fatal to the appeal, because in such case there is no proper appeal before the Court at all 3 In such cases, the Court may in its discretion add the necessary parties under this Rule and then proceed with the appeal 4 (See Note 4. cnte and O 1, R 10)

A person who is not joined as a party to an appeal is not bound by the decree passed in the appeal. But the assignee of a decree is, in the absence of fraud, bound by the decree of the appellate Court though he has not been made a party to the appeal against the decree 5

# 11 Limitation

The power of the Court under this Rule is not subject to the provisions of the Limitat on Act and a party who is interested in the result of the appeal may be added as a respondent under this Rule though the period of limitation for an appeal by or aga not him may have expired 1 The Privy Council decision in Chokalingam v Seetharla does not affect the correctness of this proposition which is accepted as settled Law by all the High Courts But the powers under this Rule should be exercised very cautiously masmuch as a person in whose favour the lower Court has passed a decree against which an appeal is not filed within the period of Limitation has a substantive right of a valuable kind which should not be lightly treated 2 Where a respondent is added, not under R 20, but under O 1, R 10 read with S 107, the provisions of Limitation Act will apply 3 But where a party is added in the exercise of the Court's inherent power to preserve the ends of justice from being defeated, it seems, no limita-

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2 (19_1) 1J27 Cal "83 (78a)
   (1934) 1934 Cal 459 (490) | 61 Cal 30'
(1938) 1933 | Lah 400 (40s) | Omission to
          bring on re old repre entities of
          Party in appeal who is not necessary
          jurts but only added to pro forms
          defendant is not fittl to heiring of
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(1505) 2 Suth W R 255 (755) (1874) 21 Suth W R 187 (187) 5 (1J12) 17 Ind Cas 420 (421) 39 Mad 36

Note 11 1 (1592) 14 All 154 (155 156) (F P) (1631) 13 AH 78 (63) (1633) 1633 AH W N 35 (36)

(1667) 8 Suth W R 367 (365) (1906) 33 C41 320 (33") (1906) 33 C41 320 (33") (1508) 25 C41 565 (569) (1533) 9 C41 325 (22) (1126) 1926 Lah 673 (620) (1924) 1924 Lah 629 (620)

(See also (1373) 1329 Lab 203 (201) (1914) 1314 Lab 2 o (218) 1914 P R No (1914) 1314 Lab 2 o (218) 1914 P R No (1914) 1915 P R No (1914) P R No (1914

In this er e however the appella was held to be extremely real ac! and the Court declt ed to add th

new 14rty after limitation (1321) 1921 Nag 12 (13) (1315) 1915 Gulh 1,3 (160) 13 Oudh Ct

(1324) 1374 Pat 773 (774)

(1321) 1921 U B 13 (14) 4 L B R 97 (1912) 16 Ind Cas 771 (777) 6 Sand L I

(1920) 1920 L B 64 (65) 10 L B R 191 Se als: cues citel in Ace 3 for

Se also cues cilet in Ace of Found (1)

1 (1921) 1927 PC 2.22 (25) G Ring 2 (1 C)

2 (133) 1927 PC 232 (25) G Ring 2 (PC C)

Sealto Note 4 signs fat cles (3-a)

(a) and (b)

3 (15-0) 2 333 457 (4-3 492)

t on will apply 4

12 Addition of parties in second appeal

The Rule requires that the propo ed party respondent must have been a party in the suit in the Court from whose decree the appeal is preferred Suppose, a person was a party to the suit in the Court of first instance but was not a party in the first appellate Court, has the High Court in second appeal power to make him a respondent? On this question there is a conflict of decisions the Ulahabad High Court holding that he cannot be added as a respondent and the High Courts of Calcutia Lahore, Madras' and Patina' the Judicial Commissioner's Court of Oudh's and the Chief Court of Lower Burma holding a contrary view 7 It is submitted the Allahabad view is not correct (See Notes 2 and 8 surpea and 4 so, Note 11 to 0 1. R. 10)

The High Court in second appeal can remand the case to the lower Court with a direction to it to add fresh parties.

• • •

R. 21. [5 500] Where an appeal is heard ex parte and of judgment is pronounced against the respondent he may apply to the Appellate Court's to re-hear the appeal, and it he satisfies the Court that the notice was not duly served or that he was prevented by sufficient causes from appearing when the appeal

prevented by sufficient causes from appearing when the appeal on was called on tor hearing, the Court shall re hear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him.

[1877—S 560]

# Local Amendment

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(i) Frising r 21 shill be re numbered as sub r (1) and
(b) after sub-r (1) so re numbered the following shall be in seried as sub r (2) namely —

(1) The provious of Section 5 of the Indian 1 mutation Act IX of 1908 shall apply to applications under sub-r (1)

### Synopsis

Note No Scope and applicability of the Rule O 9 R 13 Note 9 and S 96 Note 12 He may apply to the appellate Court 2 Re hearing pending an appeal from an Notice ex parte decree—Ses O 9 R 13 Note 10 and S 96 Note 12 Sufficient cause 4 Inherent power to order re hearing On such terms as to costs or other -See 5 Lat Note 2 5 Appearance Limitation 10 Remedies in case of ex parte decree-Remedies whether concurrent-Sec Appeal 11

1 Scope and applicability of the Rule

This rule applies also to appeals under the Bengal Rent Recovery Act.

4 [Sec (1924) 1924 Pat 773 (174) ]

Note 12

1 (1914) 1914 411 293 (293) 37 411 57

(1894) 16 AH 5 (8) 2 (1919) 1918 Cat 173 (175)

2 (1919) 1918 Cat 173 (175) 3 (192 ) 1927 Lah 189 (189) ∠mand

21, X of 1859 1 (See also Notes under O 9, R 13) The appellate Court has jurisdiction under this rule to entertain an application for re-hearing by a respondent notwithstanding the fact that another respondent had preferred a second appeal to the High Court which was dismissed under O 41, R 112

# 2 He may apply to the eppellate Court

An application for re hearing of an appeal heard and decreed exparte by the High Court under this rule should be made to the same Beach which heard the appeal.

### 3 Notice

Where a guardian ad litem has been appointed by the Court, service of notice of the appeal on such guardian is sufficient service 1

#### 4 Sufficient cause

A respondent against whom an appeal is heard and decided ca partle is entitled to a re-hearing of the appeal provided he proces either that he had not been duly served, or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing 1 As to what constitutes sufficient cause, see O 9 R 9, Note 8 ante and the undermentioned cases.

- 5 Inherent power to order re hearing-See S 151 Noto 2
- 6 Appearance -See O 3 R. 1 and the undermentioned class 1
- 7 Remedies in cese of ex parte decree—Remedies whether concurrent—See O 9 R 13 Note 9 and S 96 Note 12
- 8 Re heering pending an appeal from en ex perte decree -- Sec O 9 R 13 Note 10 and S 96 Note 12
- 9 On such terms es to costs or otherwise

The words or otherwise authorise the Court to impose terms other than those relating to costs. Hence an appellate Court may require the respondent to furnish security for the due performance of the decree that may be passed on re-hearing.

#### Order 41 Rule 21—Note 1 1 (1.08) 35 Cal 799 (80a) 2 (1911) 10 Ind Cas 275 (216) (Cal)

- Note 2 1 (1916) 1916 Cal 317 (317) Note 3
- 1 (1926) 1926 Cal 1106 (1107)
- Note 4 1 (1981) 6 Cil 549 (548)
- (1933) 1933 Lah 797 (797) Service of notice on son in fither - absence—Son not residing with fither—Summon is
- residing with father—Summon is not duly served on father [1852] 11 Cal L Rep 164 (165)
- (1851) 8 Cal L Rep 112 (112) (1921) 1924 Rang 386 (335) Unrelutted
  - oath of the respondent that he was not served—Held sufficient to re open appeal
- (1866) b Suth WR Mis 43 (43) Court Lound to enquire as to the truth of the allegations in the application [See also (1936) 1.035 Alt 600 (631) 135 Ind Cas Cro (677) Terional service of Indana him indy how to be effected

- 2 The following have been held to assort to sufficient cause (1921) 1921 All 264 (260) Inability of
  - respondents agent to attend and
    - clerk
  - respondent had taken away the
- (1965) 1965 All W N 44 (44) Luche of leuder-Pleuder rifu mg notice Note 6
- 1 (189) 11 Cal L Rep 537 (531) Plater filing valuate the true of the result of the res
- 1 (15%) 19% I un Re No 70

The period of limitation for the re-hearing of an appeal heard ex parte is that prescribed by Art 169 of the Limitation Act 112, 30 days from the date of the appellate decree or where notice of the appeal was not duly served when the applicant has knowledge of the decree See also the undermentioned cases 1

#### 11 Appeal.

Ĩ.

An appeal Les under O 43 R 1 (e) from an order refusing an application for re hearing under this rule. But an application for re hearing cross objections decided ex parle cannot be ireated as an application under this rule for the re hearing of an appeal heard ex parte. Hence an order d.smissing the application for re hearing the cross-objections heard ex parte is not appealable but can be revised 1 An appeal against an order of the lower appellate Court refusing to re-hear an appeal heard ex parle from a decree in a rent suit under the Bengal Tenancy Act valued at less than Rs 100, is not maintainable as it is barred by S 153 of that Act 2

Upon bearing res pondent may object to decree as if he had preferred separate appeal

R. 22. [S 561] (1) Any respondent though he may not o h we appealed from an, part of the decree may not only support the decree2 on any of tho grounds decided against him in the Court bolow hut take any cross-objection3 to the decree which ho could have taken by way of appeal,3 provided

he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal,19 or within such further time as the Appellate Court may see at to allow.

Form of objection and provisions appli cable thereto

(2) Such cross-objection shall be in the form of a memorandum, and the provisions of Rule (1), so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto

(3) Unless the respondent files with the objection a written acknowledgment from the party who may be affected by such objection or his pleader of having received a copy theroof, tho Appellato Court shall cause a copy to he served, as soon as may be after the filing of the objection, on such party or his pleader at the expense of the respondent.

(4) Where, in any case in which any respondent has under this Rule filed a memorandum of objection, the original appeal is withdraun or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.17

Note 10 1 (1908) 13 Wad L Jour 96 (97 98) (1895) 1855 Pun Re No GG page 13"

Note 11 (1896) 19 M d 414 (415) (1919) 1919 Lah 447 (44 ) 1918 Pun Re 1 (1919) 1919 Lah 32 (33)

No J C P C 335 t 336

2 (1314) 1914 Cal 614 (614)

15

16

22, (5) The provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under this Rule 12

[1877—S. 561: 1859—S. 348]

Synopsis Note No Note No Legislative changes Against whom cross objections may be Applicability of the Rule 1a filed Respondent may support decree with Cross objections against co respondent out filing cross objections 2 Omission to file cross objections What objections can be raised by way Grounds not raised in cross objections of cross objections and when 3 not to be raised at the hearing Cross objections against findings not Effect on cross objections of with included in decree drawal of appeal or its dismissal for Which could have been taken by way 17 default of appeal 5 Effect on cross objections of shate 18 Cross objections to order of remand ment of appeal 19 Cross objections in second appeal Limitation for eross objections Cross objections in appeals from orders 8 Appeal filed out of time may be treated 20 Cross objections in Letters Patent Ap as cross objections 21 peals 9 Court fee on cross objections Cross objections in revision 10 Adding party for purposes of cross 22 Who may file cross objections 11 objection 23 Cross objections by pauper respondent 12 Second appeal

Legislative changes

This Rule corresponds to S 561 of the Code of 1882 The chief changes intro duced are -The words upon the bearing which occurred after the word may and before

the words not only support the decree in sub rule (1) have been omitted See Note 17 12 fra The words the jurty who may be affected by such objection

substituted for the words the appellant in sub rule (9) See Noto 13 infra Sub-R (4) is new See Note 17 infra.

la Applicability of the Rule

The provisions of this Rule apply also to appeals under the Chota Nagpur Tenancy Act VI of 1908 from the decisions of the Deputy Commissioner or of a Revenue Officer As regards the applicability of sub rule (1) to proceedings under the Agra Tenancy Act III of 1926, see List II No 16 of the Second Schedule of that Act

2 Respondent may support decree without filing cross objections

A respondent may support the decree appealed from, not only on any of the grounds decided in his favour1 but also on grounds decided aguinst him, and for this purpose, it is not necessary for him to file any cross objecttions 14 There is a conflict of views as to whether this Rule will enable 2 res-

Order 41 Rule 22-Note 2 1 [Sec ho vever (1903) 26 All 215 (217) ] 1a (1890) 17 Cal 809 (813 814) 17 Ind App 51 (P C)

(1919) 1919 411 420 (422) 40 411 536

(1917) 1917 All 158 (158) Decree entirely in respondent s favour - Ha cannot take cross objections-lie can only support the decree by attacking any findings against bim-If ho files anv they are not cross objections. objections (1910) 7 Ind Cas 484 (484) (411)

(1698) 1893 VII \ Y 109 (110) (1687) 1887 411 W V 44 (44) 9 411 893 (1889) 13 Lom 75 (77)

preclude respondent from objection

in second appeal

pendent to attack any portion of the decree passed against him so long as he does not ask for a variation of the decret. According to the High Courts of Calcutta," Madras 3 Lahore, and Rangoon 43 and the Judicial Commissioner's Court of Nagpur to the respondent cannot do so. Thus the respondent cannot make out a case for a decree for the same amount by attacking the decree in respect of a right decided against him. The High Court of Patna5 and the Judicial Commissioner's Court of Oudhe have, on the other hand leld, that the expression 'support the decree does not merely mean support the decision but permits the respondent to show by reference to a ground decided a ainst him, that the appellant has at least secured by the decree as nuch as, if not more than he is entitled to

A point taken in the lower Court bur not decided by it may be urged in support of the decree under appeal 7 But as a general rule a respor dent cannot take a point not taken by him in the lower Court 8 Similarly, the rule does not apply to a hading which does not affect the point at issue as the re-pondent cannot support the decree with reference to such a finding 9 In appellate Court will not of uself raise a pourt which the respondent does not raise 40

3 What objections can be raised by way of cross objections and when

The test to determine whether any particular objection can be taken by way of cross objections under this rule is to see whether if the respondent had annealed against that portion of the decree which is against him he

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could have raised such objection in his memorandum of appeal. If he could,
    (1915) 1915 Lab 129 (130)
(1917) 1917 Lab 59 (90)
                                                                                      Ho sever this was a case under the
                                                                                      Code of 1859 under which it was
    (1911) 11 Ind Cas 41 (49) (Lah) Appellate
                                                                                      not necessary to file cross objections
              Court not con idering re pondent s
                                                                         m un case]
^ (1927) t9.7 Mad 801 (804) 50 Mad 800
Decree in R 92 does not refer to
              of rections acts with material irre-u
              lanty
    (1845) 1855 Pnn Re \ 0 127 page 343
(1866) 1866 I un Pe \ 0 50 page 124
(1921) 1921 Mad 1"2 (174) 44 Mad 605
                                                                                      the quanture of the decree but to
the decision of the lower Court
                                                                            (1931) 1931 \Tad 513 (517)
                                                                         4 (19 9) 1929 Lah 684 (685)
(1894) 1897 I un Re No % 1 1ge 127
(But see (1918) 1918 Lih 129 (180)]
                                                                         (1921) 197t Lah 318 (319)
1x (1033) 1933 Rang 120 (171)
                                                                         4b (1933) 1J33 Nag 810 (311)
5 (1932) 1937 Pat 134 (138)
                                                                         6 (1923) 1973 Oudh 1.3 (176 179 185) 75
Oudh Cas 349 Respondent suggest
ing a different mode of taking
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correctue s - In it no reference is

made to R 22] (1507) 1897 Pun Re No 25 page 56 In a suit by a reversioner to et aside a sale by a widow where the sale was held to be for necessary purposes and

2 - Plaintiff appealing - Defendant cannot in resisting the appeal at tack the frame of the sust (1933) 1933 Cal 165 (169)

[See also (1862 64) 1862 64 Suth W R Special Number 48 (49) (F B)

accounts-Hell he was entitled to da so

[But sec (1915) 1915 Lah 267 (968) 31 1nd Cas 40 (741) 19t6 1 un Re

(1914) 1914 Oudh 149 (157) 17 Oudh Cas 103 When alt facts are before appet late Court-Respondent can support lower Court's judgment even on ground not taken in Court below ) (1925) 1975 Cal 518 (520)

10. (1914) 1914 Cal 639 (841)

22, then he could also raise it by way of cross-objections14 An objection as to any error, defect or irregularity in any order affecting the decision of the case, which may be taken in an appeal against the decree under S 105 of the Code can, therefore, be taken by way of cross-objections also. Thus where an ex parte decree is passed against a defendant for a portion only of the claim made by the plaintiff and the plaintiff appeals against the portion disallowed the defendant-respondent can file cross-objections in respect of the portion decreed and may therein contend that the order placing him ex parte in the sut was wrong 1 It was held by the Oudh Chief Court in the undermentioned case2 that in an appeal against a decree, the respondent earnot raise, by way of cross-objections the plea that an order granting a review of the judgment originally passed was wrong. The same Court has held in another ease22 that a respondent cannot, by way of cross-objections, attack a nonappealable order. It is submitted that the said decisions are not correct

Where a party could not have appealed from a decree he cannot file any cross-objections in respect of it 26 Thus where a decree is # holly in farour of a party he cannot file any cross-objections against it by way of criticism of the judgment, though he can support the decree on any of the grounds decided against him 3 But where a decree is partly in favour of, and partly against a party, he can take any cross objections to it which he could have taken by way of appeal 4

The cross-objections must be directed against the particular decree under appeal 42 though they need not be confined to the particular portion of the decree appealed against but may refer to any part of the decree and it need not also be confined to the subject-matter of the appeal 8 See also Note 7, Pt (3), infra

A respondent in an appeal under the Provincial Insolvency Act has

1a (1934) 1934 All 543 (546) 56 All 912 Defen dant's plea of set off-Decree omit ting to give any relief-It can be made subject of cross objections (1933) 1333 Rung 377 (378) Respondent cannot take a point in cross object tion unless he could have filed

at peal himselt on such point 1 (1924) 1924 Mad 107 (108) S 100 was how

ever not adverted to in this case

2 (1928) 1928 Oudh 400 (40a) 23 (1927) 1J27 Oudh 218 (219)

2b (1905) 29 Mad 229 (231)

(1929) 1929 \ag 361 (362) Pro f rma repondent against whom nothing has been decided and who could not have filed an independent appeal cannot ale cross obje tions

3 (191") 1917 \11 159 (159) (1933) 1333 1 at C90 (632) (195") 1557 111 11 7 44 (14) (1~ ) 7 \11 600 (610) (1997) 4 111 491 (42.) (1 11) 11 1r 1 C s 41 (42) (Lab)

(1 2) 1022 Lat 4-3 (494) 1 Pat 2 9

4 (1 "9 19\_3 I alı "21 (221) Appellate Court

cannot deprive him of this right (1891) 1937 Pun Re No 31 page 144 (1864) 1864 Suth W R Gap 231 (232) (1911) 10 Ind Cas 207 (208) 1912 Pun Re No 11 Appellate Court has no

power to reject cross objections on the ments without hearing the respondent (1914) 1914 Lab 62 (63) 23 Ind Cas 410 (411)

(1863) 2 Suth W R 45 (45) Case under Code of 1859

43 (1922) 1922 Mad 413 (415) One judgment and two de rees in first appeal-Second appeal against one de ree-Respondents cannot object to other decree under O 41 R 27

(1923) 1923 Lab 114 (115) (1929) 1929 Sund 32 (36)

5 (1919) 1919 Mad 82" (878 823) (1537) 1837 I un Ra No 31 1 150 141

(1994) S Bom 364 (3 D)

[Bit se (1J31) 1931 Wil 133 (131 135) April in lower Court was lisms of for default and on that ground cross of jections were at a dismis ed. The cro subjector Appealed Hell that the opposite

a right to file a memorandum of objections 6 Similarly, in an appeal under O S 48 of Bombay Act, IV of 1898 from the award of the Collector under the Land Actualst on Act, the respondent is entitled to file cross-objections 7 But having repaid to S 76 of the Madras Rent Recovery Act VIII of 1865 no memorandum of objections lies against the findings of the Court of first instance in cases under that Act 8 The cross-objections under this rule can be fled only in a pen ling appeal and not after the appeal has been decided 9

4 Cross objections against findings not included in decree - 5 Note 3 Which could have been taken by way of appeal -See Note 3 at to

6 Cross objections to order of remand

Under S 105 sub-S (2) where a party who is aggreesed by an order of remand from which an appeal hes does not appeal against it, he will be precluded from disputing its correctness, in an appeal from the decree after remand. It follows that he cannot by way of cross-objections, attack such an order in an appeal by the other party from the decree. The decision in the case cited below was under the Code of 1859 and is in view of S 105. sub-S (2) no longer good law

7 Cross objections in second appeal

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Cross objections may be filed in second appeals as well as in first appeals 1 (Vide O 42 R 1) But the grounds taken in cross objections filed in second appeals must comply with the provisions of S 100 as the respondent can only take such cross objections as he could have taken by way of appeal 2 A files a suit against B It is partly decreed in favour of A and partly dis-

missed Both A and B file separate appeals As appeal is allowed partially and Bs appeal is dismissed in toto A, thereupon files a second appeal B does not file any appeal but only files cross-objections in As second appeal. He can by means of such cross objections, merely attack whatever may be unfavourable to him in the decree in As appeal to the lower appellate Court. because cross-objections must relate to the particular decree from which the appeal has been preferred (See Note 3 above ) It is not open to B to attack the decree passed in his appeal to the lower Court by means of cross-objections

party could not attack the dismissal of his appeal in lover Court for de fault) 6 (1313) 1313 Mad "84 (490 791) 41 Mad

904 (L B)

7 (1905) 23 Long 514 (52") 5 (1 04) 2 Mad 513 (545 946)

9 (1J24) 1J24 All 867 (868) (1917) 1917 All 299 (99J 300) 89 Ind Cas

947 (948) (311) (1682) 1882 All W N 20 (20) (1668) 9 Suth W R 875 (376) (1924) 1924 1 at 775 (776) Note 6

1 (1567) 8 Suth W R 208 (209)

Note 7 1 (1899) 21 All 207 (300)

But under the Cole of 1859 there was a conflict of decisions of this point As the natter is nown ade clear by 0 42 R 1 tie following decisions under the Code of 1359 are o il j of acade nic interest — (1866 67) 3 Vad H C R 216 (216) (1869) 1862 Suth W R 48 (19) (B B) Cross

objections allowed in second appeal (1862 63) 1 Mad H C R 102 (102) Cross ob

rections not alloyed in second append (1935) 1935 All 404 (405) Appeal by defend

ant and cross objection by plaintiff-Latter partly allowed-Plantiff ap pealing from decree-Defendant can either file cross appeal or file cross objection to plaintiff s appeal-In eather case appellate Court can dis pose of entire suit [See (1935) 1935 Oudh 58 (89) In

Oudh where an appellant is entitled to hie a second appeal only after obtaining a declaration that it is a fit can for appeal the cross chec

22, then he could also raise it by way of cross-objections12 An objection as to any error, defect or irregularity in any order affecting the decision of the case, which may be taken in an appeal against the decree under S 105 of the Code can, therefore, be taken by way of cross-objections also. Thus where an ex parte decree is passed against a defendant for a portion only of the claim made by the plaintiff and the plaintiff appeals against the portion disallowed, the defendant-respondent can file cross-objections in respect of the portion decreed and may therein contend that the order placing him ex parte in the suit was wrong 1 It was held by the Oudh Chief Court in the undermentioned case2 that in an appeal against a decree the respondent cannot raise, by way of cross-objections, the plea that an order granting a review of the judgment originally passed was wrong. The same Court has held in another case2a that a respondent cannot, by way of cross-objections, attack a nonappealable order. It is submitted that the said decisions are not correct Where a party could not have appealed from a decree he cannot file

any cross-objections in respect of it 26 Thus where a decree is wholly in favour of a part; he cannot file any cross objections against it by way of cruicism of the judgment, though he can support the decree on any of the grounds decided against him 3 But where a decree is partly in favour of, and partly against a party, he can take any cross objections to it which he could have taken by way of appeal 4

The cross-objections must be directed against the narticular decree under appeal 42 though they need not be confined to the particular portion of the decree appealed against but may refer to any part of the decree and it need not also be confined to the subject-matter of the appeal 5 See also Note 7, Pt (3), inira A respondent in an appeal under the Provincial Insolvency Act has

cannot deprive him of this right

# Note 3

1a (1934) 1934 All 543 (546) 56 All 912 Defen dant's plea of set off-Decree omit ting to give any rehef-It can be made subject of cross objections (1933) 1J33 Rung 377 (378) Respondent filed

2 (1928) 1928 Oudh 405 (405) 21 (1927) 1927 Oudh 218 (219)

25 (1905) 23 Mad 229 (231)

(1929) 1929 Nag 361 (362) Pro f rma res condent against whom nothing has been decided and who could not have filed an independent appeal cannot file cross objections

3 (1917) 1917 111 1 7 (159) (1933) 1933 1 it (90 (6 12) (15) 1557 111 11 \ 14 (44)

(15 ) 7 \11 (06 (010) (15 7) 4 (11 491 (43.)

(1 11) 11 In 1 C 1s 41 (12) (Lah)

(1 2) 1922 I at 493 (491) 1 Pat 2.3 4 (1 °9) 1923 I ah \_21 (221) Appellata Court (1697) 1897 Pun Re No 31 page 144 (1864) 1864 Suih W R Gap 231 (232) (13t1) 10 Ind Cas 207 (208) 1912 Pun Re No 11 Appellate Court has no power to reject cross objections on the merits wilhout hearing the respondent

(1914) 1914 Lab 62 (62) 23 Ind Cas 410 (t86.) 2 Suth W R 45 (45) Case under Code of 1859

41 (1922) 1922 Wad 413 (415) One judgment and two decrees in first appeal-

Second appeal aguinst one decre-Respondents cannot object to other decree under O 41 R -? (1923) 1923 Lab 514 (515) (1929) 1929 Sind 22 (36)

5 (1919) 1919 Mal 827 (819 81))

(1837) 1937 Pun Ro No 31 page 141 (1951) S Lom 303 (3 0)

[1 ut < e (1331) 1931 Mid 133 (134 135) Apest in lower Court was distan ed for delault and on that ground cross of je tions were al o dism seed flo cross objector ap-Palei Hell that the eppost a right to file a memorandum of objections 6 Similarly, in an appeal under O S 48 of Bombay Act, IV of 1898, from the award of the Collector under the Land Acquisition Act, the respondent is entitled to file cross objections 7 But having rega d to S 76 of the Madras Rent Recovery Act, VIII of 1865, no memorandum of objections has against the findings of the Court of first instance in cases under that \ct 8 The cross-objections under this rule can be tiled only in a pending appeal and not after the appeal has been decided 9

- 4 Cross objections against findings not included in decree See Note 3
- Which could have been taken by way of appeal -See Note 3 ante
- 6 Cross objections to order of remand

Under S 105, sub-S (2) where a party who is aggreed by an order of remand from which an appeal lies, does not appeal against it, he will be precluded from disputing its correctness, in an appeal from the decree after remand. It follows that he cannot, by way of cross-objections, attack such an order in an appeal by the other party from the decree. The decision in the case cited below! was under the Code of 1859 and is in view of \$ 105, sub-S (2), no longer good law

7 Cross objections in second appeal

Cross objections may be filed in second appeals as well as in first appeals 1 (Vide O 42 R 1) But the grounds taken in cross-objections filed in second appeals must comply with the provisions of S 100 as the respondent can only take such cross-objections as he could have taken by way of appeal 2

A files a suit against B It is partly decreed in favour of A and partly dismissed Both A and B file separate appeals A's appeal is allowed partially and Bs appeal is dismissed in toto A, thereupon files a second appeal B does not file any appeal but only files cross-objections in As second appeal. He can, by means of such cross-objections, merely attack whatever may be unfavourable to him in the decree in As appeal to the lower appellate Court, because cross-objections must relate to the particular decree from which the appeal has been preferred (See Note 3 above) It is not open to B to attack the decree passed in his appeal to the lower Court by means of cross-objections

party could not attack the dismissal of his afferl in lower Court for de

6 (191J) 1J1J Nad "84 (190 791) 41 Mad 904 (I B)

7 (1905) 29 How 514 (27) 5 (104) 27 Mad 513 (545 546) 9 (1924) 1324 M 567 (568) (1917) 1917 All 299 (299 500) 39 Ind Cas 947 (948) (All)

(1682) 1882 All W N 29 (29) (1868) 9 Suth W R 3"5 (3"6)

(1924) 1924 Lat 775 (776) Note 6

1 (1867) 8 Suth W R 208 (209)

Note 7 1 (1899) 21 Alt 297 (200)

But under the Cole of 1859 there was a conflict of decisions on this point As the matter is now riade clear by 0 42 B 1. the following decisions under the Code of 1859 are o il j of acade nic interest -(1866 67) 3 Mad H C R 216 (216) (1862) 1862 Suth W R 48 (49) (F B) Cross

objections allowed in second appeal (1862 63) 1 Mad H C R 102 (102) Cross ob pections not allowed in second appeal

(1935) 1935 All 404 (40o) Appeal by defend ant and cross objection by rluntiff-Latler parily allowed-Pluntifi ap pealing from decree-Defendant can either tile cross al peal or file cross objection to plaintiff appeal-In either case appollate Court can dis

pose of entire suit [See (1935) 1935 Oudh 58 (89) In Oudh where an appellant is entitled to hie a second appeal only after obtaining a declaration that it is a fit case for appeal the cross objector also should obtain such a decia

ration before filing objections? 2 (1901) 7 Oudh Cas 49 (50)

In the appeal preferred against another decree of that Court 3 Nor can be attack the decree of the first Court in such carcumstances, 4 inless the first Court 5 decree is incorporated in the decree of the first appellate Court 5

### 8 Cross objections in appeals from orders

Cross objections can be taken also in appeals from orders 1 See O 43, R 2

9 Cross objections in Letters Patent Appeals

It has been held by the High Courts of Allahabad¹ and Calcutta² that this rule does not apply to appeals under the Letters Patent But a Full Bench of the Madras High Court has held that, in view of the Privy Council decision in Sabitri v. Savi² this view is wrong and that this order applies also to Letters Patent Appeals ⁴ It is submitted that the Madras view is correct

### 10 Cross objections in revision

This rule does not apply to Civil revision petitions 1 But the High Court's powers of revision may be exercised even without any application by an aggreed party and when a case is already before it, and the necessary parties are also before it it has ample powers to entertain any questions that may be raised by the respondent 8

### 11 Who may file cross objections

of 1959 ]

As has been seen in Note 3 ante this rule provides that any respondent may take any cross objection to the decree which he could have taken by way of appeal it follows that a person cannot file cross-objections unless he is a respondent to the appeal and unless he could have taken such an objection by way of an appeal 2.

Does the mere fact that a respondent has filed an appeal against the same decree, preclude him from taking cross-objections against it in the appeal filed by the opposite party? The answer to the question depends upon the further question whether the appeal so filed by the respondent had been

Note 9 3 (1926) 1926 All 582 (584) 1 (1930) 124 Ind Cas 763 (2) (764) (All) (1922) 1922 Mnd 413 (415) In [ -9 TOT t 111 \_ot econd appeal to one parts other 115 Note 10 1 (1912) 14 Ind Cas 562 (563) (Lab) [Contra (1904) 17 Mad L Jour 62 (63) ·B (1933) 1933 Lab 882 (882) the fact that the appellate Court's decree incorporated the decree of the (1928) 1928 Vad 794 (796) 2. (1928) 1928 Mad 794 (796) (1907) 17 Mad L Jour 62 (63) first Court was apparently not I rought to the notice of their Lord Note 11 sh is of the Allahabid High Court 1 (1919) 1919 Mad 1026 (1027) [1564] 1 Suth W R 341 (342) Note 8 [See also (1865) 2 Suth W R 227 1 (225) ] [See also (1863) 9 Suth W R 2 3 Gap

2 (1929) 1929 Nag 361 (362)

decided, at the time of the hearing of the cross-objections if it had been O decided, then he cannot be heard on his cross-objections under this rule 3 He would, in fact, be barred by the principle of res judicata 34 But where his appeal had not been decided on the date of the hearing of the cross-objections, he is entitled to be heard on his objections 4 in this view, the decision of the Labore High Court in the undermentioned case 5 where it was held broadly that a respondent who has preferred an appeal cannot file cross objections under R 22 seems to state the proposition too widely

### 12 Cross objections by pauper respondent

Sub-Rule (5) expressly provides for the filing of cross-objections in forma pauperis. This supersedes the following decisions under the previous Codes.

13 Against whom cross objections may be filed

The principle that no decree can be passed against a person who is not a party to the proceedings applies to cross objections also and hence cross-objections cannot be allowed against a person who is not a party to the appeal. But in the undermenuoned case<sup>2</sup> where it was impossible to give relief against the appellant without giving relief against the absent party also the Bombay High Court held that the decision on the respondent's cross-objections bound the ron-party also as, otherwise in all such cases coming under O 41 R 4 one of several defeated parties can appeal on behalf of all and defeat the respondent's rights under this rule. It is submitted that this decision is not correct. The respondent could have preferred an appeal against all if he was dissatished with the decree Further the appellate Court has power o add should be appeal under R 20 above, whenever it considers it necessary to do so, and the difficulty mentioned by the Bombay High Court can thus be obvaited (See O 41 R 20 and the notes thereunder and also O 1, R 10 and S 161)

(10 3) 1933 Hang 2:: (3:b)
(1914) 1914 Mad 220 (230) 33 Mad 256 In
this ca e the decree was held to
affect the respondent adversely al
though another person was also sum
larly affected

3 (192s) 1928 Cal 882 (885) (1924) 1924 All 867 (868) (1903) 25 Atl 628 (629)

[See also (1867) 8 Suth W R 3.J (380) But where the respondents Nota 12 1 (1010) 7 Ind Cas 118 (122) (Cal) (1933) 1933 Aug 158 (105) 29 Nog L R 225 Overwling (1900) 1 Nag L R 33 (30) (1904) 1908) 4 L B R 262 (265)

2 (1845 77) 1 Bom 75 (79) (1835) 11 Cal 735 (737) (1868) 9 Suth W R 356 (356 357) (1885) 8 Mad 214 (217) (1905) 1 Nag L R 33 (35)

Note 13

31 [Sec (1918) 1918 Lah 201 (202) 1918 I un Re No 20 ]

> I cross draft vered al peal

-Cross objections ou different grounds filed by appellant in cross appeal are not buried by res juds cata 2 (1887) 11 Bom 596 (5.55) [See also (1934) 1934 Oudh 131 (132)

(1924) 1924 A)1 840 (840) 5 (1925) 1925 Lah 2 (5)

14 Cross objections against co respondent It has been held by the High Courts of Allahabad. Bombay. Calcutta3 and Patna4 and the Judicial Commissioner's Court of Upper Burma5 that as a general rule the right of a respondent to urge cross-objections should be limited to his urging them against the appellants, and it is only by way of exception to this general rule that one respondent may urge cross-objections as against the other respondents, the exception holding good among other cases, in those in which the appeal of some of the parties opens out questions which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents. Thus when the questions raised by the cross-objections are common both to the appellant and corespondent the cross-objections may be entertained as against both 6 P sucs Q and R for Rs 10,000 alleged to be his share of the profits of certain lands A decree is passed against Q and R for Rs 7,000 Q appeals from the decree making P and R respondents. In such a case, P may prefer cross-objections not only against Q but also against R with reference to the Rs 3,000 in respect of which his claim was dismissed by the lower Court 7 Similarly in suits for dissolution of partnership and for accounts, accounts are taken as between all the partners and not as between the plaintiff on the one hand and the defendants on the other. Hence the appeal of one of the partners opens out the whole case and cross-objections can be urged not only against the appellant but also against co-respondents 8 According to the High Court of Madras cross-objections may be allowed to be taken against co-respondents in all cases 9 Opinion is divided in Lahore, Nagpur and Oudh, some cases farouring the view first mentioned above10 and others Note 14 (1864) 1864 Suth W R Gap 234 (205)

(1901) 23 411 93 (94) (See however (1924) 1924 111 605 (608) In this case it was held that

the respondent cun le transpo ed as af pellunt] 2 (1930) 1330 Bom 1 (a)

(1913) 21 Ind Cas 7 (8) 37 Bom 511 (1896) 1896 Bom P J 742

1 (1906) 28 All 95 (97)

(1599) \_G Cal 114 (121 122) (1871) 15 buth W 11 96 (26) (1869) 11 Suth W R 435 (436) (1869) 9 Suth W R 78 (59)

(1568) 10 Suth W R 326 (328) (1867) 7 Suth W R 22 (533) (1867) 7 Suth W R 322 (533) (1867) 7 Suth W R 49 (42) (1867) 7 Suth W R 49 (42) (1867) 7 Suth W R 39 (1) (39) (1504) 1 Suth W R 224 (2.0)

(165°) 1657 Pun Re No 7 1360 13 (1901) 14 C P L R 46 (48) (1636) 9 C P L R 62 (64) (1923) 1323 Oudh 103 (109) 25 Oudh Cas 9-0 (1921) 1921 Oudh 170 (185) (1919) 191J Oudh 32J (331)

(1864) 1864 Suth W R Gap 3 (2) (4)

nght

4 (1924) 1924 Pat 200 (203) (1934) 1934 Pat 134 (140 141) One respon dent not entitled to urga cross objec tion against another as a matter of

(1920) 1920 Pat 77 (81 82) 5 Pat L Jour

I,

# 15 Omission to file cross objections

I party in whose favour a decree has been passed has a substantive right of a valuable kind which should not be lightly interfered with 1 Hence, as an ordinary rule, in the absence of a cross-appeal or cross-objections by a respondent, the appellate Court has no power to disturb the decree of the lower Court as far as it is in the appellant's favour2 and cannot grant any relief to the respondent except in so far as such relief is incidental to the relief granted to the appellant 3 This Rule, however, is only a general rule and the power of the appellate Court to pass any order or decree that may be necessary in the interests of justice is now expressly saved by O 41, R 334 and was recognised by the following decisions under the former Code. The ger etal rule mentioned above applies also in cases where the decree of the lower Court is such that a remand by the appellate Court is necessary 54 It follows from

(190-) 11 Oudh ( 14 13 (34) 11 (1923) 1323 Lah 31 (40) (1910) 6 Ind Cas 430 (431) (Nag)

(1019) 1019 On th 60 it 1)

1 (1927) 1.127 P C 182 (155) b Rang 2J (P C) 2 (1870) 2 N W P H C R 44 (44) (133) 1933 Mad 46 (465) (1863) 1863 Marsh 332

(1863) 1863 Marin 334 (1887 1401) 2 U B B 300 (1889) 1863 Pun Re No 127, page 343 (1851) 18-1 UIN N 85 (84) (1857 1851) 141 163 (847) (1850) 141 203 (847) (1850) 14 Dom 233 (291) (1000) 1920 Oudh 145 (166) 23 Oudh Cas

(1925) 1925 Cal 94 (05) (1921) 1321 Lah 318 (310) (1018) 1918 Lah 120 (180)

(101e) 1918 Cal 169 (169)

(1916) 1016 P C 148 (149) (P C) (1J16) 1916 Lah 255 (287)

(1016) 1016 Cal 250 (251) 32 Ind Cas 494

(1875) 24 Such W R 179 (181) (1912) 34 411 32 (34, 35)

3 (1907) 3 Nag L R 85 (59) Held, in this case the relict claimed by the ies pondent was not incidental to the relief granted to the appellant and hence could not be granted

(1892) 1892 Pun Re No 46, pige 169

(1908) 30 All 48 (49)

Section 348 of the Code of 1859 did not expressly require the respondent to tile any written objections to the dicice of lo meant to attach the same in the appear of the opposite party But the practice under that Ce le al o s as to insist is untiten ob jects no ber I filed befor the hearing See tie toll un i cases -(1867)

the Court's rule of practice [See also (1870) 1870 Pun Re No 78

(1866) 6 Suth W R Vis 102 (102) No objection to respondent nling notice with the Recistian

[But see (1864) 1864 Suth W R Gap 239 (300) Written notice not necessars)

4 (1917) 1917 Oudh 399 (400) (1917) 1917 Lah 423 (426) (1910) 8 Ind Cas 337 (838) (Wid)

[See also (1027) 1927 All 453 (454) 49

All 224 97 Ind Cas 65

5 (1891) 18 Bom 520 (521, 522) A v B and C
—Suit decreed against B dismissed against C-lipperl by B against A and C-Appellate Court can vary decree both against B and C making each liable to extent of half

> pealing against B-Appellate Court may add B as respondent and pass decree against him, setting aside decree against C

(1904) 31 Cal 643 (645) (F B) [See also (1878) 1 Cal L Rep 144 (146)]

5a (1907) 34 Cal 906 (098)

(1811) 11 Ind Cas 640 (641) (All) (F B)

[But compare (1881) 3 All 643 (646) In this case Stuart, C J took opposite view but Oldfield. J took the view stated above?

22, what has been said above that the appellate Court cannot as a general rule dispose of the appeal on a point not raised by either party 6 (See howers O 41, R 2) Where, however, the case is such that the respondent could not have filed an appeal or cross-objections, the appellate Court can grant him the necessary relief without any cross-objections. Thus where the suit in first Court was for e ther of two reliefs in the alternative and the first Court passed a decree granting him one of the reliefs, the plaintiff having got what he asked for, can neither appeal nor file cross-objections. But if on the appeal of the opposite party the appellate Court considers that the plaintiff was not entitled to the relief granted by the decree it may, while setting aside the decree of the lower Court, pass a decree in favour of the plaintiff granting him the other relief? Similarly, where the trial Court has not dealt with the respondent's claim to set off at all the absence of cross-objections by the respondent is no bit to the entertainment of the point in appeal.

16 Grounds not raised in cross objections not to be raised at the hearing

The respondent cannot urge at the hearing of the appeal, grounds not set forth in the memorandium of objections, except with the permission of the Court 1 (See O 41, R 2)

17 Effect on cross objections of withdrawal of appeal or its dismissal for default.

S 561 of the former Code provided that a respondent may mpon the hearing, take any objection to the decree which he could have taken by way of appeal if he had filed cross-objections. Hence, it was held that if the appeal was withdrawn before the hearing, the respondent could not prosecute his cross-objections! but that once the hearing had commenced the appellant could not withdraw the appeal so as to prevent the respondent from urging his cross-objections 2 Similarly it was held that if the appeal was dismissed for default the cross-objections could not he heard 2 Under the present Rule the words 'upon the hearing' in sub-R 1 have been omitted and sub-R (4) has been added, making it clear that the withdrawal of an appeal for the dismissal of an appeal for the dismissal of an appeal for default<sup>§</sup> does not affect the hearing of the respondent on his cross-objections

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6 (1925) 1925 Cal 518 (520) (1

(1871) 16 Suth W. R. 227 (227) (1)

7 (1919) 19 Mad L. Jour 586 (587)

8 (1904) 30 Hom 173 (189) 2 (1)
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Note 16 1 (1913) 19 Ind Cas 98 (113) (Bom).

Note 17 1 (1895) 17 \11518 (519)

<sup>(1833) 1833 111</sup> W N 68 (68) (1886) 8 111 551 (552) (1866) 1 Agra H C R 23 (24) (1873) 10 Loon H C R 397 (398) (1875) 23 Suth W R 229 (229) (1870) 14 Suth W R 210 (210) (1868) 9 Suth W R 239 (323) (1909) 4 Ind Cas 1076 (1077) (Mad)

The following cases dealing with the question of whether in such cases the Co set might treat the cross objections as an appeal and liting one of it as such are only of academic interest now in view of the clear provisions of sub rule (4) of R 12—(1502) 16 Don 1919 [235].

<sup>(1839) 23</sup> Bom 692 (695)

<sup>(1883) 9</sup> Cal 733 (740) (See also (1834) 10 Cal 415 (479 480))

<sup>2 (1901) 23 4</sup>H 130 (133) (1883) 9 Bom 23 (30)

<sup>4 (1925) 1925</sup> Mad 725 (725)

<sup>(</sup>See (1934) 1934 Lah 136 (138) Court is not bound to hear cross of jetti ns

<sup>(1932) 1932</sup> Mad 722 (723) 55 Mad 940 But if the appeal itself is not validly filed then the memorandum of objection should not be heard 5 (1921) 1921 Mad 405 (405 406) 44 Mad

<sup>5 (1911) 1911 (1911 100 (100 100)</sup> 623 (1911) 9 Ind Cas 572 (1) (572) (Mad).

Ι

Dismissal of appeal as time-barred —Under the former Code it was held O the Allahabrd High Court that the entertainment of the cross-objections was contingent and dependent upon the hearing of the appeal and when the appeal was dismissed as being time-barred the cross objections could not be heard of The same view has been held under the present Code also by the High Courts of Lahore<sup>7</sup> and Midraso notwithstanding the omission in sub R (1) of the words upon the hearing which occurred in the former section

Dismissed of appeal was dismissed for failure to pay Court fees—Effect—Under the former Code where an appeal was dismissed for failure to pay Court-fees it was held that there heing no hearing of the appeal the cross objections could not be heard. Even under the present Code it has been held by the Lahorei® and Rango mil High Courts and the Nigpur Judicial Commissioner's Court! that K. 22 (4) should be interpreted strictly and that on the dismissal of an appeal without a hearing on account of the appellant's failure to pay the requisite Court fees, the cross-objection eannot be heard. But it has been held by the High Court of Madras<sup>13</sup> that the dismissal of an appeal for failure to pay Court fees is only a dismissal for default and does not affect the maintainability of the cross objections.

Dismissal of appeal for failure to pay Court fees—Effect—I nden the been held by the Patia High Court that the dismissal of an appeal for fulure to furnish security for costs is a dismissal for default and the respondent is entitled to have his cross objections heard and disposed of on the ments not-withstanding, such dismissal 18 But the Oudh Court has taken a contrary tiew 18

Dismissal of appeal after licaring does not affect cross objections—
The respondent is entitled to have his cross-objections heard and disposed of
on the merits notwithstanding that the appeal is rejected on the ground that
no appeal hes, because in such a case the appeal does not fail for an extra cous
reason but fails after hearing is Similarly, where an appeal is dismissed for
failure to join the necessary parties, after hearing the appeal on the question
of non joinder the cross objections may be heard in

## 18 Effect on cross objections of abatement of appeal

Cross-objections cannot be heard when the appeal has abated. The reason is that there is no dismissal for default or withdrawal of the appeal in such a case.

[But contr. (1914) 1914 Oudh 303 (204) This case is bad law as it is opposed to tile plain language of the

[Bit compute (1905) 1903 Pin Re No 23 page 148] 17 (1998) 21 Mad 359 (353)

10 (1920) 1920 Lah 24 (24) (1911) 10 Ind Cas 207 (209) 1912 Pun Re

<sup>14 (1919) 1919</sup> Pat 219 (219) 15 (1923) 1923 Oudh 103 (105 109) 25 Oulh Gas 280

<sup>16 (1912) 13</sup> Ind Cas 19 (19) 34 4H 140 (1884) 8 Bom 368 (3"0) (1909) 4 Ind Cas 625 (626) (La1)

19 Limitation for cross objections

Cross-objections must be filed within one month from the date of the service of notice of the date fixed for hearing the appeal 1 Otherwise they cannot be heard 2 The appellate Court has no power to hear the appeal before the expiry of this period of one month so as to deprive the respondent of his right of filing cross objections 3 Where a respondent in a High Court appeal was merely served with a notice of the appeal in the usual form fixing a period of 25 days for appearance but was not served with any notice fixing the date of hearing, a memorandum of cross objections though filed long after one month from the receipt of the former notice, is not out of time 4 A transferee from a respondent is bound by the same period of limitation as would have applied to his transferor and cannot file any cross-objections after the expris of that period 5 It has been held that the nonce referred to in the Rule means only the notice of the original day fixed, and the fact that a subsequent notice is given of a postponed date does not give the respondent a fresh opportunity of fi ing a memorandum of cross objections 6

When the period of one month expires on a holiday the cross-objections may be filed on the re-opening day 7 (See S 4 of the Limitation Act) The appellate Court may, in its discretion, extend the period within which the cross-object ons are to be filed.8 and this may be done even after the objections have been filed 9 The extension of time may also be implied from the circumstances of the case 10

Sub-R (1) of this Rule prescribes the period of limitation only for filing cross objections Limitation for filing a cross-appeal is governed by the Lunitation Act 11

Note 19 1 (1871) 15 Suth W R 18 (1) (18) Under the Code of 1859 there was no period of limitation

(1883) 1863 All W N 237 (237) Under the Code of 1877 and under that of 1852 prior to amen Iment in 1889 the cross objections were to be filed seven la je prior to the date of the hearing Sce the following cases -

(1500) 13 Mad 492 (494) S 531 as amended by Act VII of 1888 allows one month

2 (1504) 1534 All W N 2 (2)

[See (1857) 11 Lom 638 (700) Pur po e ol the Rule is to give timely intimation of the proposed objections to the appellant

J (1500) 13 Mad 432 (433)

(1902) 5 Oudh Cas 285 (287) (1917) 1917 1 at 408 (403) (1916) 1916 Mad 734 (734) That the month

is I chrusty does not affect the cal culation 1 (13%) 13.6 Mad 283 (254)

o (1332) 1332 All 45 (47)

(133a) 133a I 4h 653 (Gas) (1531) 7 C P L R 85 (57)

(See also (154 ) 4 111 248 (249) (P B) Case under Code of 1502 prior to amer direct made in 1553 by which the present rule as to himitation was introduced]

(But see (1887) 1887 Rom P J 177 Case prior to 1888 when the section required cross objections to be filed seven clear days before the day fixed

for hearing] (1857) 11 Lom 698 (700) Day fixed for hear ing includes day to which hearing may be adjourned

7 (1892) 4 All 430 (134)

[But see (1583) 1553 All W N 2 9 (229)]

8 (1905) 28 Mad 229 (235)

(1J22) 1922 Na., 213 (216) (1890) 14 Bom 111 (112) Where respondent In order to more costs delayed in

The following dicusions great to 1455 hate been segerseded In endite srale in 1503 and repeated in the greient

Cods -(18-2) 2 All W > 213 (213)

(1553) 9 Cal 631 (632) (1531) 7 Cal 654 (659)

9 (1917) 1917 L B 37 (34) 10 (1902) 22 All W > 74 (74)

11 (1506) 5 Suth W R J1 (93)

Cross-objections in forma pauperis -Art 170 of the Limitation Act O does not apply to cross-objections in forma panperis and such cross-objections may be filed within the period indicated in Rule 22 12

20 Appeal filed out of time may be trested as cross objections

An appeal filed beyond the per od of limitation may be treated as cross-objections under this Rule 1

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21 Court fee on cross objections Under S 16 of the Court-fees Act the Court fee payable on a memo randum of cross-objections was the difference between the fee paid on the memorandum of appeal and that payable on it if it included the subject-matter of the cross object ons 1 A memorandum of cross objections is now chargeable with Court-fee under Art 1 Sch I of the Court fees Act 2 That section has now been repealed and even where the appeal where n the cross-objections are filed falls within the scope of Sch II Art 17 it is only Art 1 Sch 1 that applies to the cross-objections masnuch as Sch. II Art. 17 refers only to suits and memoranda of appeals. In such cases the valuation placed by the respondent on his cross-objections must be accepted if not unreasonable 3

Where the decree is entirely in respondent's favour and he files objections against the findings but supporting the decree the objections are not cross objections and are not hable to stamp duty under Sch. I Art. 14

Cross-objections as to costs -In Kamal Lumare v Rangpur Bank 5 the Calcutta High Court has held that a memorandum of cross-objections as to costs alone requires to be stamped only as a petition under Sch 2 Art 1 and not ad valorem under Art 1 Sch 1 the reason given being that costs do not form the subject-matter of dispute within the meaning of Art 1 of Sch 1 The Patna High Court has, on the other hand, held that even if the crossobjections are as to costs only an od jalorem Court-fee should be paid 8

Under the repealed S 16 of the Court-fees Act it was enough if the Court-fee on cross-objections was paid at any time before the hearing? But now S 6 of the Court-fees Act applies to the case and the Court fees should be paid at the time of filing the cross objections

It has been held by the High Court of Allahabad that S 12 of the Court Fees Act does not apply to cross-objections 8

1 (1925) 1925 Lab 57 (57) (1934) 1934 Lah 2"3 (273) (1922) 1922 Lah 423 (424) Note 21 1 (1918) 1918 All 165 (186) 40 (H 93 (1919) 1919 Cal 620 (622) 46 Cal 160 No excuse merely because appellant has paid more than adequate Court fee on the appeal

(1919) 1919 Pat 494 (494) Where elect of ero s objection is to have a declara tion in reject to a mertgage set aside proper value of cross obje tion for Court fees is the value of the

mortgage 2 [See (1899) 2 Oudh Cas 87 (90) 1 (1871) 15 Suth W. R. all (512)

12 (1929) 1929 Pat 31 (32) 7 Pat 827 Note 20

> [S e (1867) 8 Suth W R 2/9 (330) Case before the Court fees Act ] (1905) 2 Cal L. Jour 68; But in the case of a cro s apn al Court fee was

to be paid at the time of filing 8 (1993) 1893 411 W \ 55 (55)

22 Adding party for purposes of cross objections

It has been seen in the Notes under O 41, R 20 that since the Privy Council decision in Chokkalingam v Seethor, 1927 P C 252, the mere fact that the presence of a party before the Court is necessary for the complete disposal of the appeal or cross-objections is not enough to make him interested in the result of the appeal within the meaning of R 20 unless he stands to be prejudiced by the determination of the appeal as framed behind his back Hence a party cannot be added as a respondent to an appeal under R 20 merely for the purpose of filing cross-objections against him 1 As to the Courts power to add parties to an appeal apart from the provisions of R 20 see Notes under R 20 Assuming such power exists, the Court will not direct the addition of a party who is an unnecessary party for the appeal merely for the purpose of enabling a respondent to file cross objections against hum 2

# 23 Second appeal

A decree of an appellate Court disallowing the cross objections of a respondent is a decree passed in appeal within the meaning of S 100 and a second appeal hes therefrom 1 But where the cross-objections are rejected in limine2 as for instance, on the ground of the respondent's failure to pay the deficit Court-fees within the time ordered,3 the order does not amount to a decree and hence is not subject to a second appeal

R. 23. [S 562] Where the Count from whose decree an appeal is preferred has disposed of the suits Remand of case by upon a preliminary point3 and the decree is Appellate Court reversed in appeal the Appellate Court may, if it thinks ht by order remand the case,8 and may further direct what issue of issues shall be tried in the case so remanded and shall send a copy of its pidgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions be evidence during the trial atter remand

[1877-S 562, 1859-S 351]

## Local Amendment

#### MADRAS

5 chattl ste the following for Rule 23 -23 Where the Court from whose decree in appeal is preferred has disposed of the auit upon a preliminary point and the decree is rever ed in appeal or mi re

3 (1904) 4 Nag L R 168 (175)

ng 13 h d C to 633 (C d) Note 22 1 (1926) 1316 Cal 533 (w35) 53 Cal 2 C Note 23 (1373) 1973 Mad 473 (450) 1 (15c) 10 Mad 112 ( 75) (1)33) 1933 Lah 301 (901) 2 (1)1-) 1918 Lah 301 (901) 1118 PR \( \circ\) 0 (1)31) 1934 Lah 278 (4) 15 Lah 611 4p heaton to treat time larted application to treat time larted [See also (1667) 11 Bom 596 (59e) ] In so far as the fellowing decisions lag-loun the contrary proposition they should be regar at as obsolete al real as cross objections and alles (169n) 25 Cal 565 (JCS) both de missed by single judgmet !-(1664) 1 Suth W R 229 (250) Judgment so far as rejects appl a (13-0) 19-0 Mad 120 (120-121) tion is not appealable and rev a (1316) 1916 Mad 1219 (1220) (1922) 1322 \ng 213 (215 216). lies. 2 (1312) 13 Ind C10 306 (300) (Mad) Fellow

the appellate Court in recurring or setting saids the decree under appeal conuders time c it's in the interests of justice to remind the cise the ippellate
Court in a be order remaind the cise and may further direct whit issue or
i uses shall be tried as the cise so remainded and shall send a copy of its judgment
at 0 d der to the Court from who electer the argical is preferred with directions
tore admit the suit under its original number in the register of civil suits and
plus cal to determine the suit and the evidence (if any) recorded during the
original trial hall subject to all just exceptions be evidenced that the

#### Sunopsis

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#### Other Topics

De 1 ion on a question of law de ided by order of remand—Whether can be reopened See Note 29 Powers and duties of succeeding Judge regarding remaided ca c See Note 99 Pt (7) Transfer of case after remaid See Note 30 1t (2)

#### 1 Legislative changes

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The words and the evidence remand at the end of the Rule ato new Loro S 502 was amcuded by Act VII of 1888 the sect on only apple of where the lower Court had d pe ed of the suit on a preliminary point so as to exclude any evidence of fact which appears to the appellate Court essential to the determination of the ughts of the parties. The words were consisted by Act VII of 1889 which also substituted the words. We determine the suit on the ments for the words meetingate the suit on the ments which occurred originally

## 2 Distinction hetween Rules 23 and 25

This rule empowers the appellate Court to remand the case only when the lower Court has disposed of the suit upon a preliminary point. If the trial Court decides the suit on the merits, it is not open to the appellate Court to order a remand under this rule. It may, however, act under Rr. 24 or 25 intin.

The following are the points of distinction between Rr 23 and 25. ınfra

- (1) Where an order of remand is made under this rule, the whole case goes back for decision to the lower Court (except on the point on which the appellate Court has reversed the finding of the lower Court) Whereas in the case of an order under R 25, the case is retained on the file of the appellate Court and only issues are remitted to the lower Court for findings 14
  - (2) An order of remand under this rule is appealable but not an order under Rule 25
  - (3) An order of remand under this rule is a final order which cannot be re-considered by the Court which passed it except on review whereas an order under R 25 is an interloculory order which it is open to the Court to re consider 2

## Preliminary point meaning of

23.

A point can be said to be a preliminary point within the meaning of this rule, only where it is such that the decision thereon in a particular way is sufficient to dispose of the whole suit, without the necessity for a decision on the other points in the case 1 The point may be one of fact or of law 12 Thus a suit will be held to be disposed of on a preliminary point if it is disposed of on any of the following grounds -

- (1) That the suit is barred by res judicata 2
- (2) that the suit is barred by limitation3 or by any other rule of law.4
  - (3) that the document on which the suit is based is inadmissible in evidence \*
  - (4) that the plaintiff is estopped from proving his case 6

1a (1927) 1927 Cal 401 (402) (1939) 1933 Lah 659 (659) Appellate Court framing new issues and remanding case to trial Court-Remand should be under O 41 R 25 and not under O 41 R 23 (See ilso (1925) 1925 Rang 303 (303) The word remand should be used only when a case is returned for decision 1 [See also (1935) 1935 Oudh 333 (334) ] 2 (1922) 1J22 Oudh 236 (248) 25 Oudh Cas

[Sea also Note 23 point 2]

Note 3

(1930) 1930 Vad 1017 (1018) (1929) 1929 Vad 205 (207) (1928) 1928 Mad 991 (991 992) (1928) 1928 Mad 430 (432) (1927) 1927 Mad 1159 (1160) (1889) 11 All 194 (223) (I' B) (1917) 1917 All 243 (243) 39 All 165. (1923) 1923 Oudh 177 (1/9) 26 Oudh Caa 10 la (1935) 1935 Lat 49 (50)

(1931) 1931 Cal 49 (\*0) 2 (1866) 5 Suth W R 63 (66) (P C) (1925) 1975 Vrd 483 (484)

3 (1866) 5 Suth W R f3 (66) (P C) (1909) 1 Ind Cas "85 ( 81) (Cal)

(1867) " Suth W R 331 (331) 4 (1564) 10 Sith W R 434 (459) Sut under 5 230 of 1et VIII of 18.9-buit dis

rus ed on a point not arisin, ur der (1844) 10 111 959 (322 323 374 313)

(1557) 3 411 .6 (1) 0 (1303) 27 111 631 (631) 1 104) 1903 I un lle No 2 1ace 10 (1-33) 16 Mad 207 (-10) (1)2 ) 1) 2 1/2 (0) (0) 10 1/2 (0)

o.

- (5) that the plaintiff has no cause of action.
- (6) that the suit is bad for defect in the description of the defendant.8
- (7) that the matter is concluded by a valid award.9
- (8) that the case raised at the hearing is different from that raised in the plaint.10
- (9) that the suit has abated 11

Ī.

There is a conflict of opinion, however, as to whether the point should be one not relating to the ments of the case. It has been held in one class of cases that a point is not a prehiminary point where it relates to the merits of the case, although its decision may dispense with the necessity for a decision on the other points in the case 12 Thus according to this view a suit cannot be said to have been disposed of on a preliminary point in the following cases -

- (1) Where in a suit for ejectment and damages, the Court finds that the plantiff has failed to establish the title alleged by him and dismisses the suit 13
- (2) Where in a suit for mesne profits, the Court finds that the defendant was not in possession during the period in guestion and dismis es the suit 14
- (3) See also the undermentioned cases 15

According to another class of cases a point may be a preliminary point although it relates to the ments of the case. Thus, according to these decisions a preliminary point means some point either collateral to the ments which precluded their determination altogether, or some particular question which, though relating to the ments, precluded their general determination 16 Thus,

```
7 (1897) 20 Mad 25 (27)
         [See also (1887) 9 Alt 26n (30) l'oint that the suit is a bit of
         wanton litigation and that there as
         nothing tangible upon which the
         claim is based is preliminary point]
         [See also (1931) 1931 Cal 604 (606)
         59 Cal 68 Application for prosecu
         tion under Criminat Procedure Code
8
          tiff at hearing was different from
          that raised in his plaint
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26 Lom holding

(1911) 9 Ind Cas 224 (224 225) (Cal) Per Chitty J Cox J, contra (190a) 190a Pun L R No 49 tago 187 (1903) 1903 Pun L R No 157 page 635 (1902) 1902 Pun Re No 99 page 445 CPC 337 U338

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(1887) 1887 Pun Re No 100 page 250
(1920) 1920 Mad 898 (899)
13 (1905) 1905 All W N 157 (167)
14 (1897) 1 Cal W N 840 (340)
15 (1868) 10 Soth W R 411 (411) Suit for rent
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-Question of plaintiff s title is not a preliminary question (1933) 1933 Lah 224 (224) Question of factum of death of defendante-

m and other (1901) 4 Oudh Cas 23 (24) Suit by daugh ter for her share under Mahomedan Law-Trial Court holding that by custom she was excluded from in

Court ntitled

heritance and dismissing suit-Ap pellate Court reversing decision can not remand as trial Court's decision was not on a preliminary point

16 (1921) 1921 Mad 118 (118 119) (1934) 1934 Cul 49 (50) (1933) 1933 Rang 413 (414 415)

(1893) 16 Mad 207 (210) (1699) 12 C P L R 45 (47).

(1906) 1908 Pun Re No 2 page 10 (F B) [See also (1930) 1930 Mad 1017 (1018)}

cording to this view, in a suit for damages for breach of contract, the estion as to the factum of contract is a preliminary point although it relates the mer t of the case 17 Similarly, in a suit based on an award, the question the validity of the award has been held to be a preliminary point 18 So also e quest on of the validity of the contract on which the suit is based 10 See so the following cases for other instances 20

The question whether a point is a preliminary one does not depend on the degree of unportance which it may assume during the hearing of the se 1 Nor is it necessary that the suit should have been dismissed as a result the finding on the preliminary point A suit may also be decreed on a climinary point. Thus where a decree is passed, not after trial on all the sues but on the basis of an award22 or on the consent of the parties23 or on e basis of a commissioner's report,24 the suit may be said to be disposed of a prelminary point See also the undermentioned cases 25

Where the points left undecided in a suit are such that they would ive arisen only after the suit is disposed of, it cannot be said to have been ecided on a preliminary point 20 Thus in a suit for possession and mesno

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(1921) 1921 Mad 118 (118 119)
(1905) 27 All 691 (694)
(1908) 30 All 63 (66)
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(See also (1917) 1917 Pat 577 (578) Suit based on lease—Dismiseed on the ground that lease was obtained by unduo influence-Other issues not considered - Appellate Court re

versing decree can remand)
(1927) 1927 Mad 1150 (1160) Suit for main tenance-Suit dismissed on the ground that plaintiff was not entit led to maintenance-Other assues not doulded-Disposat is on a prela

minary point (1933) 1933 Oudh 560 (561) Suit by co sharers for share of profits-Ples of

mand hold to be one nuder O 41 R 23

(1908) 1908 Pun Re No 56 page 283 Sust by reversioner to set aside a sale by a proprietor-Suit dismissed on the ground that plaintiff had no locus stands to sue as the vender had adopted a son-Dismisss1 is on a proluminary point

(1915) 1915 Lah 449 (449) Redemption enit -Defendant s plea that there was a sale in his favour is a preliminary

ing that wilful neglect was proved and temanding on question of da

mages-Remand is under O 41

sition

of referce al pointed by agreement of 23 (1931) 1931 P C 107 (109) (P C)

23 (1931) 1931 P G 107 (109) (P C)
24 (1917) 1917 111 148 (149) In this essent
was hold that it was a little diffcult to apply the processes of
Rule 23 after a proliminary decrehad been passed but that they were applicable so far as they could be

reasenship applied [Compare (1922) 1922 Mad 112 (113] 25 (1930) 1930 Vad 1017 (1018)

(1933) 1933 Oadh 6 (9) Decision of proli minary point—High Court not agreeing—Only course for it is to send case back for trial of other

question arising in the care (1871) 16 Suth W R 109 (110) Burt de reed by lower Court on a certain slow of law-Decision set aside-Case re

thurman to

(1908) 6 All L J 515 (516) Appellate Court send ig do in ca o for partition by motes and lounds-Affeal hes as from decres and not as from order of

[Compare I owever (19 0) 19 0 Mad 1017 (1018) Suit for possession-Defen lant clauming right to roles a -Trial Court firding against bm profits in which a question of mesne profits would arise after the decree for O

possession is passed, the dismissal of the suit on the ground that the plaintiff was not entitled to possession, is not a decision on a preliminary point 27

A suit disposed of under O. 17, R. 3 cannot be said to be disposed of on a preliminary point 28

## 4 Where Court decides on all the issues

1

Where the Court has adjudicated on all the issues involved, the disposal cannot be said to be on a preliminary point merely because one of the issues is of a preliminary nature and the suit has been dismissed on the basis of the decision thereon2 or because it has decided the case with reference to the admissions made by both the parties without taking other evidence 3 or because other points, which might have arisen if the stat had been differently framed, or if an amendment of the plaint had been allowed, have not been

and decreeing unconditional no ses-

payable by the defendant for re-demption-Held that Rule 23 cover ed the casel [Compare also (1917) 1917 411 148 (149) Where it was held that it was a little difficult to apply Rule 23 to a case where a preliminary decree had been passed but that the provisions should to applied, so far as it was reasonable to do so to a case where a final decree had been erroneously passed on the basis of the report of a commissioner who had been super

27 (1922) 1922 Mad 112 (113 114) 45 Mad 449 28 (1935) 1975 Rang 123 (124)

(1869) 10 Suth W R Cr 383 (388) (1332) 1932 Lab 443 (443 (1930) 1930 Lab 181 (182 (1927) 1927 Lah 618 (619) (1927) 1927 Lah 42 (43) (1926) 36 Ind Cas 756 (Lub) (1926) 1976 Lab 537 (539) (1926) 1928 Lub 184 (185) (1923) 1923 Lab 171 (172)

(1896) 19 Mad 479 (481) (1896) 19 Mad 167 (159) (1929) 1929 Nag 68 (63) (1923) 1928 Oudh 177 (179) 26 Oudh Cas

(1927) 1927 Pat 296 (207) 6 Pat 330 The decision in 1920 Pat 735 is in so far as it is against this do ision can not be accepted as correct

56

(1838) 3 Cal W N 325 (328) (1837) 1 Cal W N 29s (30) (1892) 19 Cat 836 (838) (1800) 17 Cal 168 (171)

(1876) 25 Sath W R Cr 284 (285) (1874) 21 Suth W R 326 (326) (1870) 13 Suth W R 107 (107, 108)

[Compara (1890) 13 All 386 (388 383) Where it was held that R 23 applied to a case which had been de eided in accordance with the deposition of a referee appointed by agreement of both the parties under the provisions of the Oaths Act ]

23, decided 4 Hence, where the appellate Court allows an amendment of the plaint<sup>3</sup> or directs the addition of certain parties<sup>6</sup> and remands the suit, the remand is not under this rule.

But the mere fact that the Court has recorded evidence on all the issues does not make its decision other than a disposal on a preliminary point if it has, in fact, decided the suit with reference to its finding on a preliminary issue without deciding the other issues in the case ?

S Entire suit must have been disposed of on a preliminary point

In order to attract the application of this Rule the entire suit must have been disposed of on a prehimmary point and not only a portion of  $n^1$  A sues B for an injunction restraining B from interfering with A's enjoyment of his lands and for a declaration of his right of easement over B's land The Court decrees the claim for injunction but dismisses the suit so far as the claim for easement is concerned on the ground that, on the face of the pluint, the statement of the easement claimed is so madequate and unsatisfactory that it is impossible to enter into the question thereby raised. In such a case, only a portion of the suit having been disposed of on a preliminary point, this rule does not apply  $^2$  Similarly where several questions have been traved and decided, the suit cannot be said to be disposed of on a preliminary point merely because one or more of the issues have not been decided on the ments but have been disposed of on a preliminary point of recovery of arrears of rent and for ejectment from certain plots of lands, one of the

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to its arrendment by Act VII of 1889 a suit
4 (1931) 1931 Vad 1 (2)
                                                                         could not te remanded of the lover Court
5 (1925) 1925 Mad 229 (229) 48 Mid 713
   (1924 1924 Lah 245 (246)
(1927) 1927 Mad 859 (960)
                                                                         had recorded endence on all the ssues The
                                                                        following cases bearing up on the section as
   (16 8 60) 2 \11 660 (670 671)
(1894) 17 Mad 187 (188)
                                                                        at stood a raor to the amendment are only of
                                                                        academic interest nou -
0 (1925) 1925 Ring 320 (320) 3 Ring 490
                                                                        (1837) 3 111 29n (CO)
                                                                        (1888) 10 All 289 (822)
(1884) 7 All 167 (170)
    (1886) 10 Bom 338 (400)
   (1926) 1926 Ca) 1076 (1977)
   (1910) 7 Ind Cas 75 (78 79) (Cal)
                                                                       (1881) 7 All 107 (170)

(1893) 17 All 112 (110) 22 Ind 1pp 1 (P C)

(1893) 10 Suth W R C 411 (411)

(1893) 10 Suth W R C 7 37 (474)

(1803) 10 Suth W R C 7 13 (474)

(1874) 22 Suth W R C 7 12 (422)

(1874) 22 Suth W R C 7 12 (422)

(1874) 12 Suth W R C 1 2 (423)

(1874) 18 Suth W R C 1 (475)
   (1311) It Ind Cas 183 (184) (Cal)
   (1916) 1916 Cal 283 (284) 43 Cal 933
   (1920) 1920 Bom 85 (87)
                                                                        (1903) 11 Oudh Cas 169 (170)
   to be erroneous -
   (1927) 1J27 Lah 196 (197)
                                                                                              Note 5
   (1924) 1924 Lah 33 (34) Death of one de
                                                                     1 (1892) 1892 All W N 11 (12)
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(1971) 1977 Lah 196 (197)
(1921) 1978 Lah 296 (197)
(1924) 1974 Lah 29 (24)
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I uder > Wel of the Cale of 1m2 prior

7 (1908) 50 VII 63 (67) (1908) 27 VII 631 (634) (1908) 1907 Pun W II No. 27 (1818) 13 Mail 422 (427) (1824) 16 Mail 207 (209, 210)

decided matter could be kept aparts then a remaid under 5 x62 is not absolutely prohibit d) 2 (1-52) 11 VII 4-3 (1-5)

See however (150 )) 12 C P L/R 113

(122) If the decried and the un-

(1902) 1902 Pun Re No 99 page 445

3 (19-0) 19-0 /144 89 (90)

(1932) 1932 Lah 219 (220)

questions was as to the amount payable by the planniff as the value of improvements effected by the defendant on the planniff's land. The trial Court held that the planniff should pay Rs. 10,000 as decided in a prior litigation between the parties. On appeal the appellate Court held that the prior decision was not resuld cata and remanded the case to assess the their value of the improvements Held that this rule did not apply to the case as the decision of only one of the issues in the case and not of the whole suit was based on a preliminary point, I in this view the underinentioned decision of the Patina High Court, seems to be open to question. In that case, the lower Court had superseded an award on the ground that it was submitted too late and had disposed of the suit on the ments. In appeal it was held that the suit had been disposed of on a preliminary point, because the result of the lower Court's decision had been that the award had not been considered on the ments.

Where a suit has not been disposed of on a preliminary point in the sense described above, no remand can be made under this rule \* Thus no remand can be made under this rule prerely because —

- (1) The lower Court has omitted to decide one or more issues or the appellate Court requires certain additional issues to be fried?
- (2) The lower Court has wrongly rejected certain evidence<sup>3</sup> or the taking of additional evidence is found to be necessary<sup>3</sup>

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(3) The lower Court has not recorded the evidence properly 10
                (4) The lower Court admitted madmissible evidence 12
4 (1932) 1932 Lah:219 (270)
5 (1916) 1916 Pat 21 (23)
                                                                           (1976) 1926 Mad 605 (697)
                                                                          (1925) 1925 Mad 171 (171)
(1925) 1J25 Mad 169 (170)
(1928) 1928 Mad 381 (881)
5 (1916) 1910 Far 21 (23)
(1924) 1977 Bom 111 (112)
(1800) 14 Bom 232 (704)
(1854) 12 Cal L Rep 130 (138)
(1854) 12 Cal L Rep 130 (138)
(1834) 133 Lah 210 (220)
(1835) 133 Lah 210 (220)
(1835) 133 Lah 210 (137)
(1823) 1833 Lah 210 (172)
                                                                          [See (1929) 1923 Nag 68 (63) ]
(1893) 6 C P L R 77 (77 78) Deciding a
                                                                                   question of fact on insufficient
grounds and disposing of a suit on
                                                                                   A preliminary joint are not con
    (1916) 1J16 Lah 295 (299)
    (190a) 130a Pun L R No 49 page 187
                                                                       8 (1897) 1 Cal W N 80 : (50)
                                                                                    (See also (1861) 7 Suth W R 313
                                                                                    (313)]
                                                                           (1918) 1918 Oudb 170 (171)
                                                                      (19°9) 1929 Smd 150 (160)
(1699) 1 Bom L R 110 (11°)
9 (1916) 1916 All 258 (259)
                                                                           (1928) 1928 Cal 749 (750)
                                                                           [See (1,376) 1926 Cal 912 (912)]
(1920) 1920 Cal 374 (375)
     (1917) 1917 Cal 701 (702)
                                                                           (1917) 1917 Cal 94 (J4)
                                                                          (1699) 3 Cal W V 748 (750)
     (1J05) J Cil W N 54 (56)
    (1868) 10 Suth W R Cr 469 (471)
     (1930) 1930 Lah 181 (187)
     (1926) 96 Ind Cas 44 (Lah)
(1925) 1925 Lah 480 (480)
                                                                     10 2
     (1919) 1919 Lah 102 (103) 1919 Pun Re
     No 27
(1916) 1916 Lah 298 (29J)
                                                                           (1896) 1896 Pun Re \o 45, page 123
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(1902) 1902 Pun Re No 43 page 158

11 (t895) 5 Mad L Jour 82 (Si)

- (5) The appellate Court is dissatisfied with the decision of the lower Court<sup>12</sup> or
- (6) The suit was not properly tried 13

As to the inherent power of the Court to remand in such cases see Note 10, infra

6 Order returning or rejecting plaint whether disposal on preliminary point

It has been held in some cases that an order returning a p aint for presentation to the proper Court under O 7, R 10 s not a disposal of the suit on a preliminary point within the meaning of O 41, R 23 s Similarly at has been held in some cases that the rejection of a plaint under O 7, R 11 does not amount to a disposal of the suit on a preliminary point The rationale of these cases would seem to be that a suit cannot be said to be disposed of when the deals on in no way affects the rights of the parties \$(See S 2 (2)) Notes 6 and 13). But in the cases cited below 11 has been held that even when a plaint is rejected the suit can be a d to be disposed of on a preliminary point. These cases proceed on the ground that as the rejection of the plaint precludes the Court from deciding the point arising in the case, the suit may be regarded as disposed of on a preliminary point.

7 Decision of lower Court must be reversed

No remand can be ordered under this Rule unless the decision of the lower Court on the prel minary point is reversed in appeal. The decision of the lower Court must be defin tely iccersed. Where such is not the case it is not a good ground for ordering a remand under this Rule, that the lower Court has decided the issue on a wrong view as to the burden of proof 2 or that the appellate Court is not able, on the materials before it, to agree with the findings

on prelimit ary not it it il i 0 41 R 23
[100] I find Cas \* 55 (50 5 8) (cut) Cas
dimmissed as barred by limitation
after it was registered—Disposal it
on prelimitary joint within R 23 II
it had been rojected on presentation
without hey admitted there my

(18°0) 14 Suth W R 69 (70) Issues not properly settled by lower Court—No femal d to Lo ordered under R 23 (1922) 1322 411 226 (228) 44 AH 492 Noto 6

.

179

(1°0) 6 Cal L Jo 11 214 (216) 1 2 (1931) 1931 L 1h 197 (191) Confrising (1922) 1 J29 Lah 53 (84) and following (1915) 1315 Lah 8 (5)

1915/1/15 Land 8 (9)

3. [Set [L15]] \*\* 0 Ind Cas 145 [445] \*\* 35 All 427 Ord r of dismissil of a surt for non appearance of patter—Order est Court of secret for the secre

See also 5 13 of the Court fees Act which seems to treat resection of Plaint or memoicf, saffeal asidistinct from disposal

out entering into nerits on the ground that plaintiff had no cause of action — Disposal is on preli

. .

minary point Note 7

1 (1918) 1915 Bom 57 (59) 23 Bom 352

(1926) 1926 I ah 184 (15.) (1927) 19.7 I ah 856 (856) Rule 13 did not apply teraum the appellate Couldid to to gave its doction on the twolaures that had been decided by the lower Court (See also (1864) " Suth W B 2.6 (327)

(18"0) 14 Suth W R 60 (60). 2 (1912) 17 Ind Cas 94 (94) 94 All 612 of the lower Courts or that the appellate Court considers that the lower Court's O anding is not supportable on the ground given by that Court but might be supported on another ground which requires investigation 4 But where the finding of the lower Court on a preliminary point is definitely reversed by the appel a c Court, the suit may be remanded under this Rule notwithstanding that the decision of the appellate Court is made subject to a finding of fact which is left to be determined by the lower Court 5 Where the intention to reverse the decree is clear, the remand is not vitiated by the mere absence of a formal order setting aside the decree a Where the lower Court has decided the suit on several preliminary points, the appellate Court should reverse the decision on all of them before remanding under this Rule 7

Under this Rule it is not competent to the appella's Court to affirm the decision of the tover Court regarding one part of the suit and remand the sult regarding the other part, be ause, otherwise there would be two final judgments in the same case-a thing opposed to the provisions of the Code and because there is only a partial reversal of the lower Court's decree 8 The Rulo contemplates that the whole case except as to the preliminary point, is remanded to the lower Court Hence where the appellate Court not only reverses the decision of the lower Court on the preliminary point but also gives its fundances on the other issues in the case excepting one, it should not remand the case under this Rule for the decision of that single issue but may remit it to the lower Court for a finding under R 25 9

8 The appellate Court may, if it thinks fit by order remand the case

These words show that the appellate Court is not bound to remand a suit under R 23 merely because the circumstances of a case fall within the provisions of the Rule at may either do so or proceed under R 24 or R 25 1 The question is one of discretion 2 The appel ate Court should not, however, rashly and w thout sufficient cause, order a retrial in any case in which this can possibly be avoided, a remand should not thus be made under this Rule in a case which could efficiently be dealt with under R 253

And may direct what issue or issues shall be tried in the case

This Rule does not enable the appeliate Court, while remanding the suit for trial de novo to direct that one of the essential issues in the case should

was barred on another ground-Held romand was not proper;
5 (1923) 1923 Bom 142 (145)
6 (1902) 6 Cal W N 826 (327)
7 (1922) 1925 Cal 716 (120) 62 Cal 783
(1884) 11 Bom 663 (653)
6 (1905) 27 All 163 (165)
6 (1905) 9 Bom L. R 966 (967)

(1861) 8 Suth W R 303 (J03)

(1892) 1832 Pnn Re No 3 page 16 (1877) 1877 Pun Re No 82 page 216 In this case the remand was held to be unfair to the parties] (See also (1935) 1935 Rang 34 (35)

Appellant had not led his entire ovidence—Remand ordered] 3 (1934) 1934 Lai 433 (434) All evidence adduced and no complaint of ovi dence being shut out-Aprellate Court should distore of case and not

remand it (1933) 19.3 Pat 706 (707)

<sup>9 (1917) 1917</sup> All 187 (157) Note B

<sup>1 (1899) 1899</sup> All W N 2 (3) (1916) 1916 Oadh 257 (264)

be omitted <sup>1</sup> for the Rule contemplates that the whole suit except with reference to the preliminary point should be remanded to the lower Court. But if any limits are imposed by the appellate Court in remanding a case, the lower Court has no power to travel beyond those limits (See note 30, Point 4) In an old case decided under the Code of 1859 it was held that an appellate Court carnot remand a case for retrial with instructions to frame new issues <sup>2</sup> See also Note 27.

Where the appellate Court set aside the order of the trial Court and re-Court that in cases not falling within the scope of O 41, R 23 an appellate Court to take additional evidence on the issue, it was held that the order was illegal and not one under this Rule 3

#### 10 Inherent power of remand

It is now settled law in all the High Courts except the Aliahabad High Court that in cases not falling within the scope of O 41, R 23 an appellate Court has an inherent power ex debito justituse to remand a case for retiral. In the Allahabad High Court, the point is unsettled 2 Under the previous Code

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1 (1920) 1920 Cal 374 (375)

[See also (1973) 1c

2 (1864) 1 Suth W R 69 (77

3 (1935) 1935 Lah 161 (162)

Note 10

1 (1912) 17 Ind Cas 891 (89
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(1985) 1985 Bom 216 (217 218) But it bas no power to remand disregarding method de

Note 9

LR 341 184 83

(1917) 1917 Cal 44 (46 47 48) 44 Cal 929 (F B)

(191 ) 191, Cal 556 (55")

(1920) 1920 Mad 698 (SJB) (1916) 1916 Vad 957 (958) (1912) 15 Ind Cas 809 (860) 86 Mad 492

tis powers of superintendence than District Courts (1911) 9 Ind Cas 300 (307) (Cal)

[But see (1914) 1914 Cal 163 (164) 20 ind Cas 39 (40) 41 Cul 108) 2 (1972) 1922 411 47 (48) Inherent power

cxists
(1894) 17 All 99 (31 32 33) Inherent
power exists

power exists (1922) 1922 411 254 (956) 44 411 176 The

(1901)

cf when plaint is ordered to be ameeded or when new parties are added — But there is no power cz debto justitue to order remand [See now the amendment by the Allahabad High Court to O 48 R 1(m)]

10

there was a section, 112, S 564 which prohibited the appellate Court from making a renand except as provided by S 562 (O 41, R 23) 3 This section was found to be extremely embarrassing in practice as for instance, when the appellate Court felt a remaid to be urgently needed in view of the amendment of the plaint or the addition of new parties. The repeal of this section in the present Code leaves the way open for remaid in such cases, 4 although the Legislature has thought it safer not to formally enact that the appellate Court has power, in cases not covered by R 23 to remaid 5

But the inherent power of remand should not be exercised except when it is clearly necessary for the ends of justice to do so <sup>8</sup> When there is any specific provision of the Code which would meet the necessities of the case of when the circumstances are such that the appellate Court can itself dispose of the case <sup>8</sup> (Sec O 41 Rr 24 to 29) no remand should be ordered A remand should not generally speaking be ordered when the defect in the proceedings has been due to the neghrence or default of the party who asks for remand <sup>9</sup>

See the amendment of this Rule by the Madras High Court

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3 (1595) 17 All 117 (190)
                                                                 (1926) 1926 Lah 537 (538) Cale not to be
   (1860) 6 Bem H C R 1 C 156 (109)
                                                                         remandel when appellate Court can
   (1852) S Cal 9'3 (9_6)
(1873) 20 Such W R 148 (149)
(1908) 1908 Pun Ro No 138 page 632
                                                                         follow the procedure laid down in Rr
24 to 29 of O 41
                                                                 (1919) t919 Mad 561 (562) Case hould not
                                                                         be remanded when appellate Court
   (1590) 3 C P L R 131 (132)
                                                                         may follow the procedure laid down
4. (1912) 17 Ind Cas 591 (e92) 37 Bom 289
                                                                 in Ri 24 to 29
(1909) 4 Ind Cas 1002 (1002) (Mad)
5 See Notes on clauses report of the Select
           Corımstice
6 (1922) 1922 Cal 279 (279)
(1920) 1920 Pat 56 (58 59)
(1919) 1919 Cal 1017 (1018)
                                                                 (1979) 1928 Cal 748 (748)
                                                                 (1900) 23 \frad 447 (448)
                                                                 (1912) 15 Ind Cas 3 (a) ( 111)
(1864) 1 Suth WR 6 (7) Remand not
   (1921) 64 Ind Cas 599 (60t) (Cal)
                                                                         allowable merely tecause Judge
   (1915) 1915 Pat 505 (503) 3 Pat L Jour 253
(1917) 1917 Cal 44 (46, 47 48 49 50) 44
                                                                         wanted further cyidence
           Cal 929
                                                                         [See also (1916) 1916 Born 275 (276) ]
   (1929) 1929 Nag 63 (64) 26 Nag L R 44
(1928) 1928 Lah 116 (116)
                                                                         1 Hay 200
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(1919) 1919 Mad 561 (562) (1922) 1992 Mad 112 (114) 45 Mad 449

(1318) 1018 Cat 207 (005)
(1379) 4 Cal 100 (204 205) 5 Ind App 149
(1400) 6 Cal N. 1038 (202) Sant for means
of the start of the start

decree in accordance with that finding

306

9 (1924) 1974 Cal 306 (397) (1919) 1919 Cal 8°6 (836) (1863) 3 Suth W R 5 (6) (1920) 1970 Pet 56 (59) (1870) 14 Suth W R 195 (196) Deliberate

undervaluation—Remand refused (1868) 10 Suth W R 207 (207) Suit under

valued, case not remanded (1929) 1329 Lah 444 (446)

(1923) 1923 Lah 645 (646) Remand in order to enable plaintiff (appellant) to ascertain whether or not a demand was made within three years of the

(1932) 1932 Lah 443 (443) (1917) 1917 Cal 657 (658) 43 Cal 148 11 Grounds of remand

Subject to the general principles stated in Note 10 supra Courts have an inherent power to remand in the following, among other cases:-

- (1) When the appellate Court directs an amendment of the plaint,1 or the addition of fresh parties.2
- (2) When the appellate Court finds that the suit is bad for misjoinder of parties and causes of action. In such a case the appellate Court may remand the case and direct the lower Court to return the plaint for amendment 3
- (3) When the lower Court has dismissed a suit on the ground that the suit has been brought in the name of the wrong person as pla.ntiff4 or defendant.5
- (4) When the lower Court has musunderstood the whole cases and when the suit has been disposed of on an erroneous issue 7
- (5) When the lower Court has failed to determine material issues in the case 8
- (6) Where a suit has been dismissed for default instead of being tried on the merits as it ought to have been 9
- For other instances, see the following cases 10

institution of the snit which would save limitation was refused (1921) 1921 Cal 651 (637) Prolonged trial-Ramand marely for enquiring it there

is any ovidence is improper Note 11 1 (1929) 116 Ind Cas 671 (All) Plaintiff was ordered to pay the costs menred till

(1925) 1925 Mad 229 (229) 48 Mad 713 (1916) 1916 Vad 957 (958)

(1917) 1917 Cal 891 (891)

(1931) 1931 Mad 1 (4) In this case an amondment altering the fundamental

character of the suit was refused to be allowed

[Bot see (1930) 1930 All 863 (964) When the lower Court has tried the aust and dismissed at on the ments, it would be unfair to the defendants to direct a remand on the ground of

misioinder ] 4 (1901) 23 All 167 (173) (1871) 1/ Sath W R 409 (410)

(1903) 25 All 194 (195)

[But ses (1932) 29 Cal 60 (62) No appeal being open from an order of diamissal tor default the appellate Court has no power of remand in such a case)

ScH

10 (1922) 1922 Bom 267 (270) . 45 Bom 184 Errogeous refusal to grant adjourn. ment-Case remanded

(1932) 1932 Lah 126 (126) Lower Court deciding case on an admission in a provious suit without considering

other evidence (1912) 15 Ind Cas 859 (860) 36 Mad 492

or of the mat-

(1899) 1899 Pan Re No 23, page 131 Suit on bond executed by defendant-Trial

. -- ', --- ' Cuun Uza 10741

O

12 Wrong onus of proof

Where the trial Court has thrown the burden of proof on the wrong party, the appellate Court may if necessary, remand the case for re-trial 1 But where the error in casting the burden of proof has not affected the evidence produced on e ther side and both part es have given all the evidence that they had, the quest on of burden of proof becomes immaterial and no remand can be ordered merely because the lower Court has wrongly east the onus of proof 2

#### 13 Exclusion of evidence

An erroneous exclusion of evidence by the lower Court may be a good ground for remand under the inherent power of the Court 1 Similarly the failure to give a party an opportunity to produce evidence will be a good ground for remand 2 So also, whe e the appellate Court is unable, on the materials before

Court finding that defendant was not minor and han lien of liters was not necessary - t are tried on other usages and suit dismissed - topol late Court finding that defen dant was minor as d temending case for trial after appointing guardian ad liter .- Held, that under S 411 (O 32 R 5 (2)] appellate Court might act aside the proceedings and remand (1672) 17 Suth W R 446 (447) Case re

manded where suit was decided without the plaintiff being given fair of joitunity of knowing the line of defence he had to meet

(1675) 24 Suth W R 232 (232) On account of the traffictency of the legal ad visor of the plaintiff, witnesses were not projectly examined and oral evidence full short of the require-ments of S 63 of Evidence Act —

Case remanded (1870) 2 N W P H C R 183 (184) Sunt decided without framing any lastes -- Case remanded (Sec (1876) 25 Suth W R 276 (276

277) Mero occasional objeunty in judgment of lower Court is not a proper ground for 1emand)

(1912) 14 Ind Cas 379 (580) (Lab) Order pas ed on an application without hearing objection of the other party (1877 78) 3 Cal Ci5 (C53) (1º L) Lower Court had not considered the ovidence on certain point - Privy Council, because of its imporfect acquaintance with the facts of tho caso, preferred to remand the whole case to fram

ing issues itself Note 12 1 (1926) 1926 111 453 (454)

1927) 1927 Lah 148 (149) (1924) 1924 Mad 770 (771)

(1914) 1914 Lah 448 (450) (1917) 1917 Mad 872 (874), 40 Mad 654 2. (1910) 7 Ind Cas 986 (986, 987) (Bom)

(See also (1923) 1923 Nag 62 (63)]
(1859) 1899 All W N 2 (2) Frist Court
laying onus of proof ou defendant

and decreeing suit as defendant

declined to produce any evidence-Appellate Court laying onus on plaintiff end dismissing suit - Ap peal to High Court - High Court holding that onus was on defendant and setting taide decree dismissing suit-Defendant not entitled to re mand as he had an opportunity of producing ouden a and had declined to do so

(1920) 1920 Pat 291 (298)

Note 13 •1 (1921) 1921 Cal 661 (672)

(1911) 10 Ind Cas 441 (441) (All) Evidence of defendant not taken-Case 10

(1911) 12 Ind Las GS# (GSG) (Cal) Important questions disallowed-Opportunity to produce evidence not given-Case

may be remanded (1926) 1928 Mad 991 (992) Court has inberent power to remand case for

reception of evidence to octed by the trial Court (1917) 1917 Cal 556 (557) Important quea-

tions disallowed - Case may be semanded (1922) 1922 Mad 112 (114) 45 Mad 443

Where, ewing to improper or defective enquity in lower Court, relevant documents are not admitted

remand may be ordered under S 151 if necessary to reet ands of justice [Sec (1667) 8 Suth W R 276 (277) Purty probably misled by the action of the Court into not giving evidence fully -Case may to remanded]

[See also (1911) 10 Ind Cas 675 (6"6) (Mad) When ground on which in appellate Court declares a document admissible has arisen subsequently to disposal of the suit by lower Court, order of remand may be made under O 41, R 23 or 33 of the

C P C of 1908 ] 2. (1874) 22 Suth W R 296 (296). it, to decide the case, it may remand the case for re-trial after taking fresh evidence 3

14 Basing decision on inadmissible evidence

Where the lower Court's judgment is vitiated by the admission of inadmissible evidence, the case may be remanded for re-trial under the inherent power of the Court 1 But a remand is not necessary if the finding of the lower Court is amply supported by the other evidence in the case 2

15 New plea is not a ground of remand

As a general rule, a remand cannot be ordered to enable a new plea raised for the first time in appeal, to be tried 1 (See Notes under O 41, Rt 1 and 2) But this may be done in exceptional cases 2

16 Remand in cases under special and local laws See the undermentioned cases 1

17 Remand in appeal from ex parte decree.

See S 96, Note 12 points 12, 13 and 14 and the following decisions 1

18 Remand in appeal from order refusing to set aside ex parte decree

Where an application to set aside an ex parte decree is dismissed on the preliminary ground that there was no want of 'appearance' on the part of the defendant and the question of 'sufficient cause" for non-appearance

(1918) 1918 All 875 (376) Trial Court & fusing to grant time for the produc tion of certified copies-Appellate Court may remand (1874) 12 Suth W R 317 (318)

(1J11) 12 Ind Cas 684 (686) (Cal) Trial Court refusing to summon witnesses -Case may be remanded

examined ] 3 (1930) 1930 Pat 7 (13) (1927) 1927 Nag 192 (192)

[But see (1918) 1918 P C 3 (4) 45 (al 748 45 Ind App 94 (P C) 1 Note 14

1 (1920) 1920 Pat 726 (726) (1874) 21 Suth W R 257 (257) 2 (1)24) 1924 Cal 370 (371)

Note 15

(1901) 4 Oudh Cas 261 (263) (1898) 1 Oadh Cas 172 (174) Note 17

(1965) 27 \11 167 (168 169) (1894) 16 All 375 (878 879)

(1889) 11 All 31 (32)

Cases holding that the appellate Court has inherent power of remand in such

(Mad) Quaere - Whether such

power exists? (1923) 1923 All 287 (290) 45 All 311 Appel

late Court reversing ex parte de ree

Note 16

Cases un ler Agra Tenancy let -

decree) Cases holding that there is no lower of remand in such cases -(1900) 23 Mad 260 (261) (1683) 17 Bom 783 (784)

CCT 28 All 253 (265) (1 O() as VII 63 (54)

was therefore not gone unto by the lower Court, the appellate Court, on O reversing the decision of the lower Court on the prehimnary point, can remand only the application to set aside the ex parte deeree and cannot remand the sait itself for re-trial 1 But where the lower Court has refused an application to set aside an ex parte decree on the merits, there is no disposal on a preliminary point and the appellate Court cannot remand the application to the lower Court 2

The ap, cliate Court in an appeal from an order rejecting an application for setting aside an ex parte order can treat the appeal as one from the ex parte decree itself and decide the whole case finally 3

#### 19 Remand by consent

A case may be remanded with the consent of parties though a remand may not be permissible otherwise 1 Thus a case may be remanded on the agreement of parties for trial on issues not raised in the memorandum of appeal 2

### 20 Remand in second appeal

O 41. R 23 applies also to second appeals (See S 108 and O 42, R 1) Hence, where a first appeal has been disposed of on a preliminary point the High Court may, in second appeal, remand the case if it reverses the decision on the preliminary point or it may itself dispose of the appeal 2 But even if a case has not been disposed of on a preliminary point, the High Court in second appeal may remand the case in the exercise of its inherent power to prevent the ends of justice from being defeated 3 (See Note 10.

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Note 18.
1 (1901) 28 All 220 (226) 28 Ind App 28 (P C)
2 (1908) 7 Cal L Jour 379 (380)
3 (1926) 1926 Cal 1232 (1233)
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Note 19 1 (1914) 1914 Mad 15 (15)

(1915) 1014 Mad 15 (15) (1905) 12 Cal W N 5-90 (See also (1909) 2 Ind Cas 405 (46s) 26 Cal 833 36 Ind App 21 (PC) Additional evidence by consent of parties — They cannot sub-equently

complain about it]
2 (1907) 30 Mad 510 (513)

Note 20

1 (1882) 9 A11 29n (91) (1869) 11 Suth W R 228 (229) (1887) 1887 Pun Re No 98 page 225 (1910) 5 Ind Cas 701 (703) 6 Nag L R

(1916) 1916 Oudh 257 (263) (See also (1931) 1931 Cal 353 (355) Lower appellate Court deciding appeal

on preliminary soint should decide

Louer aprellate Court acting in excess of its pouers

(1865) 3 Bom H C R A C 60 (62) District . Judge reversing Munsile decree but failing to pass decree in favour of successful appellant - High Court remanding to District Judge for

passing decree-District Judge (successor of former one) going into the merits and deciding case against the appellant—High Court again reversed this decree and remanded the case to District Judge to pass judgment in favour of appellant [But see [1867] 8 Suth W R 503

Louer Court misappreciating true controversy between the parties .

(1875) 23 Suth W R 166 (167) Lower Court not examining evidence with reference to the right issues in the case-Case remanded

(1927) 1927 Lah 480 (480 481) Case decided with reference to irrelevant issues-Case remanded

(1923) 1923 Lah 206 (207) Lower Court mis apprenating true controversy in the case-Case remanded

(1921) 1921 All 335 (335) Lower Court misunderstanding the nature of the

case-Case remanded Failure to decide material issues-Case may be remanded -

(1866) 6 Suth W R 262 (265) (1926) 1926 Lah 351 (352) (1923) 1923 Lah 308 (308) (1920) 1920 Pat 642 (643)

(1906) 4 Cal L Jour S6 (87) (1870) 25 Suth W R 110 (141) [See also (1876) 25 Suth W R 25 (26)]

Decisio i tased on an incorrect ricio of the law applicable-Care rer anded -(1931) 1931 Mad 577 (579)

3, supra) But generally speaking, a case will not be remanded for re-hearing on an issue raised for the first time in second appeal 4 Further, unless it is absolutely necessary in the interests of justice, to remand a case, a remand will not be ordered under the inherent power of the Court 5 (See Note 10 supra )

Moreover, the powers of the High Court in second appeal are carcumscribed by the provisions of S 100, and hence the High Court cannot in second appeal reverse a finding of fact of the lower appellate Court, however erroneous it may be, and cannot remand a case on the basis of such reversal, unless the finding is vitiated by any such illegalty or defect as is mentioned in S 100 6 It should also be noted that the power of the High Court to decide questions of fact from the materials on record bave been considerably extended by S 103 and the amendments to that sect on made by Act VI of 1926, and the High Court may itself decide such questions where it is in a position to do so sat sfactorily from the mater als on the record For further information see 5 103 and the notes thereto and also the follow ng cases ?

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(1908) 11 Oudh Cas 264 (266) Improper admission of evidence-Case may be remanded (1927) 1927 Lah 45 (45)

(1916) 1916 Cal 691 (692) Improper exclusion of evidence-Case may be remanded -

May 08 78 manaca — (1919) 1919 Cal 902 (903) (1917) 1917 Cal 78 (79) (1895) 17 All 2J (31 32) (1874) 22 Suth W R 2J6 (296)

Lower appellate Court not complying with the provisions of O 41 R 31-Case

may be remanded .

(1589) 1880 All W N 178 (179) (1888) 1889 All W N 61 (62)

(1887) 9 All 26 (83)

(1896) 1896 All W N 295 (285 286) (1896) 1898 All W N 171 (171 172) (1894) 1894 All W N 29 (99) (1917) 1917 Cal 233 (294) (1909) 35 Cal 813 (816)

1908) 81 Mad 46J (470 471) (F B)

(1916) 1916 Pat 262 (264) 2 Pat L Jour 8 Miscellaneous -(1904) 8 Cal W N 830 Case decided without

grapp opportunity to prove case-

- Case remanded (1923) 1923 Pat 174 (175) Lower appellate Court not deciding point with refer

ence to the evidence bearing upon

the point but with reference to the pleadings-Case may be remanded by the High Court (1886) 12 Cal 93 (95) Finding based on no

evidence-Case may be remanded (1918) 1918 Cal 282 (283) Lower appellate Court not realising the legal effect of admission by the pleader of a

party-Case to be remanded. (1894) 1891 111 W N 19 (19) Appeal disposed of on advanced date without notice to st and will not remand the for reconsideration by it] [See also (1922) 1922 Oudh 268 (269)

6 (1922) 1922 Pat 575 (577) 1 Pat 689 Where issue has been determined no remand mercly because the usue was

cannot determine it itself but remand the

(1806) 23 Cul 170 (185 186) (1881) 7 Cal 2J3 (296)

(1921) 1921 Pat 61 (63) 5 Pat L Jour 410 Einding of fact by lower appellate Court

tritaled by ellegality within the meaning of S 100-Cases after tel VI of 1926 shound that the High Court itself can determine question without a remand of the moterials 21 Appeal against an order of remand under this Rule.

O 43, R 1 (u) gives a right of appeal against an order of remand under this rule if an appeal would be from the decree of the appellate Court 1 An appeal w.ll. therefore, he from an order of remand only in those cases in which an appeal would be against the decree, if the appellate Court, instead of making an order of remand, passed a decree on the strength of the adjud.cation on which the order of remand was based. The test is whether, in the circumstances, an appeal would be if the order of remand were itself treated as a decree and not a mere order 2 Thus no appeal lies against an order of remand in a sull of a small cause nature whose value does not exceed Rs 500,3 as a second appeal would be barred by S 102 if the order of remand were treated as a decree Similarly, an appeal against an order of remand is only maintainable on a question of law 4

on the record are sufficient -(1931) 1931 Cal 123 (131 131) (1930) 19.0 Cal 235 (235)

#### Note 21

(192J) 1J29 Cal 6°6 (63J) 1 (1325) 1325 Mad 483 (2) (484)

> (See (1921) 1921 Lib 154 (155) 2 Lah 252 Court of appeal confirming dismissal of a suit as lo a part and

R 25 but by a clerical mistake R 25 quoted-Order is appealable] (1902) 6 Cal W N 3.6 (327) Remand under R 23—Appeal lies though the order is informal in that the decree of the lower Court is not formally declared sa set asido (boe also (1912) 16 Ind Cas 834 (834) (Lab) ] (But see (1913) 18 Ind Cas 525 (526) (All) Where party appealing accep-ted compensation for order of romand

(Ondh) Order made variually under

teing made, appost is not maintain able No appeal lies under O 43 R 1 (u) if the order of res and is not one under O 41

R 23-See the following cases - (1912) 15 Ind Cas 367 (368) (Wad)

(1926) 92 11 d Cas 1015 (Mad)

(1926) 1926 Pat 514 (515) (1926) 1926 Mad 695 (694)

(1932) 1932 Lah 538 (52J) 1 pellate Court remai ding suit to Court of proper pecunitry jurisdiction - Held. the

remand is not under this Rule (1909) 2 Ind Cas 572 (572) 36 Cul 510 Order of remaid by special Judge exercising powers under S 109 4 of the lengal Tenancy Act-Not ap-

pealable 2 (1922) 1922 Lah 178 (181) 3 Lah 218 (FB) (1914) 1914 Lah 328 (329 330) 1914 Pun Re No 85

(1910) 8 Ind Cas 1157 (1157) 1910 Pun Re

No 101 (1913) 20 Ind Cas 788 (789) (Lab) (1914) 1914 Lah 503 (510) 1915 Pun Re

No 8 (1930) 1936 All 122 (123)

The trete taken in (1911) 11 Ind Cas 315 (316) 1911 I un Re No 50 that an appeal would be only if it could be stated with would be only 11 to could be search using certainty that the direct which the appel late Court would have passed if it had decided the appeal on the ments would be appealable was overruled in (1922) 1922 Lab 178

(See also (1923) 1923 Lah 535 (536) No special appeal in Punjab against order of remand if it was based on

finding as to custom] 3 (1921) 1921 All 55 (55) 43 All 408 (1916) 1919 All 6 (6) 42 All 200 (1916) 1918 All 125 (125)

(1918) 21 Ind Cas 638 (638) (All) (1916) 1916 Cal 581 (581)

(See (1010) 8 1nd Cas 162 (162) 84 Mad 502 Suit for mesne profits not being of small cause nature order of remand in such a suit is appealable]

Section 558 Cl (28) (corresponding to 0 43 R 1) of the former Gode did not contain the condition as to an appeal teing open from the decree Hence it was held in the following cases that S 580 (now S 102) was no bar to an appeal from an order of remand though it would have bar-

(1909) 3 Ind Cas 283 (284) (Mad) (1914) 1914 Lah 328 (331) 1914 Pun Ra No. 85

S 104 sub-S (2) bars a second appeal from an order passed in an appeal from an order under S 104 or O 43. R 1 Hence, where an order of remand is made in an appeal against an order under O 43, R 1 no further appeal is competent 5

Can an order of remand be appealed from after it has been carried out and the lower Court has decided the suit on the ments in accordance with the order of remand? On this question there is a conflict of decisions. The High Courts of Allahabads and Rangoon,62 the Chief Court of Punjab7 and the Judicial Commissioner's Courts of Nagpurs and Oudhs have held that an appeal is not barred under such circumstances and that if the order of remand is set aside in appeal the proceedings based on the order of remand fall to the ground This view proceeds on the ground that there is nothing in the Code to limit the right of appeal against an order of remand under such circumstances On the other hand, the Calcutta High Court has held that an appeal against an order of remand must be filed before the lower Court has decided the suit on the ments in accordance with the order of remand 10 The reason

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(1919) 1919 Lah 202 (292)
                           1918 Pun Ra
      No 109
(1914) 1914 Lah 509 (509)
                           1915 Pun Re
      No 8
      (Contra (1910) 8 Ind Cas 246 (216)
      (Lah) ]
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keen under the former Code S 583 Ol (28) (now O 43 R 1(u) which did not contain the conditio : at to an appeal being compelent from the decree of the appellate Court it was held in the following cases that questions of fact could not be re open as an an appeal from a norder of remand the reaso i given being that such an appeal was a second appeal -(1898) 20 All 42 (45) (1893) 15 All 413 (414)

(1882) S Cal 674 (675) (1896) 19 Mad 422 (424) But in some cases it was held that ques

tions of fact might be re opened in an ap neal from an order of remand as it was not a second appeal from a decree -(1922) 1922 Lah 178 (181) 3 Lah 218 (See

observations of Shadi Lat C J ] 5 (1907) 1907 Pun Re No 120 page 547 (1896) 19 Mad 167 (168)

[See also (1906) 3 Alt L J 119 (123) Order refusing review-Appeal-Re mand in--Held that no appeal being competent from orders refusing re view the appeal was not one under 8 588 and hence the bar et the second para of S 588]

Appeal under O 48 R 1 (a) against an 10rther

ın Ro

(t899) 21 Atl 291 (292) Some of the decisions above cited will show that the law in this respect was the same under the former Gods also -

6 (1908) 30 All 470 (482) (F B)

fore the remand order had been carried out by the toner Court] The follo ung decisions to the contrary should be regarded as overruled by the Full Bench decision already cited -(1892) 1892 All W N 53 (53) (1881) 1884 All W N 5 (5) (1908) 30 All 191 (192) (1907) 29 All 659 (660) (1881) 1881 All W N 174 (171) Ga (1933) 1933 Rang 413 (415) 7 (1902) 1902 Pau Re No 37 page 139 (1900) 1900 Pun L R page 314 (1891) 1991 Pun Re No 89 page 431 (1887) 1837 Puu Re No 65 page 135

co strary -(1634) 1834 Pun Re Vo 129 (1886) 1886 Pun Re No 117 (1886) 1856 Pun Re No 83 8 Nag L R 42 8 (1912) 14 Ind Cas 672 (678)

(1887) 1887 I un Re No 40 page 86

But see the following decisions to the

9 (1912) 15 Ind C ts 191 (191) 15 Oudh C1143. (1912) 15 Ind Cas 131 (182) 15 Oudh Cas

No 119 (1926) 1376 Mad 900 (900)

App al un ler O 43 It 1 (1)-Remand-

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given is that an appeal against an interlocutory order cannot be filed after the decree in the case has been passed.

An appeal Les as to an order regarding costs in an order of remand it (See also the undermentioned case 12)

An appeal against an order of remand should be filed as a miscellaneous appeal and not as second appeal 13

22 Appeal from order of remand under inherent power

T.

O 43, R 1 (a) gives a right of appeal only against an order of remand under O 41, R 23 Hence, there is no right of appeal against an order of remand under the inherent power of the Court 1 But the right of appeal under O 43, R 1 (u) is not confined to cases which properly come within the scope of O 41, R 23 but extends also to cases in which the order of remand purports to be under Rule 23 although in reality the circumstances urder which the order is pas ed may not fall within the purview of that rule 2

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11 (1--9) 15-9 Pup Re No 89
12 ( ^2) 1032 All 16 (17) Ordinard in in
               arreal from an order of remand ap
               rellate Court would not modify
                rder without first a sung notice t
                the offo ite parts But if the re
               mand order has been modified with
              cut notice to the other puts
the order modifying the remand
order though irregular is not ultra
                tires and without jury diction
13 (1933) 1903 Oudh 191 (192) S Luck 876
 Note 22
1 (1921) 63 Ind Cas 858 (555) (411)
(1933) 1935 Pat 43 (51) Remand order
                under inherent power would be ap
                perlable only if order amounts to a
                decree
      (193.) 1934 Pat 97 (98)
      (192s) 1929 Cal 305 (305)
(1921) 1927 Cal 642 (644)
      (1020) 10.0 Cal 124 (124)
(1974) 1864 Suth W R Mis 39 (40)
     (1932) 1932 Lah 311 (311)
(1932) 1932 Lah 219 (220)
(1931) 1931 Lah 202 (802)
      (1920) 1920 Pat 788 (789)
     (1920) 1920 FAL 199 (100)
(1924) 1924 Lah 487 (487)
(1924) 1924 Lah 285 (246)
(1910) 6 Ind Cas 491 (492) (Lah)
(1931) 1931 Mad 1 (2)
(1929) 1929 Mad 209 (207, 203)
(1928) 1928 Mad 031 (992)
(1928) 1928 Mad (1987)
      (1928) 1928 Mad 984 (985)
      (1927) 1927 Vad 859 (860)
      (1927) 1927 Mad 335 (336)
(1926) 1926 Mad 1965 (1966)
      (1926) 92 Ind Cas 1045 (Mad)
      (1925) 1925 Mad 229 (229) 48 Mad 713
(1922) 1922 Mad 112 (113) 45 Mad 449
(1921) 1921 Mad 716 (716)
(1920) 1920 Mad 759 (760)
(1920) 1920 Mad 88 (90)
                                                                               2 (1922) 1922 411 254 (256) 44 4lt 176
(1935) 1935 Cal 134 (186) Although re-
      (1920) 1920 Mad 898 (899)
(1929) 1929 Nag 63 (63) 26 Nag L R 44
      (1929) 1923 Oudh 177 (179) 25 Oudh Cas
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(1917) 1917 Pat 100 (101) 3 Pet L Jour
         99 Lower Court d smissing suit for
        possession-Appellate Court revers
          35.1.1
         sion by metes and bounds-No appeal
 (1913) 20 Ind Cas 145 (145) 30 All 427
         Order of dismissal of suit for non
         appearance of parties - Order set
aside by appellate Court - First
Court directed to hear the case-No
        appeal hes against the order
[See (1935) 1935 Lah 161 (161) Appellate Court setting aside lower
Courts order and remanding suit to
        lower Court with issue re framed
         with directions to take additional
        evidence if required-Order is illegal
        and 1, not appealable - But High
         Court can set it aside in exercise of
         rovisionat power
     But the Allahabad High Court has
ariendel O 43 R 1 (u) so as to allow an
appeal even when the remand is not under
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(See also the new R 23 substituted by the Madras High Court ]

mand not strictly under O 41.

(19.0) 1930 Alt 122 (123)

R 23 appeal hes

(1927) 1927 Cat 642 (644)

(1925) 1925 Cal 1258 (1259) (1925) 1925 C il 716 (717, 718) . 52 Cal 783

(t927) 1927 Pat 296 (297) 6 Pat 350 (t926) 1926 Pat 516 (o16)

(1920) 1920 Pat 666 (666) (1919) 1918 Pat 500 (500) S Pat L Jour

(t925) 1925 R mg 820 (320) 3 Rang 490 (t924) 1924 Rang 177 (177) 1 Rang 656

See also the following cases

This view proceeds on the reasoning that the right of appeal depends on what the Court purports to have done and not on what it ought to have done 22 It has been held in the undermentioned cases3 that where the order appealed from 15 silent as to whether 1t was passed under S 151 or under this rule, it should be held to have been passed under this rule and not under S 151 even though the circumstances of the case do not bring it within the scope of this rule. The reasoning on which these cases proceed is this An order of remand can be passed under the Court's inherent power only in exceptional cases Therefore where the Court intends to remand a case under its inherent power it may be expected to show in its order that it considers the case to be of an exceptional nature and that it therefore applies the provisions of S 151 Where this is not done the order may be presumed to have been passed as under O 41, R 23 and not under S 151 If such a presumption is not to be made, many an illegal order of remand would be incapable of being appealed against. It is submitted that this reasoning is not correct It involves a presumption that the appellate Court illegally applied the provisions of Rule 23 to a case to which it does not apply when it was legally open to it to achieve its object by applying S 151 The Madras

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(1922) 1922 Cut 456 (457)

(1922) 1922 Cut 270 (279)

(1920) 1920 Cut 124 (125)

(1920) 1920 Cut 124 (125)

(1930) 1930 Cut 124 (125)

(1930) 1930 Luh 291 (222)

(1921) 1930 Luh 276 (377)

(1928) 1928 Luh 745 (753)

(1928) 1928 Luh 110 (116)

(1928) 1928 Luh 110 (116)

(1928) 1928 Cut 1250 (1200)
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But according to some elections the girst ton of appel must depend on whell or the conditions laid down in 0 41 H 28 have been complied with and not on whether the appellate Court purported to act or did not purport to act under B 23—See the follow ing cases— (1927) 1927 Cal 850 (852 863) 55 Cal 219

| 1927 Cal 830 (832 833) 53 Cal 215 | Remarks were obster in this case | [See also observations in (1927) 1927 | Cal 642 (643 644) 7

C31 042 (043 044) }

(1927) 1927 Mad 1193 (1190) Remand is not under R 23 though the appellate Courtiefers to the Rule in the judg ment if R 23 does not really apply to the case

(See also (1008) 5 All L J 515 (546)
Partition suit—Remand not for de a son on ments but for partition by metes and bounds — Order wrongly described as one under S 562— hp peal must be as from a decree and not as from an order of remand and should be'r stamp as an appeal from a decree of the decree of the second second to the second sec

(1908) 1908 Pun Re No 33 page 212 (1892) 1892 Pun Re No 6 page 25

One of the tests usually relied on for letern ning ulether the order of resiant was vitented to be made under R 23 is to

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see whether the Court fee nas ordered to
be refunded because under 813 of Court
fees Act an order for the refund of Court
fee ca: be passed only in the case of a re
mand under R 23—See the following
cases—
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(1925) 1925 Cal 716 (717 718) (1928) 1928 Lah 116 (116)

(1926) 1926 Lah 537 (538) [See (1932) 1982 Lah 311 (811) Refusal to order refund of Courties indicates that remand is not under R 23]

Lut see (1929) 1929 Lah 175 (176) Vere omission to order refund of Court fee does not necessarily indicate interior not to make the order under O 41 R 23]

(1932) 1932 Lah 219 (220) In this case it was held that the mere fact that refund of Court fee was ordered is not proof that remaind was under R 23 as refund of Court fee can be ordered even if the remaind is under the tendered to the remaind is under the tendered to explose the expression of S 13 of the Court fees act.

2a [See (1932) 1933 Luh 311 (311) Remand made under S 151—No appeal hes though it might have been validly

made under O 41 R 23) 3 (1922) 1922 411 2,4 (256) 44 411 1 6

3 (1922) 1922 111 254 (256) 44 111 1 (1927) 1927 Cal 401 (402)

(1)28) 1928 Lah 753 (703)
Appellate Court not mentioning the fro

(1928) 1923 Lah 116 (116)

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given is that an appeal against an interlocutory order cannot be filed after the decree in the case has been passed

An appeal hes as to an order regarding costs in an order of remand it (See also the undermentioned case 12)

An appeal against an order of remand should be filed as a  $\it muscellaneous$  appeal and not as second appeal  $^{13}$ 

## 22 Appeal from order of remand under inherent power

O 43, R 1 (u) gives a right of appeal only against an order of remand under O 41 R 23 Hence, there is no right of appeal against an order of remand under the inherent power of the Court 1 But the right of appeal under O 43, R 1 (u) is not confined to cases which properly come within the scope of O 41, R 23 but ovtends also to cases in which the order of remand purports to be under Rule 23 although in reality the circumstances under which the order is passed may not fall within the purview of that rule 2

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11 (15.3) 15.9 Pun Re No 53
12. (1J32) 1032 All 16 (17) Ordinarily in an
             appeal from in order of remand ap
             reilate Cut would not modife
             rder without first 1 mg 1 office to
the opposite party But if the re-
                                            ng 1 office to
             m nd order has been modified with
             out notice to the other part
the order modifying the remand
             order though irregular is not ultra
tires and without jurisdiction
13 (1993) 1983 Oudh 101 (197) 8 Luca 876
                         Note 22
 1 (1921) 63 Ind Cas 858 (858) (411)
    (1930) 1935 Pat 49 (51) Remand ord e
             pealable only if order amount to a decree
    (1984) 1984 Pat 97 (98)
(1929) 1928 Cal "05 (30a)
     (197") 192" Cal 642 (644)
    (1970) 1920 Cal 124 (194)
(1564) 1864 Suth W B Mis 39 (40)
    (1992) 1993 Lah 311 (311)
(1992) 1992 Lah 219 (220)
(1991) 1932 Lah 202 (762)
(1990) 1970 Pat "48 (739)
(1924) 1924 Lah 487 (487)
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sion by metes and bounds—Noappeal (1912) 20 Ind Cas 145 (115) 28 All 427 Order of distinst-1 of suit for non appearance of lattice—Order second control of the second control of
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[See also the new R 23 substituted by the Midras High Court ]

52 Cal 793.

(19.0) 19.0 411 122 (123)

2 (1922) 1972 All 254 (756) 44 All 176 (1935) 1935 Cal 184 (186) Although re mand not strictly under O 41,

R 23 al peal hes (1927) 1927 Cal 642 (644) (1925) 1925 Cal 1258 (1259)

(1925) 192, Cal 716 (717, 718)

(1927) 1927 Pat 296 (297) 6 Pat 380

(1920) 1920 Pat 666 (666) (1918) 1918 Pat 505 (505) 3 Pat L Jour

possession-Appellate Court revers

ing and remanding for ascertainment of mesne profits—No appeal lies (1903) 5 All L J 545 (546) Partition suit—

Appellate Court remauding suit not

for decision on merits but for divi

I 1 at 100 (101) 3 Pat L Jour Lower Court diamissing suit for

(19°a) 1925 Rang 320 (320) 3 Rang 400 (19°4) 1924 Rang 177 (177) 1 Rang 656

See also the follor ing cases -(191") 1917 I at 100 (101) 8 P

(1976) 1926 Pat 516 (516)

(1974) 1974 Lah 245 (246) (1910) 6 Ind Cas 491 (492) (Lah)

(1926) 92 Ind Cas 1045 (Mad)

(1921) 1921 Mad 716 (716) (1920) 1920 Mad 759 (760) (1920) 1920 Mad 88 (90)

(1970) 1920 Mad 898 (899)

(1975) 1925 Mad 229 (229) 49 Mad 713 (1972) 1922 Mad 112 (118) 45 Mad 449

{1929} 1929 Nag 63 (63) 26 Nag L R 11 {1923} 1923 Oudh 177 (179) ... Oudh C ...

(19°1) 1931 Mad 1 (2) (1923) 19°9 Mad 205 (°207 208) (1928) 19°8 Mad 991 (992) (1928) 1928 Mad 984 (985) (1927) 1927 Mad 859 (860) (1927) 1927 Mad 358 (876) (1927) 1926 Mad 1005 (1066) This view proceeds on the reasoning that the right of appeal depends on what the Court purports to have done and not on what it ought to have done 2a It has been held in the undermentioned cases that where the order appealed from is silent as to whether it was passed under S 151 or under this rule, it should be held to have been passed under this rule and not under S 151 even though the carcumstances of the case do not bring it within the scope of this rule. The reasoning on which these cases proceed is this. An order of remand can be passed under the Court's inherent power only in exceptional cases Therefore where the Court intends to remand a case under its inherent power it may be expected to show in its order that it considers the case to be of an exceptional nature and that it therefore applies the provisions of S 151 Where this is not done the order may be presumed to have been passed as under O 41, R 23 and not under S 151 If such a presumption is not to be made, many an illegal order of remand would be incapable of being appealed against. It is submitted that this reasoning is not correct It involves a presumption that the appellate Court illegally applied the provisions of Rule 23 to a case to which it does not apply when it was legally open to it to achieve its object by applying S 151 The Madras

(1922) 1922 Cal 456 (457) (1922) 1922 Cal 279 (279) (1920) 1920 Cal 124 (125) (1920) 1920 Cal 569 (570) (1930) 1930 Lah 221 (222) (1923) 1929 Lah 376 (377) (1928) 1928 Lah 753 (753) (1928) 1928 Lah 841 (341) (1928) 1928 Lah 116 (116) (1926) 1926 Lah 537 (538) (1928) 1928 \land 1200 (1200)

But according to some decisions the ques tion of appeal must depend on whether the conditions laid down in O 41, R 23 have been complied with and not on, whether the appellate Court purported to act or did not pur port to act under R 23-See the follow ing cases -(1927) 1927 Cal 850 (852, 853) 55 Cal 219

Remarks were obster in this case [See also obsert tions in (1927) 1927

Cal 642 (643 644) 1

(1927) 1927 Mad 1193 (1190) Remand is not under R 23 though the appellate Court refers to the Rule in the judg ment, if R 23 does not really apply to the case

[See also (1908) 5 411 L. J 545 (546) Partition suit-Remand not for de-1 sion on merits but for partition by metes and bounds - Order wrongly described as one under S 562 - Ap peal must be as from a decree and not as from an order of remand and should bear stamp as an appeal from 4 decree ]

(1908) 1908 Pun Re No 38, page 212 (1802) 1802 Pun Re No 6 page 25

One of the tests usually relied on for determining whether the order of remand was intended to be made under It 23 is to see whether the Court fee nas ordered to be refunded, because under S 13 of Court fees Act an order for the refund of Court fee can be passed only in the case of a re mand under R 23-See the following cases -

(1925) 1925 Cal 716 (717 718)

(1928) 1928 Lah 116 (116) (1926) 1926 Lah 587 (538)

[See (1932) 1932 Lih 311 (311) fusal to order retund of Court fee indicates that remand is not under (But see (1929) 1929 Lah 175 (176) Mere omission to order refund of

Court fee does not necessarily and cate intention not to make the order under O 41, R 23] (1932) 1932 Lah 219 (220) In this case it

was held that the mere fact that refund of Court fee was ordered is not proof that remand was under R 23 as refund of Court fee can be ordered even if the remand is under inherent power This view, it is submitted overlooks the express pro-visions of S 18 of the Court fees

21 [See (1932) 1932 Lah 311 (311) Remand made under S 151-No appeal hes though it might have been validly

made under O 41, R 23] 3 (1922) 1922 All 254 (256) 44 All 176

(1927) 1927 Cal 401 (402)

have been made, the onus is on the appellant to satisfy the Court that the order complained against is an order falling within the purview of this Rule 42 Where several issues were left undecided in the first Court, the disposal of the case must be held to have been on a preliminary point and the order of remand consequently to be under this Rule 45 Where an order of remand under the Court's inherent powers amounts to an adjudication under S 2, sub-S (2), it will be appealable as a decree under S 965 (See also S 151, Note 9) As to whether an appeal hes from an order of remand under the Court's inherent powers, by vartue of the amendment in Oudh of O 43, R 1 (u), see the cases cited below 8

## 22a Order of remand-When will amount to decree

See S 2 (2) Note 6 and the cases cited therein and also undermentioned cases 1

### 23 Letters Patent Appeal

An order of remand by a Single Judge of the High Court is a within the meaning of CI 15 of the Letters Patent and is appealable as such 1 (See also for fuller information S 104 Note 6)

## 24 Privy Council Appeal

See S 109 Note 4 and the undermentioned cases 1

(1925) 1925 Cal 1157 (1159)

4 (1920) 1940 Mad 898 (890) 53 Ind Cas 417

(413)

4a (1933) 1933 Sand 279 (200) (F E) 4b (1934) 1934 Mad 643 (643)

power - Appeal from - Maintaina bility-Ten is whether decree of Court of first instance is set aside or not-Where decise is not expressly

rights of parties as to the matter in controversy it will not be a decree-See the

follouing cases -(1926) 1326 Pat 457 (409) Dissenting from 1920 Pat 738

(1927) 1927 Oal 850 (851) 55 C at 219

(1929) 1929 Nag 63 (63) 26 Nag L R 44

6 (1930) 1930 Oudh 366 (368) (1935) 1935 Oudh 333 (334) Order of remand under inherent powers is appealable

But order under R 25 infra is
not order of remand and is not ap pealable

Note 22a 1 (1934) 1934 Pat 13 (14) Older of remand not deciding rights of parties- Yot a dauree

(1935) 1935 Pat 49 (51)

Note 23 Pemand under O 41 R 23 - (1909) 4 Ind Cas 329 (330) (Cal) (1933) 1933 All 262 (268 264)

(1909) 35 Cal 1096 (1098) (1905) 55 Cal 1006 (1905)

Remand under subteent joner (1899) 21 All 178 (180)
(1918) 1918 Pat 650 (082) 2 Pat L Jour 663
(1922) 1922 Pat 384 (385) 1 Pat 246 Distinguishing 1920 Pat 85

Note 24

1 Order of semand is not final order "
nithin S 100 unless it decides some cardinal

essue in the case -

3 AU U A U OU 1011

3.

25 Powers of High Court in appeal from order of remand

In an appeal from an order of remand under this rule the High Court may not only consider whether the lower appellate Court's order satisfies the requirements of this rule but may also enter mito the ments of the decision of the first Court on the preluminary point and if possible, may dispose of the case itself is Similarly, in an appeal from an order of remand purporting to be under Rule 23 (though that rule did not apply to the case), the High Court may enter into the ments of the lower Court's decision in respect of which the order of remand was made and may either dispose of the case utself or remand it to the lower appellate Court according to the necessutes of the case. But the High Court has no power in an appeal from an order of remand, to go into any questions unconnected with the correctness of the order of remand.

26 To what Court remand could be made

Ordinarly the case should be remanded to the Court from whose decree
the appeal is preferred and to no other Court, But if the sppellate Court has
power to transfer a case from one Court to another there is nothing illegal
in remanding the case to a Court to which the case could have been transferered? But a remand cannot be made to a person who has no jurisdiction to
decide the case 3 (See also Note 30, infra and 8, 24, ante).

27 Effect of order of remand

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An order of remand implies a reversal of the decision of the lower

instead of remitting issues — High Court cannot deal with it as if it can lower the

(See also (1898) 21 Mad 234 (236)

Order of High Court on appeal from the order of remand, soling saids the order of remand, being merely of an interlocutory kind cannot have the effect of rer judicata upon any point that may be urged in appeal on the merits!

Note 26

Failure in a marked manner to do justice bet ween the parlies—Case was sent to

ness of the decision on the preliminary point is, in second appeal if any preferred from the decree after remand — (Subramania Ayyar, J,

as 33

3 (1835) 7 All 136 (139 140) Lower appel

3 (1933) 1933 Mad 471 (475)

have been made, the onus is on the appellant to satisfy the Court that the order complained against is an order falling within the purview of this Rule 4 Where several issues were left undecided in the first Court, the disposal of the case must be held to have been on a preliminary point and the order of remand consequently to be under this Rule 4b Where an order of remand under the Court's inherent powers amounts to an adjudication under S 2 sub-S (2), it will be appealable as a decree under S 965 (See also S 151, Note 9) As to whether an appeal lies from an order of remand under the

High Court has in the case cited below,4 refused to make any such presumption It has also been held by the Judicial Commissioner's Court of Sind that when the order of remand is silent as to the rule under which it purports to

(4), see the cases cited below 6

22a Order of remand-When will amount to decree See S 2 (2) Note 6 and the cases cited therein and also undermentioned cases 1

Court's inherent powers, by vartue of the amendment in Oudh of O 43, R 1

23 Letters Patent Appeal

An order of remand by a Single Judge of the High Court is a "judgment' within the meaning of Cl 15 of the Letters Patent and is appealable as such 1 (See also for fuller information, S 104 Note 6)

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24 Privy Council Appeal
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See S 109, Note 4 and the undermentioned cases 1

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(1925) 1925 Cal 1157 (1158)
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4 (1920) 1940 Mad 899 (899) 53 Ind Cas #17 (419)4a (1988) 1933 Sand 279 (290) (F B)

4b (1934) 1934 Mad 643 (643)

5 (1923) 1923 Cal GOG (607) (1925) 1925 Cal 716 (717 718) 52 Cal 753 (1928) 1929 Cal 218 (219) (1564) 1864 Suth W R O 19 369 (364) (50e also (1924) 1924 Rang 177 (178)

1 Rang Coo Remand under inherent

(1928)

-21

force of a decree and is appealable as

(1922) 1922 Mad 112 (115) 45 Mad 449 Re mand-Rights of parties adjudicated upon-Appeal hes

Where the order does not decide or the rights of parties as to the matter in con troversy it will not be a decree-See the following cases — (1926) 1J26 Pat 457 (459) Dissenting from

1920 Pat 738 (1927) 1927 O d 850 (851) 55 C d 219 (1929) 1929 Nag G3 (63) 26 Nag L R 44

6 (1930) 1930 Oudh 366 (368) (1935) 1935 Oudh 333 (934) Order of remand

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Pemand under O 41 R 23 - (1909) 4 Ind Cas 329 (330) (Cal) (1933) 1933 All 262 (263 264) (1908) 35 Cal 1096 (1095)

perlable

decree (1935) 1935 Pat 49 (51) Note 23

Remand under inherent poner -(1899) 21 All 178 (180) (1918) 1918 Pat 650 (682) 2 Pat L Jour 668 (1922) 1J22 Pat 381 (385) 1 Pat 246 Dis

under anherent powers as appealable -Lut order under R 25 infra 1

not order of remand and is not an

Note 22a

1 (1934) 1334 Pat 18 (14) Order of remand not deciding rights of parties - tot a

270

tinguishing 1920 Pit 86 Note 24

23. 25 Powers of High Court in appeal from order of remand

In an appeal from an order of remand under this rule the High Court may not only consider whether the lower appellate Court's order satisfies the requirements of this rule but may also enter into the ments of the decision of the first Court on the preliminary point and if possible, may dispose of the case itself is Similarly, in an appeal from an order of remand purporting to be under Rule 23 (though that rule did not apply to the case), the High Court may enter into the ments of the lower Court's decision in respect of which the order of remand was made and may either dispose of the case itself or remand it to the lower appellate Court according to the necessities of the case 3 But the High Court has no power in an appeal from an order of remand, to go into any questions unconnected with the correctness of the order of remand 4

26 To what Court remand could be made

Ordinarily the case should he remanded to the Court from whose decree the appeal is preferred and to no other Court <sup>1</sup> But if the appellate Court has power to transfer a case from one Court to another there is nothing illegal in remanding the case to a Court to which the case could have been transferred <sup>2</sup> But a remand cannot be made to a person who has no jurisdiction to decide the case <sup>3</sup> (See also Note 30, intra and \$2.4 antic)

27 Effect of order of remand

An order of remand imphes a reversal of the decision of the lower

Note 25 1 (1881) 3 All 675 (680) (F B) (1880) 13 Bom 14 (17) (1891) 17 Cal 168 (170) (1890) 5 Cal 144 (146) instead of remitting issues — High Court cannot deal with it as it it was first appeal from decrea—It can only rectify the procedure of lower Court and direct it to decide the case itself on the merits

4 (1023) 1928 Mad 430 (432) (1902) 1902 Pun Re No 28 page 111 (See also (1886) 8 All 172 (175 177) Order of lineh Court on a page from

> the effect of resjudicata upon any point that may be urged in appeal on the merits]
>
> Note 26

TOLE T

[See also (1898) 21 Mad 234 (236) Appeal against Order of lower appel late Court returning plaint for prosentation to proper Court — High

> n marked manner to do justice bet ween the parties—Case was sent to another Court

ness of the decision on the preliminary point is, in second appeal if any preferred from the decree after remand — (Subruminia tyvar, J,

ourts been a fle suit

R 115

3 (1885) 7 Ml 126 (130, 140) Lower appel late Court remanding whole case

3 (1933) 1933 Mad 471 (475)

Court<sup>1</sup> and re-opens the whole case for re-trial by the lower Court except in regard to matters decided by the order of remand<sup>2</sup> There is a difference of opinion as to whether where a suit is remainded the lower Court can raise another preliminary point which was not the subject-matter of the appeal, and decide the case thereon According to the High Courts of Allahabad<sup>3</sup> and Bombay<sup>4</sup> it cannot According to these decisions such points might and ought to have been raised before the remaind The High Court of Madras has held that it can <sup>5</sup> The High Court of Calcutta has expressed conflicting views <sup>8</sup> Where a party did not take any part in the proceedings of the lower Court and d.d not appeal against the order of the lower Court, it was held by the High Court of Lahore that he could not, after remand in an appeal by other objections in cruene as an objector on remaind <sup>64</sup>

After a suit has been remanded the appellate Court is not competent to pass any order in it unless and until the case comes before it again in

Note 27 (1809) 12 Suth W R 112(119 113) (1807) 7 Suth W R 396 (394)

(See also (1,32) 1.022 10 255 (355) 15c also 1700; 3 Cd 1 Jour 181 (152) When decree is set aside in a spreal and cree is remanded under this rule the appelling is entitled to restitution of the property taken Consession of in execution of the George as set aside although an appeal has been preferred against the order of remand 1 (See also (15:0) 11 Suth W R 380 (381) Dut enricher on the

(381) But evidence taken on the previous occasion may be considered —See words newly added to the pre ent Rule ]

pre ent Rule ]
2 (18 4) 21 Suth W R 7 (8)
(1910) 1910 Cal 77 (78)
(1925) 1929 Mad 14 (14)
(1565) 10 Suth W R 239 (340)
(1569) 11 Suth W R 227 (227 228) If law

is altered by Tull Bench ruling since the case was remanded the trying Court should take it into consider

(1919) 1919 Mad 1.0 (193) Whole case is the opened even in respect of those who did not appeal [See also (1867 69) 12 Meo Ind App 495 (502 .03) (PC) Remand of whole case cures defects in original trial?

cuse cures defects in original trial ]
(1868) 10 Suth W R 935 (306) A fresh
appeal lies from the decision after
remand

Whole case is re opened—Judge in lower Court can come to conclusions different from those arrived at by himself or I is predecessor previously in respect of mat ters not to iched by order of remand— (1920) 1920 Cat 350 (351)

(1912) 13 Ind Cas 813 (814) 14 Oudh Cas

(1869) 12 Suth W R 112 (112 113) (1932) 1932 Oudh 123 (126)

[See also (1925) 1J25 411 369 (370)

Where at stage of second appeal the case is remainded for decision on a certain issue and the case comes back after termind the parties hiving had full opportunity to meet the case it crained by urgod that the Court should not have allowed a nevicase to be set up.)

notics—Case remanded to Second Class Sub Judge—No plant being in existence suit could not be proceeded with—Plantiff a remedy was by appeal against rejection of plant by First Class Sub Judge ] 3 (1916) 1916 All 213 (21)

[But see (1897) 1897 All W N 108 (109)]

4 (1668 69) 5 Bom H C R (4 C) 137 (138)

(1881) 8 Bom 535 (537)

(1877 78) 2 Bom 120 (130 131) 5 (1922) 1922 Mad 514 (516 517) In this case

it was held that the point could be naised and decided but that the lower Court acted improperly in disposing of the suit on a preliminary point 3, appeal 7 (See also Notes 2 and 30)

## 28 Effect of improper order of remand

Where an order of remand is passed in circumstances which do not warrant it, the defect involved in the order is one of procedure and not of substantive law and comes within the purview of S 99 of the Code But the question arises whether such an order is one affecting the murisdiction of the Court within the meaning of S 99 On this question there is a conflict of opinion According to the High Courts of Bombay1 and Calcutta2 such an order is not one passed without jurisdiction and hence, does not, in itself, affect the jurisdiction of the Court and neither the order of remand nor the subsequent proceedings based thereon can be interfered with unless the decision of the case on the merits or the jurisdiction of the Court in any other respect has been affected But according to the High Courts of Allahabad,3 Madras' and Patna42 such an order of remand is one made without surisdiction, the term 'jurisdiction being understood not in the sense of the power to deal with a certain matter but in the sense of the power to pass a given kind of order in such matter, and therefore the order of remand and the subsequent proceedings based thereon may be set aside although the decision of the case on the merits or the jurisdiction of the Court in any other respect has not been affected

If an appellate Court passes an order of remand in a matter over which it has no jurisdiction, the order is ultra vires 5

As to the effect of setting aside an order of remand, see the following cases 6

## 29 Matters decided by order of remand finality of

Section 105, sub section (2) of the present Code provides that if the agricused by an order of remand from which an appeal lies does not appeal therefrom he cannot subsequently question the correctness of the order of remand (See S 105, Note 8 and the following cases 1) But even apart

7 (1883) 1883 4ll W N 171 (172)
(See also (1932) 1932 P C 146 (150)
(F C) Appellate Court remanding at case for addition of a necessary party and Irial—Before that party to be added as heard, appellate Court should not indicate the order which should be passed by the lower Court 1

Note 25 1 (1890) 14 Lom 232 (235 236)

2 (1923) 1923 Cal 355 (386) (1914) 1914 Cal 163 (164) 20 Ind Cas 39 (40)

41 C4 103 (190) 11 C41 W A S-0 (386) (1907) 5 C41 L Jour 328 (333) (1907) 5 C41 L Jour 407 (1900) 2 C41 L Jour 406 (4J4) (1900) 2 C41 L J4 (333) (1873) 20 Suth W R 184 (1872) 17 Suth W R 465 (466)

(15,0) 13 Suth W R 231 (23.5) (1567) 8 Suth W R 207 (207) (1565) 2 Suth W R 191 (152)

[See however (1836) 12 Cal is (47)] (1565) J Suth W R 31s (610) (1866) 6 Suth W R 47 (4")

(\*\*\*\*)

R 193

(196) ] (1874) 6 N W P H C R 114 (118) (1874) 6 N W P H C R 101 (103) 4 (1908) 32 Mad 93 (85) (1896) 19 Mad 4.9 (441)

(1896) 19 Mad 4:9 (491) (1895) 18 Mad 421 (422) 4a (1920) 1920 Pat 56 (57 85)

5 (1889) 11 411 35 (33 40) (1909) 1 1 Ind Crs 400 (461) (Lah) 6 (1922) 1922 All 35 (37) 44 4ll 211 Remand order—Sot aside—Subsequent pro

ceedings based on it also fall with it
(1J02) 5 Outh Cas 301 (.03) Regard
order set aside—Decree et original
Court is restored—Limitation for
execution tuns from appellate order

Note 29

1 (1920) 1920 آماً 1,3 (191) Order of reman1

Court¹ and re-opens the whole case for re-traal by the lower Court except in regard to matters decided by the order of remand² There is a difference of opinion as to whether where a suit is remanded the lower Court can raise another preliminary point which was not the subject-matter of the appeal, and decide the case thereon. According to the High Courts of Allahabad³ and Bombay⁴ it cannot According to these decisions such points might and ought to have been raised before the remand. The High Court of Madras has held that it can² The High Court of Calcutta has expressed conflicting views 6. Where a party did not take any part in the proceedings of the lower Court and did not appeal against the order of the lower Court, it was held by the High Court of Lahore that he could not, after remand in an appeal by other objectors in ervene as an objector on remand 6.3.

After a suit has been remanded the appellate Court is not competent to pass any order in it unless and until the case comes before it again in

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Note 27
(1869) 12 Suth W R 112 (112 113)
(1867) 7 Suth W R 326 (397)
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(Soc dec (1337) 132 All 333 (355)

[See also (1337) 132 All 333 (355)

[See also (1309) 3 Cut J dour 131

[See also (1309) 3 Cut J dour 131

[See also (1309) 3 Cut J dour 131

appeal and ever the commended under the control of the property taken powers son of in execution of the property taken powers son of in execution of the decree so set ande although an appeal has been preferred against the order of remand J

[See also (1870) 14 Suth W R 250

[331] Dut erdence taken on the previous occasion may be considered —bee worde newly added to the present Rule J

2 (1871) 21 Suth W R 7(e)

2 (1874) 21 Suth W R 7 (8) (1910) 1916 Ca1 77 (78) (1925) 1928 Mad 14 (14) (1868) 10 Suth W R 339 (340)

(1609) 11 Suth W.R. 227 (227, 228) If law is eltered by Full Bench ruling since the case was remanded, the trying Court chould take it into consider stion

(1919) 1919 Mad 150 (153) Whole case is respected even in respect of those who did not appeal (See also (1807 69) 12 Moo Ind App 495 (502 503) (P.C.) Remand of whole

case cures defects in original trial ]
(1868) 10 Suth W R 535 (836) A fresh
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remand

Whole case is re opened—Judge in lower Court can come to conclusions different from those arrived at by himself or his predecessor previously in respect of mat ters not touched by order of remand— (1920) 1920 Cal 350 (351)

(1912) 13 Ind Cas 813 (814) 14 Oudh Cas 321

(1869) 12 Suth W R 112 (112, 113) (1982) 1932 Oudh 123 (126)

[See also (1925) 1925 411 369 (370)

Where at stage of second appeal the case is remained for decision on an ecetam issue and the case comes have farmed the practice having had fall of portunity to much the case is continued beinged flast the case is continued beinged flast the case is continued by the case is continued to be exceed to be set up.

But ere (1916) 2016 Cal 77 (78) A High Court in the excress of its power of supervision under the Charter can exame in certain special remainded to the lower Courts without Length them there can be continued to the case of the case o

notice—Case remanded to Second Class Sub Judge—No plaint being in existence suit could not be proceeded with—Plaintiff a remedy was by appeal against rejection of plaint by First Class Sub Judge ]

3 (1916) 1916 All 213 (215) [But see (1897) 1897 All W N 108 [103] ]

4 (1868 69) 5 Bom H C R (A C) 137 (138)

(1884) 8 Bom 535 (537) (1877 78) 2 Bom 120 (130 131) 5 (1922) 1922 Mad 514 (516 517) In this case

It was held that the point could be rused and decided but that the lower Court acted improperly in disposing of the suit on a preliminary point again after remand without giving its findings on the other issues

13641 after remains without gring 6 (1675) 24 Suth W R 233 (333) (Cannot) (1905) 2 Cal L Jour 403 (405 407) (Do) (1505) 3 Suth W R Act N 153 (159) (It can) (1870) 14 Suth W R 370 (317) (Do) (1907) 11 Cal W N 250 (386) (Do)

6a (1933) 1933 Lah 948 (949)

appeal 7 (See also Notes 2 and 30)

## 28 Effect of improper order of remand

Where an order of remand is passed in circumstances which do not warrant it, the defect involved in the order is one of procedure and not of substantive law and comes within the purview of S 99 of the Code But the question arises whether such an order is one affecting the jurisdiction of the Court within the meaning of S 99 On this question there is a conflict of opinion According to the High Courts of Bombay1 and Calcutta2 such an order is not one passed without jurisdiction and hence, does not, in itself, affect the jurisdiction of the Court and neither the order of remand nor the subsequent proceedings based thereon can be interfered with unless the decision of the case on the merits or the jurisdiction of the Court in any other respect has been affected. But according to the High Courts of Allahabad.3 Madras and Patna42 such an order of remand is one made nithout jurisdiction, the term 'jurisdiction being understood not in the sense of the power to deal with a certain matter but in the sense of the power to pass a given kind of order in such matter and therefore the order of remand and the subsequent proceedings based thereon may be set aside although the decision of the case on the merits or the jurisdiction of the Court in any other respect has not been affected

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7 (1853) 1853 All W » 171 (172) See tale (122) 1932 P G 146 (150) [P C) appellate Court remanding a case for radiation of ancessary mastry and trial—Before that party to be added heard appellate Court should not indicate the order which should to 1858-ed by the lower Court?

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(1866) 6 Sath W R 47 (47)

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R 193

R mad order-Set aside-Scientert proceedings based on it also full with it 
(1907) 5 Ought Cas 201 (A3) R.mard, 
order set aside-Dr reo of or, 
Court is restored-L mustom for 
execution runs from appellite order

Note 29

L (19\_0) 19\_0 Lah 193 (134) Order of remar I

from th' said provisions an order of remand under this Rule as contrasted with an order tenuting issues for findings under R 25, is, as regards the Court passing the order, conclusive on all points decided thereby and they cannot be re-opened in that Court before the same judge or his successor, in appeal from the decision of the lower Court on remand 2 Nor can the Court to which the case is remanded go behind the order of remand 3

The High Court of Allahabad has, however, held in the undermentioned against, the Court is bound to take notice of a subsequent event which renders the order of remand if not appealed against, the Court is bound to take notice of a subsequent event which renders the order of remand nugatory. Thus where a Revenue Court dismisses the suit or the ground that the planniff has no tutle to the property and the District Judge remands the suit in appeal under this Rule, and the trial Court, after remand, decrees the suit but before the hearing of the appeal after remand, the defendant obtains a declaration from the civil Court that he was the owner, it has been held, that the Court is bound to take notice of the Civil Court s decree and act accordingly

from which appeal has not appealed from—Its propriety cannot be questioned in an appeal on the merits from the final decree But a person not odiersely affected by

Similarly a paint can be raised by the appellate Court suo motu under O 41, 1 2 - (1920) 1926 Nag 147 (149)

Cases under the all Code which proceeded

(1863 66) 10 Moo Ind Ap 340 (359, 360) (PC)

this case order of remand was not of such a character as precluded the

ordered on review - Decision of question on review cannot be re-opened] 2 (1923) 1923 Pat 226 (228) (1921) 1921 All 275 (277) 43 All 377 (1922) 1927 Oudh 236 (248) 25 Oudh Ca

[But see (1920) 1920 Pat 86 (85)]

If the remand was under it 25 the remanding Court can reconsider its 011 non —

(1929) 1929 Alad 391 (392) (1912) 14 Ind Cas 16 (17) (Luh) (1912) 17 Ind Cas 224 (226) (Cal) (1913) 21 Ind Cas 700 (701) (Cal) (1914) 1914 P C 153 (155) 17 Oudh Cas 30

(P C) (159 (155) 17 Oudh Cas 31 (P C) (See also (1892) 14 All 141 (143

[But see (1912) 15 Ind Cas 39 (41 (Cal) Judge is not bound to re consider]
[But see (1917) 1917 Cal 701 (703 701) Court not bound to re consider?

3 [See (1916) 1916 Mad 421 (421, 422)] (1576) 25 Suth W. R. P. C 157 (160) (P. C) (See also (1921) 1921 Nag 129 (130)]

Sa (1927) 1927 411 694 (695)

3. But an order of remand does not preclude the determination of points not conclusively decided by it 4

30 Jurisdiction after remand depends upon the order of remand

Where a case is remanded to a particular Court, it is only that Court and no other Court can try it 1 But if a case is remanded to a District Court that Court can, under S 24 of the Code, transfer the case to any other Court subordinate to it which is competent to try it 2 An order of remand cannot confer on the lower Court to which the case is remanded jurisdiction which it would not have possessed but for the order of remand 3 Where the order of remand lays down any hmits for the enquiry to be made by the lower Court, that Court has no jurisdiction to enter into questions which fall outside those limits \*

31 Right of parties after remand -Sec Notes 27 29 and 32

32 Procedure after remand

4 (1875) 24 Suth W R 316 (317) (1911) 11 Ind Cas 6 (7) (Cal)

(1900) 10 Mad L Jour 238 (23)

(1899) 21 A11 230 (232) (1871) 15 Suth W R 574 (575)

(1928) 1928 Bom 201 (202)

9719

When a case is remanded for re-trial the whole case is re-opened and the Court is to proceed de novo and is entitled to take evidence again even of those witnesses who had already been examined 1 But if the remand is only to enable the Judge in the lower Court to record his reasons for his judgment, a trial de noto is ultra vires 2 When the lower Court has not properly carried out the order of remand, the case may be again remanded to it 3

Where a case is remanded to the lower Court for re-trial the parties are, according to the practice of the Nagpur Judicial Commissioner's Court, not entitled as of right to notice of the date fixed for re-hearing 4 Nor are they entitled to notice of the receipt of records by the lower Court 42 They are, how-

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(1868) 10 Suth W R 491 (492)
(1874) 21 Suth W R 7 (8) Plaintio may
   (1925) 1925 Oudh 527 (528)
(1912) 13 Ind Cas 813 (814) 14 Oudh Cas
                                                               prove his case in any way he can
2 (1865) 2 Suth W R 275 (276)
(1866) 1 Ind Jur N S 101
                      Note 30
1 (1923) 1923 Mad 251 (352)
2 (1922) 1922 MI 35 (36) 44 MI 211
[See also (1914) 1914 Cal 638 (639
                                                               (1666) 5 Suth W R 124 (124)
3 [See (1864) 1864 Suth W R Mis 39 (40) In
                                                                          remanding a second time Court
   640) 23 Ind Cas 69 (10)
(1909) 1 Ind Cas 913 (917 918) 26 Cat 193
                                                                          should point out the manner in
      The following decisions to the contrary
                                                                          which the carrying out of the pre-
   under the former Code should be regarde !
   as no longer good law in thew of the amend
                                                                          [Lut see (1867) 8 Bulh W R 503 (503)
   rient of S 21 in the new Code -
                                                                          Where the lower appellate Court has
                                                                          not fully carried out order of the
   (1910) 6 Ind Cas 400 (401) (411)
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lower Court would not have had but merits? 4 (1925) 1J25 Nag 31 (31) for the order of remand (1911) 12 1nd Cas 807 (808) (Nag) But 10 (1913) 39 Mad 195 (203) (F B) 4 (1631) 7 Cal L Rep 109 (106) 35 Cal 176 (1675) 24 Suth W R 330 (330)

(15"4) 22 Suth W R 207 (208) (16C5) 3 Suth W R 193 (199) [See also (1916) 1916 Cal 722 (726) Remand order to find whether a per son has a title includes an coquiry

3 (1929) 1929 Lah 534 (535) Order of remand

cannot confer jurisdiction which the

as to whether he has lost the title

or whether he is 1 recluded from re

(1933) 1933 Cal 63 (65) 26 Cal W N 693 (19,2) 130 Ind Cas 251 (2,2) (Oudh)

(1908) 4 Nag L J 166 (163) 4a (1872) 17 Suth W R 70 (70)

lving upon the title] Note 32 1 (1867) 8 Suth W R 285 (287)

High Court remanding a case the

High Court would not remaid a

second time if it should appear that the lower appellate Court sub-

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from the sate provisions an order of remand under this Rule as contrasted with an order remitting issues for findings under R 25 is as regards the Court passing the order, conclusive on all points decided thereby and they cannot be relopened in that Court before the same judge or his successor, in appeal from the decision of the lower Court on remand 2 Nor can the Court to which the case is remained go behind the order of remand 3

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B and to was appeal from the first decree after

renand
[See (1931) 1931 Oudh 212 (213)]
Similarly a point can be raised by the
appellate Court substitution of 41

(1926) 1926 \quad \text{147} (149)

Cases under the old Colounich proceede to the footing that the propriets of all

(1863 66) 10 Voo Ind Ap 310 (359 360)

this case order of terruit dwas not of such a christer as precluded the sating of a certain point in R. 22 (22). That we fee [14] Suth B. 22 (22). The second of the sating of a certain question—Remaid ordered ou retra - Dear ion of question or retwa evanue to ere of question or retwa evanue to ere of question or retwa evanue to ere of question of quest

(1922) 1922 Oudh 236 (248) 25 Oudh Cas

[But see (1920) 1920 Prt 86 (98)]

If the remand was under it 25 the remanding Court can reconsider its optimion—
(1929) 1923 Mad 391 (392)

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[See also (1892) 14 411 141 (143 144)]
[But wes (1912) 15 Ind Cas 39 (41) (Cas) Judge is not bound to re-consider]
[But wes (1917) 1917 Cal 701 (703, 403) Court rot bound to re-consider]

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8a (1927) 1927 All 694 (695)

But an order of remand does not preclude the determination of points not conclusively decided by it 4

30 Jurisdiction after remand depends upon the order of remand

Where a case is remanded to a particular Court, it is only that Court and no other Court can try it 1 But if a case is remanded to a District Court that Court can, under S 24 of the Code, transfer the case to any other Court subordinate to it which is competent to try it 2 An order of remand cannot confer on the lower Court to which the case is remanded jurisdiction which it would not have possessed but for the order of remand 3 Where the order of remand lays down any hmits for the enquiry to be made by the lower Court, that Court has no jurisdiction to enter into questions which fall outside those limits 4

# 31 Right of parties after remand -See Notes 27 79 and 32

32 Procedure after remand

When a case is remanded for re-trial the whole case is re opened and the Court is to proceed de novo and is entitled to take evidence again even of those witnesses who had already been examined 1 But if the remand is only to enable the Judge in the lower Court to record his reasons for his judgment, a trial de novo is ultra vires 2 When the lower Court has not properly carried out the order of remand, the case may he again remanded to it 3

Where a case is remanded to the lower Court for re-trial the part es are, according to the practice of the Nagpur Judicial Commissioner's Court, not entitled as of right to notice of the date fixed for re-hearing 4 Nor are they entitled to notice of the receipt of records by the lower Court 4a They are, how-

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4 (18"5) 24 Suth W R 816 (81")
(1911) 11 Ind C18 6 (") (Cal)
(1928) 1928 Bom 201 (202)
                                                                                lying upon the title]
                                                                                           Note 32
                                                                   1 (1867) 8 Suth W R 285 (287)
(1868) 10 Suth W R 491 (402)
(1874) 21 Suth W R 7 (8) Plaintiff may
   (1925) 1925 Oudh 527 (528)
(1912) 13 Ind Cas S13 (S14) 14 Oudh Cas
                                                                   2 (1665) 2 Suth W R 275 (276)
                       Note 30
                                                                       (1866) 1 Ind Jur N B 101
1 (1923) 1923 Mad 351 (352)
                                                                       (1866) 5 Suth W R 124 (124)
2 (1922) 1922 \tt 35 (36) 44 A11 211 [See also (1914) 1914 Cal 638 (639,
                                                                   3 (See (1864) 1864 Suth W R Mrs 39 (40) In
           640) 23 Ind Cas 69 (70)
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remanding a second time Court should point out the manner in

> the lower appellate Court substantially tried the case fully on its

(1699) 21 11 230 (232) (1871) 15 Suth W R 574 (575) 3 (1929) 1929 Lah 531 (535) Order of remand cannot confer jurisdiction which the lower Court would not have had but

> 6) 4.6 son las a title meludes an enguny as to whether he has lost the title or whether he is precluded from re-

(1909) 1 Ind Cas 913 (917 918) 36 Cal 193

The following decisions to the contrary under the former Code should be regarded as no longer good law in tiew of the amend rient of S 24 in the new Code -(1910) 6 Ind Cas 400 (401) (411) (1900) 10 Mad L Jour 238 (23)

> (1J05) 4 Nag L J 166 (168) 41 (1872) 17 Suth W R 70 (70) (1.33) 1.33 Cat 63 (65) 6 Cat W N C93

(19 2) 106 Ind Cas 251 (202) (Oudh)

ever, entitled to have a reasonable date fixed for further hearing <sup>46</sup> No fiesh vakalanama is necessary in a remanded case <sup>5</sup> When a case is remanded in secend appeal to the first appellate Court the latter may ask the trial Court to take additional evidence <sup>6</sup>

# 33 Refund of Court fee on remand

Where a remand is made under this Rule the appellate Court is bound under S 13 of the Court Fees Act 1870 to order a refund of the Court-Fee 1

There is a difference of opmon, bowever, as to whether a refund can be ordered in cases in which a remand bas been made, not under this Rule but under the Court's inherent powers. The Judicial Commissioner's Courts of Nagpur and Peshawar have held that a refund cannot be ordered in such cases? According to the High Court of Pains also S. 13 of the Court-Tees Act, 1870 applies only to cases of remand under this Rule? The High Court of Lahore has, on the other hand, held that a refund could be ordered in such cases but that the power is a discretionary one.

When an appeal is remanded as to a part, the appellant is entitled to a refund of a proportionate part of the Court-Fee 6

#### 34 Costs

See the undermentioned cases 1

#### 35 Revision

Remand under O 41, R 23,—No revision les bgainst an order of remand under this rule because such an order is appealable ! Even if the order of remand is not justified under the terms of this rule it is not a case of want of jurisdiction within the meaning of S 115, as the Court has inherent jurisdiction to remand?

of the appeal
11939 1939 AH 264 (2417)
(1569) 13 Suth W H 39 (40) Costs of appeal
can be recovered only if order of
remand provides for them x y by
resulted grade that each stall about the
resulted that the cost of the cos

(1916) 1916 Mad 429 (130) When case is remained to lower Court, because of appellant is fulure to sat out his case properly and support it by proper evidence respondent is entitled to

as to some of the respondents but is confirmed as to others no refund can be ordered

Note 34 (1866) 5 Suth W R C3 (66) Case disposed of on points (1) hunitation, (2) res ture to award costs to the appellant as question depends on ments of case

Note 35 1 (1573) 5 N W P H C R 14 (16) (1935) 1933 Pe h 48 (49) Suit dismissed on 1 lea of res judicata (1873) 5 N W P H C R 137 (135) 2 (1921) 64 Ind Cas 436 (437) (Gal)

Remand under unherent power -An order of remand under the inhe power of the Court is not appealable. Hence the question arises whether s an order is revisable under S 115 On this question there is a conflict opinion. According to some decisions a revision does not lie in such case 3 according to o her decisions a revision is maintainable 4

A revision will be in the following cases --

- (a) Where an appellate Court entertains an appeal from an appealable order and remands the case 5
  - (b) Where an appellate Court remands a case to a Court wh 15 not competent to try 1t 6
- (c) Where an appellate Court remands a case to the lower Co directing it to return the plaint under O 7, R 10 in a c where the lower Court has jurisdict on to try the suit 7

See S 115, ante and the notes thereto

24

23.

Where evidence on record sufficient Appeliale Courl may determine case fin ally

R. 24. [S 565] Where the evidence upon the record sufficient to enable the Appellate Court to p nonnce judgment, the Appellate Court ma after re-settling the issues, if necessary, fina determine the suit, notwithstanding that t judgment of the Court from whose decree t

appeal is preferred has proceeded wholly upon some ground otl than that on which the Appellate Court proceeds

[1877—S. 565; 1859—S. 353]

Synopsis

Note to | Second appeal

Note

Scope of the Rule

3 (1927) 1927 Mad 1190 (1190) [See also (1J23) 1923 All 461 (465) Not clear whether remand was under inherent power] No reitston hes because there is no

usury atton of jurisdiction -

(1927) 1927 Mad 335 (336) (1327) 1327 Mad 1111 (1112) (1921) 1921 Mad "16 (716)

No revision lies because no ease is de et led within S 115 (1923) 1923 Born 401 (401)

(1912) 13 Ind Cas 855 (-5.) (Lab) (1911) 11 Ind Cas 315 (316) 1311 Pun Re

No 40 [See also (1910) G Ind Cas 491 (492) (Lab)

No recision lies lecause another remely the by way of affeat against the decree ofter ret and is often -(1924) 1924 Lab 457 (487)

4 (1925) 1925 Cal 716 (715) 52 Cal 763 1930) 1930 111 563 (561)

1 2") 192" Cal 401 (40.) (1 2") 1327 Cal 6.0 (553) 55 Cal 419

(See also (1931) 1931 Lah 302 (8 Revision was entertained becau e alternative remedy by way of app against decree after remand wo entail delay] (1921) 63 1nd Cas 858 (858) ( 111) Lower Co

was held to have practically d lined to exercise ita juii dict when it remanded instead of tij case itself [See also (1926) 19\_6 411 55 (J6)

All 271

Perimo : hell to be on grounds of its

of jurisdiction .

(1931) 1931 Lah 302 (302) (1925) 1925 Mad 171 (172) Recision feld to be on grounds of 1 a

real erregularity . (1931) 1331 Mad 1 (a)

(1923) 1923 Mad 113 (113) 5 (1906) 3 All L J 119 (123)

6 (1915) 1915 Mad 1223 (1234 1235) 19 J Cas 555 (...0) 33 Mad 135 (F I

7 (1923) 1923 Lab 521 (225)

ever, entitled to have a reasonable date fixed for further hearing 45 No fresh C vakalatnama is necessary in a remanded case 5 When a case is remanded in second appeal to the first appellate Court the latter may ask the tral Court to take additional evidence

# 33 Refund of Court fee on remand

Where a remand is made under this Rule the appellate Court is bound under S 13 of the Court-Fees Act 1870 to order a refund of the Court Fee 1

There is a difference of opinion, however, as to whether a refund can be ordered in cases in which a remand has been made, not under this Rule but under the Court's inherent powers. The Judicial Commissioner's Courts of Nagbur and Peshawar have held that a refund cannot be ordered in such cases 2 According to the High Court of Patna also S 13 of the Court-Fees Act 1870 applies only to cases of remand under this Rule 3 The High Court of Lahore has, on the other hand held that a refund could be ordered in such cases4 but that the power is a discretionary one 5

When an appeal is remanded as to a part, the appellant is entitled to a refund of a proportionate part of the Court Fee 6

#### 34 Costs See the undermentioned cases 1

#### 35 Revision

Remand under O 41, R 23,-No revision hes against an order of remand under this rule hecause such an order is appealable 1 Even if the order of remand is not justified under the terms of this rule it is not a case of want of jurisdiction within the meaning of S 115, as the Court has inherent

- jurisdiction to remand 2 4b (15 0) 14 Suth W R 401 (40?) (1568) 9 Suth W R 294 (29a) 5 (1864) 1 Suth W R 2 6 (2 7) judicata without any decision on the principal point on the merits-Privy Council reversing decision on the above points Case remanded-Privy υ (1916) 1J16 Sind 93 (98) 9 Sind L R 148
  - Council granted appellant the costs Note 33 of the appeal
  - 1 (1918) 1918 Bom 157 (158) 42 Bom 363 (1934) 1J84 Mad 643 (644) (1933) 1933 All 216 (217) (1840) 13 Suth W R 39 (40) Costs of appeal can be recovered only if order of remand provides for them s g by providing that costs shall abids the
    - result (1916) 1J16 Mad 429 (430) When case is remanded to lower Court because of
  - (1984) 1.138 Mad 64.3 (64.4) (1920) 1930 Lab 441 (4.2) (1927) 1937 Lab 593 (593) (1927) 1937 Lab 193 (193) (1932) 1937 Lab 193 (193) (1932) 1937 Lab 193 (193) (1932) 1937 Lab 193 (193) (193) 1939 Pesh 101 (104) (193) 1938 Pesh 101 (104) (193) 1938 Pesh 101 (104) (193) 1938 Lab 193 (193) 1938 LB 126 (1933) 1933 Lab 135 (193) appellant a failure to set out his case properly and support it by proper evidence respondent is entitled to hts costs of appeal (1892) 1892 411 W V 215 (216) Remanding (1933) 1933 Lah 135 (135)
  - 5 (1930) 1930 Lah 441 (442) Court has power to apportion costs-(1933) 1933 Lah 185 (135) Held that ordinarily costs must be 6 (1866) 6 Suth W R Vis 65 (68) left to abide the result-It is prema (191") 1917 411 314 (315) The remand as ture to award costs to the appellant
    - to a part trust be as against all the as question depends on ments of respondents-If a decree is reversed as to some of the respondents but is Note 35 confirmed as to others no refund can 1 (16 3) 5 N W P H C R 14 (16) (1933) 1933 Pesh 48 (49) Suit dismis ed on
    - he ordered
    - Note 34 plea of res judicata (1673) 5 N W P H C R 137 (138) 2 (1921) 61 Ind Cas 436 (431) (Cal) (1866) 5 Suth W R 63 (66) Case disposed of on points (1) limitation (2) res

Remand under inherent power -- An order of remand under the inherent power of the Court is not appealable. Hence the question arises whether such an order is revisable under S 115 On this question there is a conflict of opinion. According to some decisions a revision does not lie in such case 3 But according to o her decisions a revision is maintainable 4

A revision will he in the following cases -

- (a) Where an appellate Court entertains an appeal from an unappealable order and remands the case 5
- (b) Where an appellate Court remands a case to a Court which is not competent to try it 6
- (c) Where an appellate Court remands a case to the lower Court directing it to return the plaint under O 7, R 10 in a case where the lower Court has surrediction to try the suit 7

See S 115, ante and the notes thereto

R. 24. [S 565] Where the evidence upon the record is sufficient to enable the Appellate Court to pro-Where evidence on nounce judgment, the Appellate Court may, record sufficient after re-settling the issues, if necessary, finally Appellate Court may determine case fin determine the suit, notwithstanding that the

judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds

[1877—S 565; 1859—S. 353.]

Sunovsis

Scope of the Rule

Note No | Second appeal

Note No

3 (1927) 1927 Mad 1190 (1190)

(See also (1323) 1923 All 461 (465) Not clear whether remand was under inherent power]
No recision lies because there is no

usurpation of jurisdiction (1927) 1927 Mid 335 (336) (1) 177 1927 Mad 1111 (1112)

(1921) 1921 Mad 716 (716) No retision lies because no case is de

cided within 5 115 -(1923) 1923 Lom 401 (401)

(1912) 13 Ind Cas 855 (855) (Lah) (1511) 11 Ind Cas 315 (316) 1511 Pun Re No 50

(See also (1,10) 6 1nd Cas 491 (492) (Lahl)

No recission lies because anotier remedy tize by way of affeal against the decree (1324) 1924 Lih 457 (487)

4 (1925) 1925 Cal 716 (718) 52 Cal 753 (1970) 1930 111 6:3 (564) (192") 1327 Cal 401 (402) (132") 13-7 Lal 8-0 (43) 55 C il 213 [See also (1931) 1931 Lah 302 (302)

Revision was entertained because the alternative remedy by was of appeal against decree after remand would entail delay ] (1921) 63 Ind Cas 859 (858) ( \11) Lower Court

was held to have practically dec-lined to exercise its juri diction when it remainded instead of tribio case itself

[See also (1926) 1926 All 55 (J) 43

Person hell to be on grounds of wart

of jurisdiction — (1331) 1331 Lah 302 (302)

Retision lell to lie on grounds of male real erregularity [1931] 1931 Mal 1 (5)

(1925) 1925 Mad 171 (172) (1923) 1923 Vad 113 (113)

5 (1906) 3 All L J 119 (123) 6 (1915) 1915 Mad 1223 (1231 1235) to Ind Cas 555 (560) JJ Mad 135 (£ 1.)

7 (1923) 1323 Lah 524 (525)

# 1 Scope of the Rule

Ţ.

This Rule enables the appellive Court to dispose of a case finally without a remand if the evidence on the record is sufficient for the purpose not withstanding that the appellate Court proceeds on a ground entirely different from that on which the lower Court proceeded Prior to Act, VII of 1888 the word 'shall' occurred after the words 'the appellate Court' and so it was held that the appellate Court was bound to decide the case itself in the circumstances mentioned in the Rule 2 The word 'shall' has now been replaced by the word 'may and the appellate Court may now, if necessary, remand a case under the present Code notwithstanding that the decision of the lower Court has not resulted in the exclusion of any material evidence

There is a conflict of opinion as to whether an appeallate Court can, under this Rule, decide a case without a remand on an issue not raised in the Court below. According to the High Court of Calcuita, the framing of a new issue is not a resulting? of the issues, and the appellate Court cannot, under this Rule frame such issue and decide it? The High Court of Bombay, has on the other hand, held that though the point was raised for the first time in appeal, a remand was not necessary where it could be decided on the evidence on the record. It is submitted that the latter view is correct. There is no reason why the framing of a new issue should be regarded as necessarily different from "resetting issues within the meaning of this Rule. The true view appears to be that when a new case is pleaded in the appellate Court, it will not act under this Rule unless the case arises on the facts stated in the pleadings and the opposite party is not taken by surprise.

In an appeal against an order returning a plaint for presentation to the proper Court, the appellate Court, cannot decide the suit on the ments under this Rule—the reason is that such a decision would be outside the scope of the appeal the same not being against the decree in the suit.

# 2 Second Appeal

See S 103, Note 2 and the following cases.1

Order 41 Rule 24-Note 1 1 (1884) 6 All 378 (378) (18°0) 11 Suth W R C9 (70) (1868) 10 Suth W R 374 (374) (1865) 3 Suth W R Act \ 154 (155)

Court without sending the case to

Ind App 166 (P C) Rule does not enable appellate Court to declare a right in favour of one of the parties, where no issue has been framed on

erccorded though trial Court held
a portion inadmis libe—lipellate
Court held justified in deckling with
out a remand
2 (1882) 1882 All W N 5 (3) (5)
(1874) 22 Suth W B 224 (225)

6 (1927) 1927 Oudh 218 (219) Note 2 1 Cases under the former Code — (1887) 9 111 290 (29) (1888) 1 1 Cal 409 (30) (1888) 1 1 Cal 409 (30) (1861) 8 Suth W R 400 (499).

7 L B R 1J!

Cases under ile Iresent Cone-Hegh

Note No

Where Appellate Court may frame is sues and refer them for trial to Court whose decree ap pealed from

R. 25. [S. 566.] Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue,3 or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if neces-

sary, frame issues,5 and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required;6

and such Court's shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor.

[1877—S, 566: 1859—S, 354.1

# Sunonsis

Note No

Legislative changes Scope of the Rule

mitted

'Has omitted to frame or try any Distinction between this Rule and R 23

May if necessary frame issues 'Shall direct such Court to take the additional evidence required What Court may try the issues re

Powers and duties of Court to which 2 issues are remitted Remand, if open for re consideration by appellate Court after return of find ings See R 26 Note 4 infra New issues raised before the appellate 3 10 Court Remand in second appeal 11 12 Appeal Letters Patent Appeal 13 Revision

# Other Topics

Power of Court to which issue is remitted See Note 8, Pt (8)

to restore case disposed of ex parte

1 Legislative changes -The words ' and the reasons therefor" in the second paragraph are new

2 Scope of the Rule

This Rule enables the appellate Court to remit issues to the lower Court for findings where the lower Court has failed to try any issue or determine any question of fact essential to the right decision of the suit on the ments 1 not

Cases under present Code-High Court s pour to interfere when finding of lower Court is ritiated by error of law-Conflict of decisions --

(1914) 1914 Lah 68 (69) High Court has

power to interfere (1922) 1922 Pat 417 (419) Evidence impro perly rejected by lower Court—Can High Court decide after taking into consideration that evidence under R 24? No (Per Dawson Miller, C J, and Per Junia Prasad, J )

- (1932) 1932 Mad 545 (552) High Court can arrive at finding not recorded by lower appellate Court instead of re ferring the matter to the lower
- Court (1933) 1933 Oudh 28 (30) All evidence on record-Bigli Court can determine question without remand
- Order 41, Rule 25-Note 2 1 (1920) 1920 P C 67 (68) 43 Mad 537 47 Ind 4pp 76 (PC)
  - (1933) 1933 Vad 187 (190) From evidence appellate Court noticing that consideration for suit transaction is immoral-No issue and finding by trial Court on that point-Remand

## 1 Scope of the Rule

I.

This Rule enables the appellace Court to dispose of a case finally without a remand if the evidence on the record is sufficient for the purpose1 notwithstanding that the appellate Court proceeds on a ground entirely different from that on which the lower Court proceeded Prior to Act, VII of 1888 the word 'shall' occurred after the words "the appellate Court' and so it was held that the appellate Court was bound to decide the case itself in the circumstances mentioned in the Rule 2 The word 'shall" has now been replaced by the word 'may' and the appellate Court may now, if necessary, remand a case under the present Code notwithstanding that the decision of the lower Court has not resulted in the exclusion of any material evidence

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In an appeal against an order returning a platnt for presentation to the proper Court, the appellate Court, cannot decide the suit on the ments under this Rule the reason is that such a decision would be outside the scope of the appeal the same not being against the decree in the suit 6

(1870) 14 Suth W R 69 (70)

(1886) 9 Mad 300 (306)

(1850) 3 Mad 96 (98)

(1868) 10 Suth W R 374 (374)

(1865) 3 Sulh W R Act \ 154 (150)

Ind 'up loc (P t) Rale does now

8 [See also (1917) 191" Cal 136 (197)] [See also (1886) 12 L 11 2 J (746) 12

# 2 Second Appeal 1 (1534) G All 378 (878)

(1 +34) 1934 I'at 630 (632)

(15 1) 10 5 th W R 211 (212)

(1565) 10 5 (h W R 451 (452)

Order 41 Rule 24-Note 1

(1923) 19 3 All 103 (604) 45 All 365 (1311) 10 ln l 1 22 (2.6) (All) Appellate

Coll his full goner to decide with

See S 103 Note 2 and the following cases 1

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it let to evider e on record the
                                                                               enable appellate Court to declare a
           sues I frun letern med by the lower
                                                                               right in favour of one of the partie,
           Court without andmo, the case to
                                                                               where no assue has been framed on
           lower Court
                                                                               the point and the maht ha not been
  (1695) 17 411 112 (116) "2 Ind Apt 1 (P C) (1691) 13 411 53 (63) 17 Ind App 150 (1 C) (1919) 1919 C 11 96 (97)
                                                                   set up in the lower Court]
4 (1875] 12 Bom H C R 23 (49)
5 (1917) 1917 Cal 469 (475 4"5)
  (1919) 1919 Cal 672 (673)
                                                                               [See also (1913) 20 Ind Cas 674 (675)
7 L B R 79]
   (1894) 4 Mad L Jour 161 (182)
  (1893) 16 Mad 299 (301) (P C)
                                                                   6 (1927) 1927 Oudh 218 (219)
                                                                                            Note 2
                                                                   1 Cases under the fore or Code —
(1887) 9 M1 29n (29)
(1887) 9 M1 26 (30)
(1885) 11 Cal 499 (501)
(1867] 8 Suth M R 409 (490)
           out a remand
2 (1832) 1882 VII W N 5 (3) (5)
(1874) 22 Suth W R 221 (225)
                                                                          Cases under the present Cole-High
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R. 25. [S. 566.] Where the Court from whose decree the

Where Appellate Court may frame is sues and refer them for trial to Court whose decree ap peeled from

appeal is preferred has omitted to frame or try any issue,3 or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if neces-

sary, frame issues,5 and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required :6

and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor.

[1877—S, 566: 1859—S, 354.]

# Sunonsis

	Syno	poto	
7	Tote No	I Note	No.
Legislative chenges Scope of the Rule Has omitted to frame or try a 1880e'	1 2	Powers and duties of Court to which issues ere remitted Remend, if open for re consideration by appellete Court efter return of find	-
Distinction between this Rule e R 23	4	ings See R 26 Note 4 infra New issues reised before the eppellate	10
May if necessery freme issues Shall direct such Court to teke i edditionel evidence required what Court mey try the issues	6	Court Remend in second eppeal Appeel Letters Petent Appeel	112
mitted	7	Revision	14

# Other Topics

Power of Court to which I sue is remitted See Note 8, Pt (8) to restore case disposed of ex parte

t Legisletive chenges -The words 'and the reasons therefor" in the second paragraph are new

# 2 Scape of the Rule

This Rule enables the appellate Court to remit issues to the loner Court for findings where the lower Court has failed to try any issue or determine any question of fact essential to the right decision of the suit on the ments 1

Court can determine questions of fact not determined by lower appellate Court -(t91t) 12 Ind Cas 925 (925) 36 Bom 183 (1916) 1916 Oudh 257 (264)

Cases under present Code-High Court & power to interfere when finding of lower Court is estrated by error of law-Conflict of decisions -

<sup>(1914) 1914</sup> Lalı 68 (69) High Court has power to interfere

<sup>(19 &#</sup>x27;2) 1922 Pat 417 (419) Evidence impro perly rejected by lower Court-Cap High Court decide after taking into suderation that evidence under R 24 2 No (Per Dawson Miller, C J. nd ler Jwila Prasad J 1

<sup>(1932)</sup> t932 Wad 545 (552) High Court can urne at finding not recorded by tower appellate Court instead of icferring the matter to the lower

Court (t933) 1933 Oudh 28 (30) All evidence on record-High Court can determine

question without remand Order 4t, Rule 25-Note 2 1 (1920) 1920 P C 67 (68) 43 Mad 537 47

Ind At p 76 (t'C)

<sup>(1933) 1933</sup> Mid 187 (190) From evidence appellate Court noticing that consideration for suit transaction is immoral-No issue and finding by trial Court on that point-Remand

Where the lower Court has not disposed of the suit on a preliminary point within the meaning of Rule 23 but at the same time has omitted to try any material 1\_sues or to determine any malerial questions of fact it is not compe ent to the appellate Court to remand the whole case under Rule 23, but it may, if neces sary, remit issues for findings under this Rule keeping the case on its own file 2 The appellate Court is not precluded from passing an order of remand under the present rule merely because it would have been competent to the Court under the c reumstances to remand the case under Rule 233

In an appeal from an order under O 7, R 10 returning a plaint for presentation to the proper Court, the appellate Court has no power to remand 1 ues which would have arisen if the lower Court had entertained the sunt 4

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As to the points of distinction between this rule and Rule 23 see
Notes to Rule 23
   3 Has omitted to frame or try any issue '
               The rule applies only to cases in which the lower Court has omitted
                under the Rule should be made
                                                                                                being framed for
                                                                                                                               tural doc
     (18.9) 4 Cal 744 (746) 6 Ind App 15 (PC)
(1869) 13 Mos Ind App 419 (425 4°6) (PC)
(1894) 1895 411 W > 79 (79)
                                                                                                amount to judicial finding
[Sec also (1985) 1985 Bom 216 (217)
                                                                                                In a case which can be semitted
under this Rule remand under R 23
     (1721) 1977 Cal Soo (856) In the ab ence of
                proof of some fact within Evidence
                                                                                                or under inherent powers should not
                 Act S 32 what the appellate Court
                                                                                                he made ]
                                                                                               [Ses theo (1933) 1933 Put TOG (707)
Appellate Court should not rashly
order retrial which case can be
                has to do to find whether or not
                there was any real contention that
                the writer was still alive and if so
     grant 3 remand
(1970) 1920 Cal 374 (374)
(1919) 1319 Cal 157 (15a)
                                                                                                remanded under this Rule l
                                                                                                [See also (193a) 1935 Pat 68 (68) Do 1
                                                                                 2 (1915) 1915 411 460 (461)
                                                                                     (1915) 1915 411 200 (2017)
(1934) 1934 Lah 576 (579)
(1935) 1935 Lah 101 (161)
(1968) 3 Agra H O R 146 (147)
(1939) 1939 Bom 175 (176) 58 Bom 895
      (1919) 1919 C11 945 (945)
      (19 6) 25 Suth W R 47 (47)
      (1929) 1929 Lah 618 (619)
      (1919) 1919 Lah %0 (252) 1919 Pun Ro
      No 64
(1911) 12 Ind Cas o3 (54) (Lah)
                                                                                     (1926) 1926 Cal 976 (977)
                                                                                     (1976) 1J28 Cal 951 (954 955)
      (1896) 9 Mad 44 (4.)
(1854) 7 Mad 8 (10)
                                                                                     (1926) 1926 Cal 1912 (912)
(1926) 1926 Cal 1912 (912)
(1906) 10 Cal W N ±22 (±23)
(1909) 3 Cal W N 54 (56)
(1897) 1 Cal W N 340 (341)
(1864) 1 Suth W R 6 (7)
      (1918) 1918 Oudh 471 (478)
      (1915) 1915 Odd + 7 (1979)

(1921) 1921 Sud 105 (157) 16 Sud L R 17

Se also it o following cases —

(1931) 1931 P C 176 (110) 58 All 190 58

Ind App 173 (PC)

(1876) 25 Suth W. R 140 (111) Lower Court
                                                                                     (1864) 1 Suth W R 6 (7)

(1883) 12 Cal L Rep 136 (12s)

(1876) 25 Suth W R 981 (295)

(1876) 25 Suth W R 98 (295)

(1864) Suth W R 6ap 561 (361)

(1864) 1864 Suth W R 6ap 567 (353)

(1864) 1 Suth W R 295 (2)7

(1964) 1964 Lah 293 (29)

(1964) 1916 Lah 293 (29)

(1925) 1925 Mad 196 (170)

(1925) 1925 Mad 196 (170)
                 having come to no decision on 1
                 point raised | laintiff in appeal has
                 a right to remand even though the
                 point is very trifling
       (1864) 2 Bom H C R 61 (64)
(1866) 5 Suth W R P C 68 (66) (P C) In a
                                                                                     (1923) 1923 Mad 227 (22s)
                 pealable cases Courts below should
                                                                                     (1896) 19 Mad 157 (159)
(1594) 17 Mad 187 (189)
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as far as possible pronounce opinion on all the important issues so as to obviate necessity for a remand (1867) 2 Agra H C R 106 (107) Co defend

ants-One defendant cannot bind unother by his pledge to abide by reference to rent roll for a certain year for the decision of the principal issue in the case

(1867) 2 Agra H C R 61 (62) Judge sremark as to certain fact without any 1 ue (1875) 24 Suth W R 137 (131) (15.0) 14 Suth W R 380 (380) (See also (1875) 23 Suth W R 347 [See also (1933) 1933 Bom 251 (251)]

[See also (1933) 1933 Lah 22. (271)]

3 (1899) 1899 All W N 2 (8)

(1917) 1917 Pat 463 (464)

4 (192a) 1925 Oulh 393 (394) 29 Oudh C s 21

5, to try any issue or to determine any question of fact. Hence where the lower Court has not omitted to decide any issue or any question of fact a remand cannot be ordered under this Rule1 merely for the purpose of enabling a party to produce evidence which ought to have been given in the lower Court 2 It has however, been held that a remand can be made under this rule where the lower Court has not arrived at its findings after a full and proper trial, masmuch as, in such a case, the issue cannot be regarded as having been tried by the lower Court 3

The omission by a plaintiff to press a certain point is, generally speaking, no ground for refusing to remit an issue on the point, if the lower Court has omitted to frame or try the same 4

4 Distinction between this Rule and Rule 23 -See R 23, No e 2

#### 5 May if necessary frame issues

The appellate Court is not bound to remand issues under this Rule in every case in which the lower Court has failed to frame or decide any issue 1 The question is one for the evercise of the discretion of the Court in each case 2 Thus, where, inspite of there being no formal issue on a point, it has been tried by the lower Court after giving the parties full opportunity to produce their evidence and present their case on it, a remand under this rule is not necessary,3 especially where the point 4

Note 3 1 (1919) 1919 Cal 945 (945) (1903) 4 Ind Cas 168 (199) (Cal) (1903) 4 Ind Cas 168 (199) (Cal) (1889) 2 C P L R 113 (114) (1914) 1914 Gudh 103 (104) (1922) 1922 Pat 575 (577) 1 Pat 639 (1928) 1928 Cal 546 (547) (1910) b Ind Cas 499 (500) (AB) (1900 1902) 1 L B R 143 (143) (1917) 1917 Pat 189 (140) (1893) 16 Mad 299 (301) (PC)

(See also (1933) 1933 Pat 472 (473) Important exidence disregarded by lower Court-Case should be re mandedl (But see (1869) 11 Suth W R 85 (36) Appellate Court has no power to send back case for trial upon issue not satisfactorily tried by Court of first instance]

4 (1902) 4 Bom L R 818 (820) [But sen (1920) 1920 Cal 325 (826)

340 No irregularity or prejudice to other party-Order of remand even when all materials are on record as

2 (1923) 1923 Cvl 201 (202)

not bad] 2 (1687) 9 111 513 (518 519) (1927) 1927 Bom 125 (126) (1924) 1924 Cal 396 (397) (1919) 1919 Cal 836 (836) (1680) a Cal 283 (285) (1927) 1927 Lah 272 (273) S Lah 123

(1919) 1319 Oudh 216 (217) further enquiry which is likely to

3 (1697) 1697 All W N 90 (91) (1912) 15 Ind Cas 3 (5) (411) (1681) 1881 VII W N 12 (12) (1894) 18 Bons 250 (205) (1885) 7 All 649 (655) (FB) (1895) 17 411 117 (119 120) (1929) 1929 Lah 376 (377) (1699) 1 Bom L R 110 (112)

(See also (1871) 15 Suth W R 346

(347)) (1923) 1923 \lad 718 (718)

4 (1927) 1927 All 410 (411) (1919) 1919 Lah 119 (120) Where the lower Court has not disposed of the suit on a prehinnary point within the meaning of Rule 23 but at the same time has omitted to try any material issues or to determine any material questions of fact at its not competent to the apic acid to the continuous many interestant, retait a tes for indings, under this Rule keeping the case on its own file 2. The appears a Court is not precluded from passing an order of remand under the pice entity the account materials.

In an appeal from an order under O. 7, R. 10 returning a plaint for pre-entiation to the proper Court, the appellate Court has no power to remand 15th s which would have arisen if the lower Court had entertimed the suit. As to the points of distinction between this rule and Rule 23 see Notes to Rule 23.

3 'Has omitted to frame or try any issue '

The rule apples only to cases in which the lower Court has omitted

under this Rela should be made (15-9) 4 Cal 744 (740) 6 Ind App 15 (PC) (1509) 13 Moo Ind App 419 (425-425) (PC) (1505) 1505 MI A 79 (73) (1-24) 127 Cal 855 (850) In the at en o of

1 24) 1927 Cal Su5 (Su6) Lifthe at en o of proof of some fact within Findence tet Su5 what the appellate Court has to do is to find whether or not there was any real contention that the writer was still alive and if so

graut a remand (1.0) 1230 Call 3"4 (274) (1919) 1J19 Call 157 (155) (1919) 1J19 Call 153 (J15) (15°0) 25 Euth W It 4.7 (47) (1929) 1929 Lah 1613 (61J) (1914) 1919 Lith "20 (252) 1919 Pun Ro

No 64 (1911) 12 Ind Cas 53 (54) (Lab)

(1J31) 1J31 P C 126 (110) J3 VII 1J0 53

Ind App 173 (t C)
(1576) 25 Suth W R 140 (141) Lover Court
having come to no decision on a
point raised plaintiff in appeal has

temp frume1 for triv1 does 100 moint to judicir finding (Sca tise (1935) 1935 Dom 216 (217) In a case which can be remitted under this Rule remand under R 23 or under inherent povers should not be made! [See also (1938) 1938 Pat 06 (70)] Airellist Court should not raship.

Appellate Court should not rashly order to trial which case can be remanded under this Rule ] [See also (1930) 1930 Pat 68 (68) Do ]

2 (1915) 1915 \11 400 (461) (1934) 1934 Eah 5°6 (5;0) (1935) 1935 Eah 161 (161) (1868) 3 Agra H G R 146 (147) (1929) 1929 Bom 1°5 (176) 53 Bom 935

(1926) 1926 Cal 954 (0.4 956) (1926) 1926 Cal 912 (912) (1906) 10 Cal W N 42 (423) (1905) 9 Cal W N 54 (56) (1899) 3 Cal W N 55 (56) (1894) 1 Cat W N 360 (341) (1894) 1 Cat W N 360 (341) (1894) 1 Cat W N 360 (423)

(1926) 1926 Cal 916 (917)

(1833) 12 Cal L Rep 136 (133) (1876) 25 Suth W R 281 (285) (1876) 25 Suth W R 35 (35)

ants—One defendant cannot bull another by his pledge to abide by reference to tent roll for a certain year for the decision of the principal issue in the case

(186 ) 2 Agra H C R 61 (62) Judge s remark as to certain fact without any 1 us (1890) 19 Vad 137 (159) (1894) 17 Mad 157 (188) (1917) 1917 Pat 463 (464) (1876) 24 Suth W R 137 (1st) (1870) 14 Suth W R 1380 (380) (See also (1870) 23 Suth W R 347 (318)] (See also (1933) 1933 Bom 2st (251)]

[See also (1933) 1933 Bom 251 (251)] [See also (1933) 1933 Lah 274 (224)] 3 (1899) 1809 MI W N 2 (3)

4 (1925) 1925 Oudh 393 (394) 29 Oudh Cas 21

25, to try any issue or to determine any question of fact. Hence where the lower Court has not om tted to decide any issue or any question of fact a remand cannot be ordered under this Rule1 merely for the purpose of enabling a party to produce evidence which ought to have been given in the lower Court 2 It has however, been held that a remand can be made under this rule where the lower Court has not arrived at its findings after a full and proper trial, masmuch as, in such a case, the issue cannot be regarded as having been tried by the lower Court 3

The omission by a plaintiff to press a certain point is generally speaking, no ground for refusing to remit an issue on the point, if the lower Court has omitted to frame or try the same 4

4 Distinction between this Rule and Rule 23 -See R. 23 Note 2

5 May if necessary frame issues

The appellate Court is not bound to remand issues under this Rule in every case in which the lower Court has failed to frame or decide any issue 1 The question is one for the exercise of the discretion of the Court in each case? Thus, where, inspite of there being no formal issue on a point, it has been tried by the lower Court after giving the parties full opportunity to produce their evidence and present their case on it, a remand under this rule is not

(1889) 2 C P L R 113 (114) (1914) 1914 Oudh 103 (104) (1922) 1922 Pat 575 (577) 1 Pat 639 (1928) 1928 Cal 546 (547) (1910) 6 Ind Cas 499 (\*00) (All) (1900 1902) 1 L B R 143 (143)

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tower Court-Cass should be re manded] (But see (1869) 11 Suth W R 35 (36) Appellate Court has no power to send back case for trial upon issue not satisfactorily tried by Court of first instance]

4 (1902) 4 Bom L R S18 (820)
[But see (1920) 1920 Cal 325 (826)
Note S

1 (1669) 13 Moo Ind App 5:3 (583) (PC) (1928) 1928 Mad 635 (636) (1923) 1923 All 603 (604) 45 All 565 2 (1923) 1923 Cal 231 (292) (1918) 1918 Mad 1159 (1162) 340 No irregularity or prejudice to other party-Order of remand even (1878) 22 Sath 'V R 496 (499)

when all materials are on record is not bad] 2 (1887) 9 All 513 (518 519) (1927) 1927 Bom 125 (126) (1924) 1924 Cal 396 (397)

(1919) 1919 Cal 836 (836) (1880) 5 Cal 283 (285) (1927) 1927 Lah 272 (273) 8 Lah 123 (1919) 1319 Oudh 216 (217) 3 (1897) 1897 All W N 90 (91) (1912) 15 Ind Cas 3 (5) (41) (1881) 1881 All W N 12 (12) (1894) 18 Bom 250 (255) (1885) 7 All G4J (655) (I B) (1895) 17 411 117 (119 120)

(1929) 1929 Lah 376 (371) (1899) 1 Bom L R 110 (112) (See also (1871) 15 Suth W R 346

(341)) (1923) 1978 VInd 718 (718) (1879)

ter of discretion claim for a decla ration ought not to le semanded for further enquiry which is likely to entail delay and expense]

Important evidence disregarded by

3 (1924) 1924 Bom 113 (114) [1907] 29 All 164 (195) 34 Ind App 27 (1 C) [1932] 1932 Lah 293 (294) 13 Lah 399 Party knowing and failing to dis charge or us-Remand 1s not proper

though issue is not clear (1675) 24 Suth W R 275 (276) 4 (192") 1927 \11 410 (411) (191J) 1919 Lah 119 (120)

But where a point is newly raised in the appellate Court it should not be dee ded without Living the opposite parts an opportunity to meet the new case 5 A remand will not, however be ordered if the excumstances are such that even f the remand is granted it is unlikely that the party asking for the remand, would be able to establish the case he wants to make out 54 In ordering a remaid under this rule the appellate Court should specify the issues to be tried by the lower Court 6

Shall direct such Court to take the additional evidence required

These words additional evidence required leave a discretion to the appellate Court not to direct the lower Court to take further evidence when it remards a case for a finding on a specific issue on a consideration of the evidence in the case 1 Where the appellate Court has not directed the lower Court to take further evidence the lower Court may2 but is not bound to do 503

7 What Court may try the usues remitted

Where issues are referred to the Court from which the appeal was preferred no other Court has power to try them ! It has been held by the Punjab Chief Court that an order remitting issues to a Court other than that from which the appeal has been preferred as not one without surisdiction but is only an error of procedure 2 Where during the pendency of an appeal to the High Court the lower Court had lost jurisdiction over the suit area pwing to a redistribution of areas but the High Court directed the lower Court to submit findings on certain issues, Held that the lower Court should be considered to have retained the jurisdiction as regards pending suits and that even assuming that the lower Court had lost its jurisdiction to try the

(See also (169 ) 21 Lem -25 (32.) Wrong 14sue framed but finding given on joint which would have been raised if correct issue had been framed-Iligh Court in secoid ap real refused to remand for a sen Ending on that mavel

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(1918) 1J18 Lah 264 (265) 5 (1915) 1J15 Lah 2J1 (2J1)

3

b Cas

6 (1889) 2 C I L R 113 (114) (1J00) 27 Cal 9Jt (960) 27 Ind App 110

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(See also (1864) 1 Suth W R 69 ("0) Appellate Court cannot remand case for retiial with instructions to frame new issues]

(1874) 22 Suth W R 396 (33 ) Appellate Court should not remand a case and order the lower Court to call upon the parties to submit to arbitration Lut parties may wante the mregu

Note 6

larity

Code that the lot or Court could take for riand

> (See also (1888) 1888 All W N 81 [But sec (1881) 1881 A11 W N 75 ("6) Omission to direct further evidence

of gais q furtler endence - (1868) 10 Suth W R 491 (492) (1668) 9 Suth W R 294 (295) Note 7 1 (1907) 29 A11 GGO (GG2)

2 (1886) 1886 Pun Re No 111

25. suit, the direction of the High Court should be considered as a transfer of the case to that Court 3

In the undermentioned case4 the Court of first instance omitted to try a certain issue. The case went up in appeal before a Court which had no jurisdiction to entertain the appeal. The appellate Court, however entertained the appeal and remanded an issue under this rule to the Court of first instance On the return of the findings, the appeal was returned for presentation to the proper Court The appeal then came before the proper Court It was held that though the order of remand was made by a Court which had no jurisdiction to deal with the case, this was not a fatal objection to the result of the enquiry made in pursuance of the order and that the appellate Court which subsequently dealt with the case could take it into consideration 42 It has also been held in the case cited below that where an additional District Judge has remanded the case to a subordinate Judge, the District Judge has power to transfer the proceedings to another subordinate Judge 46 See also the un dermentioned case 5

8 Powers and duties of Court to which issues are remitted

A Court to which issues are remitted under this rule can only try the assues and has no power to decide the suit tiself1 which continues to be pending in the appellate Court 2 Hence it has no power to refer the case to arbitration 3 Nor can such Court delegate its function of deciding the remanded issues to any other Court 4 But where the High Court has remanded issues to the lower appellate Court for findings the latter can under O 41. R 28 direct the Court of first instance to take further evidence5 or appoint a commissioner to examine witnesses under S 75 of the Code 6

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5 (1810) 21 Suth W R 353 (303)
            Note 8
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appellate Court (1800) 7 Cul L Rep 103 (10a 106) Lower Court cannot allow issue remitted to he abandoned and try case on other

Court

(1865)

(1869) 11 Suth W R 77 (78 79) Held that un ler tle terms of the ren and order the lower Court had power to try the issue of pos ession (But see (1870) 13 Suth W R 91 (93) Where High Court made a remand

order mistakenly for the trial of an issue other than that which should have been remanded for trial and the lower Court disregarding the order tried the proper issue Hel? that lower Court's disregard of the High Court's order will not affect the ments of the case ]

2 (1932) 1932 Rang 137 (137) 10 Rang 330 Remand order does not take away appellate Court a seisin of case

3 (1885) 7 111 523 (526)

(1906) 1906 All W N 221 (222) 4 (1892) 14 All 23 (24 25) (190.) 29 All 660 (662)

(1699) 1699 All W N 137 (137 138) (1895) 19 Bom 551 (552 553) (1927) 1927 Lah 769 (770) (1921) 1924 Lah 354 (355) (1913) 19 Ind Cas 970 (971) 1913 Lun Re

No 105 (1916) 1916 Sand 93 (93) 9 Sand L R 143 (1909) 4 Ind Cas 605 (606) 3 Sind L R 120

5 (1918) 1918 Lah 342 (342) (1908) 32 Lom 441 (445) District Court may also itself take what oridence it wants to take

(1916) 1916 Sind 93 (93) 9 Sind L R 149 (1909) 4 Ind Cas COJ (606) 3 Sind L R

6 (1J25) 1925 Lah 39 (41) 5 Lah 252

But where a point is newly raised in the appellate Court, it should not be dec ded without gruing the opposite party an opportunity to meet the new case <sup>5</sup> A remand will not, however, be ordered if the circumstances are such that even if the remand is grained it is unlikely that the party asking for the remand, would be able to establish the case he waits to make out <sup>5a</sup>. In ordering a remand under this rule, the appillate Court should specify the issues to be tried by the lower Court <sup>6</sup>

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[See also (1801) 21 Lora 32.5 (327) Wrong 1 she frained but finding given in point which would have been raised if correct issue had been raised if correct issue had been frained—light Court in second appeal refused to remand for a new finding on that issue?

finding on that issue]
(1918) 1918 Lab 264 (265)
5 (1915) 1918 Lab 264 (265)
5 (1915) 1915 Lab 261 (261)
(1917) 1917 Cal 196 (197)
(1922) 1922 141 281 (282) 43 4H 571
(1659) Lood P. J. 333 (333)

(1859) 10-21 km 231 (282) 43 km 311 (1859) 10-31 Eom P J 333 (383) (1873) 17 Suth W R 20 (261) (1872) 17 Suth W R 201 (261) 5a (1922) 1025 Oudh 97 (98) 27 Oudh Cas 383

6 (1889) 2 C P L R 113 (114) (1900) 27 Cal 951 (900) 27 Ind 41p 110

not one under R 25]
[See also (1864) 1 Suth W R 69 (70)
Allellate Court cannot remand case
for re trial with instructions to
frame new issues]

(1874) 22 Suth W R 336 (337) Appellate Court should not remand a case and order the lower Court to call upon the parties to submit to arbitration But parties may want the irregu

# larity

## Note 6

1859 did not require the appellate Court to direct further evidence to be taken still it was held in the following cases under that Code that the lower Court could dals fur ther evidence though the order of resumd

> [See also (1888) 1888 All W N 81 (81)]

But see (1881) 1881 All W. N. To (76) Omission to direct further evidence to be taken — Still party entitled to adduce further evidence]

See also the following cases under Code of 1859 in which it was held that the yarthes are entitled to have an opportunity of guing further cridence (1863) 10 Suth W R 491 (492) (1869) 9 Suth W R 20 (295)

Note 7 1 (1907) 29 411 660 (662) 2 (1696) 1896 Pun Re No. 111 25, suit, the direction of the High Court should he considered as a transfer of the case to that Court 3

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5 (1875) 21 Suth W R 353 (353) Note 8

233 (210)

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appellate Court (1890) 7 Cal L Rep 103 (100 106) Lower Court cannot allow issue iemitted to be abundened and try case on other

issues (1865) 3 Suth W R 198 (199) Lower Court

cannol try any other issue (1868) 9 Suth W R 350 (831) (De) (1868) 10 Suth W R 303 (201) Court re ceiving orders of remand for taking

some special evidence should confine itself to such special evidence alone (1809) 11 Suth W R 77 (78 79) Held that under the terms of the reman I order, the lower Court had power to try

the issue of possession [But see (1870) 13 Suth W R 91 (93) Where High Court made a remaind

105

Ra

(1908) 32 Bom 441 (445) District Court may also itself take what evidence at wants to take (1916) 1916 Sind 93 (93) 9 Sind L R 114 (1909) 4 Ind Cas 605 (606) 3 5md L R

120 6 (1925) 1925 Lah 39 (41) 5 Lah 252 The Court to which issues are remitted must give its findings on all the issues are remitted. It is not open to it to decide only some of the issue and to say that in the view of the law its recording a finding on the other sales is not necessary? Where it is asked to submit a finding on an issue after recording such evidence as may be produced by the parties it is bound to give an opportunity to both the parties to produce their evidence. Where the Court to which issues are remitted records its findings exparts without giving any party such an opportunity to produce his evidence, it may restore the case and allow lum to produce he syndence.

Mer a case is remanded under this rule the lower Court cannot add new part es to the suit \* but it can bring on record the legal representatives of a decea\_ed appellant \* 0

As to the interpretation of a remaind order see the undermentioned

9 Remand if open for re-consideration by appellate Court after return of findings -- See R 26 No. e4 10/12

10 New issues raised before the appellate Court

As a general rule a new point not based on the case pleaded or set up by the part es in the lower Court, cannot be raised for the first time in the appellate Court, and a remand cannot be ordered for the decision of such point? But the bar is not an absolute one and the appellate Court can in a proper case, remand issues under this rule, even on points not arising on the pleadings as framed? But this can be done only in exceptional circumstances, for good cause shown, and on payment of all costs thrown away? A remand can be ordered on a point not raised in the memorandum of

A remand can be ordered on a point not raised in the memorandum of appeal 4

11 Remand in second appeal

The High Court in second appeal can remit issues to the lower Court under this rule 1 (See also S 103)

(1874) 21 Suth W R 333 (333) (1872) 17 Suth W R 407 (408) (1927) 1937 Mad 35 (34) (1891) 17 Mad 95 (71 72) (1931) 19 Ind Cas 368 (300) 6 Sind L R 135 (1876) 26 Suth W R 55 (64) 3 Ind App 259 (P C)

2 (1906) 30 Bom 173 (188) (1892) 14 111 866 (371) (1911) 10 Ind Cas 922 (923) (L B)

would be necessary only if decision on the other point was not accepted by the at pellate Court — Appellate Court should be held to have confirmed the decision thereon.

Note 10

1 (t018) 1918 P C 3 (4) 45 Cal 748 45 Ind App 94 (P C)

(1933) 1533 Ali 829 (830) (1875) 3 Ind App 259 (270) (P C) (1870) 2 N W P II C R 23 (24) (1875) 19 Bom 212 (216) (1920) 1920 041 14 (1) (14) (1875) 24 Suth W B 121 (122) (1876) 23 Suth W B 159 (170) (1874) 21 Suth W R 338 (339)

C P C 341 & 342

4 (1921) 1921 Lah 256 (258)

order under O 4t R 25 but an order of remand in the exercise of inherent power]

# 25, 12 Appeal

No appeal hes against an order remitting issues to the lower Court under this rule<sup>1</sup> but it can be questioned in the appeal filed against the decision eventually arrived at, after the receipt of finding from the lower Court.<sup>2</sup>

# 13 Letters Patent Appeal

No appeal hes under the Letters Patent against an order remitting issues under this rule  $^{\rm 1}$ 

# 14 Revision

See the undermentioned cases 1

Findings and evidence to be put on record Objections to finding

R. 26. [S. 567.] (1) Such evidence and findings shall form part of the record in the sut; and either party may, within a time to be fixed by the Appellate Court, 1 present a memorandum and finding.

of objections<sup>2</sup> to any finding.

(2) After the expiration

(2) After the expiration of the period so fixed for presenting Determination of such memorandum the Appellate Court shall proceed to determine the appeal.<sup>2</sup>

[1877—S, 567; 1859—S. 354.]

#### Note 12 1 (1926) 1926 Cal 568 (570) (1935) 1935 All 140 (140)

(1933) 1933 Gal 496 (497) (1933) 1933 Oudh 350 (351) Altosation of O 43, R 1, Cl (u) by the Oudh and Allahabad Courts do not cover

remand under this Rule (1935) 1935 Oudh 333 (334) (Do) (1927) 1927 Cal 642 (644)

(1930) 1930 Oudh 366 (368) (1924) 1924 Rang 131 (181) (See also (1868) 19

[See also (1868) 10 Suth W R 200 (210) Issue remitted to trial Court— Limitation for appeal from the appellate Court's decree runs not from the order of remand but from the final doctsion]

(1933) 1933 Cal 496 (497) 2 (1920) 1920 Pat 735 (736)

(1933) 1933 Bom 251 (252) Order remitting issues is only an interlocutory order and can be challenged in appeal to the Privy Council against the final decree—Principle of S 105 applies to the Privy Council also

(1926) 1926 Cal 568 (570) (1927) 1927 Oudh 499 (502) (1924) 1924 Rang 131 (131)

(1923) 1924 Rang 131 (131) (1825) 29 Cal 419 (422) (1927) 1929 Lah 119 (112) Death of one of the plantiffs after remand — Legal representative not brought on record —Objection can be taken in second appears Note 14

1 (1886) 1886 Pun Rs No 111 Appealists
Court in remanding a case under
R 25 to a Court other than the
Court which tried the case cumods
be said to exercise a purrelection not
vested in it by law within the mean
ing of S 115

**ν** . . .

(103.) 1935 Bom 216 (218) Where appel late Court purports to remaind a case under its inherent power in a case covered by this Rule it is a uniterial irregularity in the exercion of its unreducing

of it's jurisdiction (1933) 1933 Cal 493 (497) Appeal memo may be treated as application 13 revision

is not a case decided and no revi-

sion lies

(1918) 1918 Lih 377 (377) Remind under

R 25—Gase is not decided within
the meaning of S 44 of Panjab
Courts 4ct and no revision lies.

(1921) 1921 Lah 370 (371) Order under R. 25
will be interfered with only in exceptional cases because it is not a

fin il order

Synopsis Note No. 1 Note No Appellate Court to fix time for present appeal ing memo of objections Unnecessary remission Effect of not filing objections 2 Second appeal Shall proceed to determine the Court fee

1 Appellate Court to fix time for presenting memo of objections

The appellate Court must by a time within which objections to the firdings returned by the lower Court should be filed 1 But the fulure to fix a time is a mere technical pregularity and may be ignored if it does not in any way prejudice the party complying of the same 2 Where ito time is fixed for film, objections, they may be filed at any time before the hearing 3 The period for tiling objections may be fixed at the time of remitting the issues It is not necessary that it should be fixed only after the return of the findings 4

2 Effect of not filing objections

Where no objections to the findings are filed within the time fixed the Court may in its discretion allow or decline to allow the objections to be taken afterwards 1 But this does not mean that the appellate Court can treat the findings received from the lower Court as final and binding merely because objections are not filed in time. The appellate Court must examine the findings on their ments masmuch as the rule says that after the expiration of the period fixed for filing the objections the appellate Court shall proceed to determine the appeal "(Sec O 41 R 31)

Where objections to andings were not taken in the lower appellate Court which remitted the issues, they cannot be raised for the first time as grounds of second appeal 3

3 Shall proceed to determine the appeal

Upellate Court is not compete it to

At the hearing after the remand, the appellate Court is to determine the appeal on the whole of the material on the record, including the evidence and findings returned by the lower Court under the remand order 1 It is not onen to the appellate Court to consider only the findings returned by the lower Court under the remand, and samply confirm the other findings without examin-

Order 41 Rule 26-Note 1 Mer the finding in respect of which 1 (1868) 3 1, r. H. C. H. D. (36) 1 (1914) 20 Ind Cas 736 (131) (Oudh) 3 (1894) 1884 111 W N 1.8 (188) 4 (1910) 7 Ind Cas 5747 (518) 6 Nag I R 109 Note 2 no objection is preferred within the 1 (15%) 7 411 79 (91 92) (18J8) 1698 UI W N 119 (119) (16 5 78) 2 AH 908 (909 510) (1973) 5 V W P H C R 114 (115) (1872) 4 N W P H C R 72 (73) (1668) 9 Suth W H 438 (4"o) (1921) 1921 Lah 225 (226) (1800) 1800 Pun Re No 27 page 77 (1859) Pun Re Vo 131 page 4.J (See also (1913) 20 Ind Cas 3. (96 JT) (Cal)) [See also (1879) 4 Cil 744 (751) 6 \*\* \*\* \*\* \*\*\* Ind App 15 (P C)] [But see (1866) I Agra H C R .0 (51)

3 (1899) 10 411 28 (99)

1 (1920) 1920 Cal 93 (94)

Note 3

, ing them on the ments <sup>2</sup> The appellate Court must take auto consideration any objections to the findings returned by the lower Court that may be dely filed <sup>3</sup> But the absence of any objections is no justification for the appellate Court not examining the findings on their ments (See Note 2 supra)

It has been held in cases under the old Code that the Court which passed the order of remand under this Rule has no power to transfer the case to any other Court for disposal whether before or after the return of the findings It is submitted that under the present Code S 24 is wide enough to enable such transfers to be made.

Where the lower Court makes its return without giving its findings on any of the issues the appellate Court can remit the issues again for a proper finding being given.

It has been held by the Punjab Chief Court<sup>7</sup> that before the return of findings by the lower Court the appellate Court has no jurisdiction to dismiss the appeal for default (See also Note 4, ulfra)

# 4 Unnecessary remission

Is it open to the appellate Court when the appeal comes on for hearing after the receipt of fresh findings from the lower Court to reconsider the views expressed by at before the remand and to hold that the remand was improper or unnecessary? On this question there is a conflict of decisions. According to the great majority of cases! there is no final decision on any matter when an appellate Court remits issues under R 25 and the entire appeal including matters on which the Court may have expressed its views before the order of remand, is open for consideration at the hearing after the remand Under this view it is open to the appellate Court to hold that the order of remand previously made was unnecessary or improper and to disregard the findings returned by the lower Court Thus it may dismiss the appeal, after the findings are received on the ground that the appeal as originally filed was itself incompetent 2 It has also been held that when a single Judge of the High Court makes an order of remand under R 25 and the case subsequently comes on for final disposal before a Bench of two Judges, the latter can go back upon the order of re mand and the views expressed therein 3 But it has been held by the Calcutta High Court in the undermentioned case that an order of remand under R 2515 an interlocutory order which, under the principle laid down by the Privy Council in Administrator General of Bengal v Hooks and Ram Kirnal v Run kuars

> (1923) 1923 Oudh 50 (51) 25 Oudh Cas 245 (1922) 1922 Oudh 236 (248) 25 Oudh Cas 187 (1922) 1922 Oudh 118 (120) 25 Oudh

> > 1

49 Ind App 286 (P C) (1869) 10 Suth W R 236 (237) 7 (1906) 1906 Pun L R No 90 page 2"5

2725

will operate as res julicata and is binding on the Court which passed it, until O it is set a ide in appropriate proceedings

An appellate Court is not bound to reconsider the views expressed in the remaid order."

Where the appellate Court has heard arguments on some of the issues and expressed its views thereon and remanded other issues under R 25 it is not bound on the return of the indings to hear the case de note but may confine coursel to arguments on the indings returned. It has been held that a party is not entitled to raise new issues for the first time at the hearing after the remaid.

# 5 Second appeal

The findings of lower appellate Court upon issues remanded by the High Court in second appeal cannot be challenged upon the evidence as in the case of first appeal but object ons to such findings must be restricted to the Limits within which the original pleas in second appeal are confined.

# 6 Court fee

No Court fee as chargeable on a memorandum of objections filed under this Rule 1

Production of additional evidence in Appellate Court

Appellate Court

Appellate Court

Application of additional evidence, whether onal or documentary, in the But if—

- (a) the Court from whose decree the appeal is preferred has retused to admit evidence which ought to have been admitted.3 or
- (b) the Appellate Count requires any document to be produced or any witness to be examined to enable it to monounce judgment, or for any other substantial cause.

the Appellate Court may allow such evidence or document to be produced or witness to be examined

(2) Wherever additional evidence is allowed to be produced by an appellate Court, the Court shall record the reason to for its admission

[1887—S 568, 1859—S 355 ]

8 (1858) 10 Ml 162 (16., 166) J (1883) 1883 Pun Re No 54 (1860) 3 Euth W R Ms 5 (5)

# Note 5

1 (1885) 7 411 °65 (768 769) (1J2×) 1928 1 C 219 (221) (P C) (1\*8\*) 1885 AH W N 225 (225) (F B) Note 6 1 (1932) 1932 All 526 (526) 54 All 465 (1928) 1928 Pat 85 (85)

(1917) 1917 All 112 (113) (1897) 24 Cal 98 (101) (1924) 1924 Lah 455 (455) 5 Lah 268 (1884) 7 Vad 52 (53)

(1910) 8 Ind Cas 578 (878) 13 Oudh Cas

(See also (1886) 12 Cal 37 (38) ] [But see (1884) 7 Mrd 52 (53 54)

o 1010Z9 3c d by him or

11

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13

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. 103

# Local Amendment

27, ALLAHABAD (1)

(2) Concert the existing Clause (b)' into Clause (c)

Synopsis Note No Note No Scope and object of the Rule VII Record of reasons 1 Il When additional evidence may be (a) Additional evidence by con ent admitted in appeal-See Notes 1 of parties 3 7 8 and 9 2 (b) Procedure to be adopted under Ш Has refused to admit evidence which ought to have been ad mitted 3 VIII (· Iν If the appellate Courl requires 14 the fresb evidence 15 (a) The appellate Court requires IX Remand for Irial de novo X. Court if can take notice of subse any document to be produced 5 16 (b) Where appellate Court requires X1 6 any witness to be examined . . . To enable it to pronounce judg 17 7 menl 18 (a) Or for any other substantial XII Second appeal 19

# Other Topics

XIII Privy Council

XIV Revision

Additional evidence in appeal against ex parts decree See Note 1 Pt (11)

# I Scope and object of the Rule

VI Discovery of fresh evidence

CRUSA

The general principle is that the appellate Court should not travel outside the record of the lower Court and cannot take any evidence in appeal This rule elucidates the provisions of S 107, Cl (d) of the Code1 and is an exception to the general rule stated above in that it enables the appellato Court to take additional evidence in the circumstances mentioned therein 2 Therefore, the appellate Court is entitled to call for fresh evidence only when the conditions laid down in this rule are found to exist 3 On the other hand, the Court is not bound under the circumstances mentioned in the rule, to allow additional evidence and the parties are not entitled, as of right, to the admission of such evidence, the matter is entirely in the discretion of the Court 4 It has, however, been held in some cases that apart from this rule,

Order 41 Rule 27-Note 1 1 (1931) 1931 P C 143 (148 149) 58 Ind App 254 10 Pat 654 (P C) 2 (1917) 1917 P C 111 (115) (P C)

(1935) 1935 Rang 3J (41) But the provisions of this Rule cannot be used to lest the evidence of wilnesses 3 (1923) 1923 Cal 300 (301)

(1919) 1919 Cal 170 (171) (1332) 138 Ind Cas 253 (251) (Inh) (1919) 1919 Lah 123 (123) (1915) 1915 Lah 323 (324)

(1898) 1 Oudh Cas 139 (201) 1. (1901) 23 Alt 121 (122 123) (1933) 1933 Lah 1011 (1011)

(1911) 12 Ind Cas 332 (333) 11 Oudh Cas (1923) 1923 Oudh 109 (111) 26 Oudh Cas

(1930) 1930 Oadh 110 (111) 5 Luck 4.3.

(1925) 1J25 Lat 501 (501)

an appellate Court can, under general principles of laws or under its inherent towers admit additional evidence. But these decisions cannot be accepted as correct in view of the decision of the Privy Council in Keson it Issur v G 1 P Ry which lays down clearly that this rule can alone be looked to for taking additional evidence and that the Court has no jurisdiction to admit such evidence in cases where this rule does not apply. This rule does not ap, ly so as to prolubit the appellate Court from doing any of the following thinks -

- (a) To take into consideration admissions by the parties before the appellate Court :
- (b) To issue a commission for local investigation or to examine and adjust accounts 10
- (c) To refer to books on lustors, etc., which may have a bearing on the facts of the case 11 (See Evidence Act. S 57)
- (d) To send for papers from its own records or from the records of
- any other Court and inspect the same 12 (See O 13 R 10)
- (c) To examire parties present in Court 124 (O 10, R 2) See also the undermentioned case 13

Additional evidence may be admitted even in an appeal against an cx parte decree 14 The rule is made applicable so far as may be to second appeals by O 42, R 1142 But the rule must be applied to second appeals subject to the conditions under which a second appeal is maintainable. Hence the High Court has no power, in second appeal, to admit additional evidence for the purpose of entering into oursnons of fact 146 But the High Court may. under its inherent powers, remand a case for retrial with a direction to take additional evidence 146 The rule applies also to appeals in income-tax proceedangs,15 but does not apply to proceedings under S 195 of the Criminal Procedure Code 16

2 When additional evidence may be admitted in appeal - See Notes 1 4 7 8 and 9 3 Has refused to admit evidence which ought to have been admitted '

The appellate Court may admit additional evidence if the evidence

5 (1 123) 1923 P C 128 (135) 2 Pat 676 50 Ind Al p 183 (P C) Extlamed in 193t P C 143 (148)

(1027) 1927 Cal 140 (142)

Evidence not to be allowed on point not in issue and not arising on the

121 (1810) t3 Sath W R 328 (329) (See (1933) 1933 Lah 328 (329) Mere

examination of defendant on cer tam points which were of some 13

115 PC

1 Rang 650] (1929) 1919 Mad 17 (18) (1929) 1929 All 375 (376) 14b(1929) 1924 All 375 (376) (1872) 9 Born H C R 89 (90) (1926) 1926 Gat 911 (913)

(1918) 1918 Mad 1159 (1162)

(Lut see (1923) 1923 All 413 (413

[Compare (1930) 1930 Att 220 (221)

Others not examined because trial Judge expressed his opinio that the point was made out — Appellate Court reversing decision — Opport

(1907) 31 Bom 381 (390) 31 Ind \pp 115

27, in question was tendered in the lower Court but was improperly rejected by it 1 But where the lower Court had properly rejected the evidence the appellate Court cannot admit the same 2 Where the lower Court had declined to take certain evidence tendered by a party as being, in its opinion, unnecessary, and passed a decree in his favour and the appellate Court takes a different view of the matter, it should not reverse the decree without giving the decree-holded an opportunity to adduce the evidence which the lower Court had declined to take 3

# 4 If the appellate Court requires etc'

Under Cl 1 (b) of the rule, it is only when the Court requires it (e e, finds it needful) that additional evidence can be admitted 1 it may be required (a) to enable the Court to pronounce judgment, or (b) for any other substantial cause but in either case it must be the Court that requires it upon its appreciation of the evidence as it stands 2 The legitimate occasion, therefore, for the exercise of the discretion under this rule, is not, whenever before the appeal is heard a party applies to adduce evidence but when, our examining the evidence as it stands some inherent lacina or defect becomes apparent to the Court 3 it follows that additional evidence cannot be admitted

unity to produce the omitted evi dence need not be given ] (1891) 18 Cal 201 (203 204) 17 Ind App 159 Note 4 1 (1931) 1931 P O 143 (148) 58 Ind App 2.4 (1874) 22 Suth W R 268 (269) (1982) 1982 Lah 202 (202) (1916) 1916 Lah 208 (202 210) 1916 Pun 10 Pat 654 (P C) (1934) 1934 All 175 (1 5) (1907) 31 Bom 381 (390) 34 Ind App 115 (PC) Re No 14 2 (1931) 1931 P C 143 (149) 53 Ind App 254 (1927) 1927 Mad 1065 (1065) (1900) 23 Mad 447 (448) 10 Pat 654 (P C) (1934) 1934 All 948 (949) (1934) 1934 All 175 (175 176) (1924) 1924 Oudh 252 (254) 27 Oudh Cas 11# (1934) 1934 Pat 284 (286) 3 (1931) 1931 P G 143 (148 149) 53 Ind App (1918) 1918 Oudh 170 (171) (1915) 1915 Oudh 14 (15) (1928) 1928 Pat 113 (114) 7 Pat 90 254 10 Pat 654 (P () (1934) 1934 All 948 (949) (1934) 1934 Cal 707 (708) (1934) 1934 Cal 627 (628) 61 Cal 412 (1916) 1916 Sind 34 (34) 9 Sind L R 191 Rule applies even to appeals from ex parte decree [See (1892) 14 All 356 (357 358)] (1933) 1933 Lah 547 (548) 14 Lah 152 2 (1879) 4 Cal 213 (215) Lower Court having (1935) 1935 Lah 555 (557) No lacuna in evidence on record - Judge should rejected document as not being pro not summon additional evidence perly stamped (1933) 1933 Mad 407 (40s) Ludence not tendered in the trial Court (1934) 1934 Pat CO (G1) in proper tine -(1935) 1935 Rang 21 (22)

3 (1875) 23 Suth W R 63 (64) (1869) 6 Bom H C R A O 88 (89) (1903) 30 AH 367 (358 369) (1898) 22 Bom 253 (225) (1887) 9 AH 339 (340) (1875) 23 Suth W R 63 (64) under this rule on a preliminary objection before the hearing of the appeal 34 O It is, however, open to the party to point out the defect or to move the Court to supply the defect 4

It was held in the undermentioned ca-es<sup>5</sup> relying upon certain observations of the Pray Council in Intrast v. Aniar Singh<sup>6</sup> that additional evidence could be admitted in appeal for reasons independent of the existence of any lacuia or defect. These decisions are no longer good law since the accessor of the Pray Council in Parsotium Thakur v. Lat Mohar Thakur<sup>7</sup> in which the sind view has been definitely repudated.

5 The appellate Court requires any document to be produced '

Where a Court termits documentary evidence to be produced under this rule it should also permit oral evidence to be adduted in order to prove the c do unjents!

For mean no of the word 're jures' see Note 4 above

6 Where appellate Court requires any witness to be examined

The appellate Court should not take additional evidence which impugns the testimony of a witness who was called in the Court below unless that witness is given an opportunity to clear up the mistake Otherwise, no witness, whatever his standing, would be safe from adverse judicial comment.

7 To enable it to pronounce judgment

When the appellate Court finds uself unable to pronounce judgment owing to a lacuna or defect in the evidence as it stands, it may, as has been in Note 4 above admit additional evidence. The ability to pronounce a judgment refers not to the ability to pronounce any judgment but to the ability to pronounce any judgment but to the ability to pronounce any judgment deliver-

 Ordinabily it is not desirable to hear application for further evidence under O 41 R 27 C P Code until applicate Court has heard appeal and considered the evidence already on record ]

135 [See also (1933) 1933 Lah 823 (823) Held on tucts that additional evidence should be admitted ] 1917 111 J6 (97)

(1917) 1917 All J6 (97) 3a (1J07) 31 Bom 281 (330) 24 Ind App 115 (P C) Note 5 1 (1913) 20 Ind Ca 4542 (543) (Oudh) Note 6

1 (1914) 22 Ind Cas 103 (104) 16 Oudle Cas 386 36 41 93 41 Ind App 76 (P C) Note 7

1 1 1 1

5 (1920) 1929 411 375 (375 376) (1922,) 1925 411 285 (289) 47 411 412 (1926) 1926 Lah 29 (21) (1926) 1926 Luh 50 (81) (1924) 1925 Mad 181 (182) (1828) 2848 (1929) 1939 Mad 349 (349)

Court to decide point conclusively was held proper in the circumstances of the casel 7, mg it 2 But the appellate Court should not, ordinarily, allow new evidence to be adduced in order to enable a party to raise a new point in appeal 3 Similarly where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment 4

# 8 Or for any other substantial cause

The words for any other substantial cause must be read with the requires in the beginning of the sentence. So that it is only where for any other substantial cause, the appellate Court requires additional evidence that this rule will apply 1 The words or for any other substantial cause need not be construed in the narrow sense suggested by the doctrine eursdem generis2 and power to allow additional evidence may be overcised when any point is required to be cleared up in the interest of justice 3 But at the same time it should be remembered that it is a power to be exercised cautiously and sparingly4 and only in exceptional cases 5 Further, the new evidence should have a direct and important bearing on a main issue in the case 6 Subject to these general rules, additional evidence may be admitted in the following cases ---

(1) When the party wishing to produce the additional evidence was unable, through no fault of his, to produce it in the trial Court 7

(1920) 1920 Wad 444 (446) (1919) 1019 All 49 (40) 42 All 48 4 (1931) 1031 P C 143 (148 149) 58 Ind \rp

4 (1018) 1918 Pat 253 (253) 1 Pat L Jour 435 [But see (1929) 1929 Pat 324 (325) Obviously genuine documents not to be rejected on such technical grounds is that they were produced too la'el

(1911) 12 Ind Cas 332 (333) 11 Oudh Cas 327 2 (1912) 14 Ind Cas 140 (141 112) 36 Mad

477 (1915) 1915 Mad 762 (762) (1923) 1923 Lah 564 (585) [But see (1923) 1923 Ondh 109 (111) 26 Oudh C18 66] 9 (1974) 1324 Cal 578 (381) 51 Cal 183 (18" J) 24 Suth W R 325 (326) (1931) 1931 1 at 191 (182)

5 (1319) 15 Ind Cas 200 (251) 15 Oudh Cas 2.3

(1876) 25 Sath W R 246 (247) (1809) 12 Suth W R 215 (216)

cross examining witness not as loned ] 7 (1905) 27 111 634 (651) 32 Ind 1pp 203 "

Oudh Cas 317 (P C) (1933) 1933 All 104 (106) Judgo satisfiel on affidavit that documents could

- (2) When evidence has been taken by the lower Court so imperfectly that the appellate Court cannot pass a satisfactory judgment.
- (3) When through the negligence of the guardian of a minor party, an important document was not moduced in the lower Court <sup>8</sup>
- (4) For other instances, see the following cases 10

But the provisions of this rule are not intended to allow a laugant who has been unsu cessful in the lower Court to patch up the weak parts of his called and fill up the onussion in the Court of appeal. If it is not the business of the appellate Court to supplement the evidence adduced by one party or that other in the lower Court is Hence, in the absence of satisfactory reasons for the ron-product on of the evidence in the trial Court additional evidence should not be admitted in appeal as a party guilty of remissioness in the lower Court is not citable I to the induspence of being allowed to give further existing the court of the co

nted ulstealments evidence (1714) 1718 Outh 400 (406) Party having ict on to suppose that a certim (1915) 1915 C at 743 (750) (1917) 1917 Mad 189 (189) Admission of original document when secondary evidence of its contents had been given in the lower Court (1913) 21 Ind Cas 619 (621) 35 All Ju3 Additional ovidence as to attestation of mortgage deed-Effect of secent I'C decision (1919) 1919 Cal 1000 (1007) Elucidation field 1 v by the appellate Court (1321) 1921 5 mt 1 135 (157) 16 Smd L R 17 of obsolete or province all expression 11 (1931) 1931 P C 143 (148 14J) 58 In d App. 254 10 Pit 654 (P C) (1935) 1932 Mang 21 (72) (1935) 1932 Mad 214 (73) (1932) 1932 Mad 148 (151) (1932) 1932 Mad 709 (713) (1866) 6 Suth W 262 (\*\*65) (1917) 1917 Cal 711 (712) (1576)

Sun Collection to confusion cte-Additional condense may be allowed 11 J-1 123 Cl. 266 (206) Certified copy of a document not offered me vidence at the pinners Court on account of the point not hiving been disputed —Such document may be identified

Patrice of the when defendant had no means of explaning way an supposed admission therein Hell first Court was wrong in accepting same at dower 11ellate Court was right in sending for defendant and examining him on

the sul ject (1921) 1921 U B 16 (18) 4 U BR 3.

13

304

(1917) 1917 Mad 153 (159) (1882) 1882 AH W N 5 (5) (1872) 17 Suth W R 300 (391)

12 (1921) 1921 All 408 (408)

(1898) 20 All 266 (267)

(1868) 10 Suth W R 402 (403)

(1932) 1932 Lah 135 (136)

27, dence under this rule <sup>16</sup> So a party who had ample opportunity to produce certain evidence in the lower Court but failed to do so<sup>15</sup> or elected not to do so<sup>15</sup> cannot have it admitted in appeal

The madestrence of the party<sup>17</sup> or his mability to understand the legal issues involved<sup>18</sup> or the wrong advice of a pleader<sup>18</sup> or the negligence of a pleader of does not constitute a 'substantial cause' within the meaning of this rule. For other cases in which additional evidence was not allowed, see the following cases <sup>51</sup>.

# 9 Discovery of fresh evidence

(18%) 12 Cal 219 (224) 12 Ind App 183 (P C) Fudence as to special means of knowledge within S 32 Ludence

(1 w) 15 Cal 76. (770 771) Additional cylindere to prove genuineness of a document held by the lower Court

Act

The mere discovery of fresh evidence subsequent to the decision of the lower Court is no ground for its admission in appeal unless the appellate Court requires the evidence to enable it to propounce judgment or requires it for any other substantial cause <sup>2</sup> If the latter condition is not present the proper course is to apply for review of judgment and not for the admission of additional evidence in appeal <sup>3</sup> Even where the appellate Court requires the

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14 (1920) 1920 P G 81 (63) 47 Cal 662 47 Ind
                                                                                                                                             to be fabrication
                          App 11 (P C)
                                                                                                                           (1911) 10 Ind Cas 315 (318) 1911 I un Re No
57 Appellate Court susjecting
that false evidence would be given
           (1918) 1918 Pat 253 (254) 1 Pat L Jour
           (1871) 15 Suth W R 507 (510)
                                                                                                                                                                 Note 9
 (1871) 15 Suth W R 507 (510)
(1926) 1930 Ng 486 (1871)
15 (1871) 16 Suth W R 211 (712)
(1916) 1915 V14 68 (50)
(1916) 1919 C14 637 (611 642) 46 C1 119
(1887) 9 41 365 (783)
(1910) 199 Obd 871 (811)
(1927) 1922 Dom 147 (418)
                                                                                                           1 (1907) 31 Bom 351 (390) 3i Ind \pp 115 (P C) (1934) 1934 All 175 (176) (1925) 1225 All 508 (500) (1925) 1225 All 508 (500) 47 Dom 67i
                                                                                                                          (1904) 98 Bem 4 (7)
(1876) 12 Bem H C R 247 (249)
(1027) 1922 Born 187 (148)
(1024) 1924 M 123 (1923)
(1671) 16 S.th W R 211 (212)
(1671) 16 S.th W R 211 (212)
(1671) 16 S.th W R 211 (212)
(1672) 1671 Lag 393 (893)
(1672) 1671 Lag 393 (893)
(1672) 16 1 167 C. S. S. S. Lh 123
(1672) 16 1 167 C. S. S. S. Lh 123
(1672) 16 1 167 C. S. S. S. Lh 123
(1672) 1672 Mad 709 (719)
(1672) 1932 Mad 709 (719)
(1683) 12 Born 247 (257)
(1693) 1955 Fun Re No 51, page 181
(1670) 1950 Fun Re No 51, page 181
                                                                                                                        (19 o) 1926 Ca1 941 (943)
(1J23) 1923 Ca1 2/3 (274)
(1J19) 1919 Ca1 26 (45)
(1919) 1919 Ca1 287 (290 291)
(1915) 1915 Ca1 407 (408) 42 Ca1 67J
                                                                                                                        (1327) 1927 Lah 574 (5:7)
(1918) 1918 Wad 1159 (1102)
                                                                                                                           (1911) 9 Ind Cas 251 (902) (Mad)
                                                                                                                           (1908) 31 \lad 114 (116)
                                                                                                                         (1J25) 1925 Nag 284 (288)
(1922) 1922 Nag 119 (120)
                                                                                                                          (1922) 1922 Pat 28 (28)
                                                                                                                          (1926) 1970 Pat 107 (108)
(1318) 1918 Pat 275 (276)
18 (1924) 1924 411 538 (539) 46 411 264
19 (1930) 1930 Bom 272 (242)
20 (1932) 1931 Lah 93 (93)
(1924) 1924 Lah 444 (447) 5 Lah 81
(1930) 1930 Sind 318 (324)
(1225) 1925 Mad 793 (793)
                                                                                                                    2 (1929) 1929 Pat 245 (217) 8 Pat 776.
                                                                                                                          (1927) 1927 P G 123 (124) (P C)
(1J24) 1921 Cal 1071 (1072)
                                                                                                                          (1923) 1923 C 1 606 (60)
                                                                                                                          (1920) 1920 Cal 813 (814)
 21 (1873) 19 Suth W R 88 (89) Documents
                                                                                                                          (1872) 17 Suth W R 47 (47)
(1931) 132 Ind Cas 6 (6) (Lah)
                        alleged to be burnt but one document
                        cought to be admitted in appeal on
the ground that it had escaped the
                                                                                                                          (1916) 1916 Wad 538 (539)
(1919) 1919 Wad 17 (18)
                                                                                                                         (1926) 1926 Oudh 74 (75)
                       general destruction-Not to be all
lowed without proof of its genuine
                                                                                                                   3 (1908) 31 Lom 381 (390) 31 Ind \p 115
                                                                                                                                        (PC)
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(1934) 1934 111 175 (176)

evidence so di covered, it should not be admitted unless it is shown that the O rany had exercise I due diheence 6

#### 10 Record of reasons

Whe ever the appellate Court admits additional evidence it should record its reason for doing \$1.1 It is a salutary provision which operates as a check against a too cast reception of evidence at a late stage of linguinon and the statement of reasons may inspite confidence and disarm objection. Let this provision is only directory and not mandatory? and the failure to record reasons does not make the evidence inadmissible? A contrary view has, however, been expressed in the undermentioned cases? It is submitted that it is opposed to the decision of the Prvy Council in Ganga Gobind Mandal's case? Where, it is laid down that the provision as to the record of reasons is not a condition precedent to the reception of the evidence, and cannot, therefore, he accepted as correct

The reasons need not be recorded in a separate order provided they are embodied in the judgment of the appellate Court \$\[ \]\\$ mere reference to the 'pecular circumstances of the case \$\[ \]\ or a mere statement that the endence i necessary to pronounce judgment' is not enough compliance with the requirement as to recording of reasons. The issue by the appellate Court of a commission for Iseal Investigation is not the same thing as the admission of additional enderce, and no reasons need be recorded for issuing such commissions.

# 11, Additional evidence by consent of parties

Note 10

4 (1 CO) 1 JO Lab 1004 (1007)

Where parties consent to the admission of additional evidence they cannot afterwards object to the recept on of such evidence <sup>1</sup> A party in whose fa-

(1920) 1920 Cal 813 (814)

(1927) 1927 Cal 126 (128) Dissenting from

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1 (1931) 1 31 P C 175 (177) (P C)
                                                                        1919 Cal 170 (171)
   (1934) 1 31 Cal 627 (62-)
                                                                 (1905) 2 Cul L Jour 4 n
   (1934) 1924 Cal 707 (709)
                                                                 (1556) 12 Cal 37 (38)
                                                                [Sec (1853) 11 Cal 189 (142 143)]
(1869) 12 Suth W R 52 (53)
(1869) 11 Suth W R 47 (48)
   (1933) 1933 Mad 407 (40-)
                                                              [See (1870) 14 Suth W R 236 (237)]
3 (1926) 1J26 Cal 369 (370)
   (1917) 1917 Cal 201 (202)
    (1902) 6 Cal W N 31 (82)
    (1867) 7 Suth W R 313 (313)
   (1868) 10 Suth W R 228 (229)
(1869) 11 Suth W R 6 (7)
(1869) 12 Suth W R 245 (246)
    (1870) 13 Suth W R 85 (86)
                                                             7 (1921) 1924 All 303 (304)
                                                                 Bet see the following cases dec _ a
under Code of 1859 —
    (1874) 21 Suth W R 416 (418)
    (1875) 24 Suth W R 20 (21)
    (18"7) 26 Suth W R 55 (76) 3 Ind App 259
                                                                 (1669) 3 Beng L R 218 (224)
                                                                 (1669) 12 Suth W R 245 (216)
(1870) 13 Suth W R 328 (329)
                                                              8 (1932) 1932 All 270 (271)
 14
                                                                                    Note 11
                                                              1 (1909) 3 Ind Cas 465 (465) 26 Em 7
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27. your an order for the admission of additional evidence is made, cannot subsequently attack it 2 Similarly, a party who has taken advantage of the order for the admission of additional evidence and lets in such evidence cannot himself subsequently question the order 3

# 12 Procedure to be adopted under this Rule

The formalities as regards the admission and recording of evidence in the original Court apply to additional evidence taken in the appellate Court 1 The appel'ate Court is not authorised merely to send a document to the thumb impression bureau and act upon their report 2 The issue of a general commission to try an issue is not warranted by this Rule. If additional evidence is required, it should be taken by the appellate Court itself or the appellate Court should direct it to be taken by the lower Court 3

There is nothing illegal in an appellate Court first ordering additional evidence and then cancelling the order and remanding the case for re trial, for, there is no decision of finality in the exercise of the discretionary power conferred by the Rule 4

#### 13 Application to put in evidence

The Rule does not require an application for the admission of additional evidence. But such an application is not prohibited, for, although the test of admissibility of additional evidence under this Rule is the requirement of the appellate Court on an appreciation of the evidence as it stands, it is open to a party to point out to the Court any defects in the evidence on the record (See Note 4) In fact the existence or otherwise of such an application seems to have been regarded as an indication of whether the Court required the additional evidence 1

#### 14 Opportunity to opposite party to contest admissibility of or rebut the fresh evidence

When additional evidence is sought to be admitted in the appeal, the opposite party should be given an opportunity to contest the admissibility of the evidence1 and to adduce rebutting evidence 2 But failure to give such opportunity does not vittate the proceedings if it has not caused any prejudice to the opposite party 3

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Ind Ap 221 (P C)
(See (1929) 1929 Bom 14 (15) 3
                                                                                                                       (1917) 1917 \(\bar{1}\) 158 (1.9)
                                                                                                                                                          Note 14
                                                                                                               1 (1924) 1921 Cat 403 (401)
(1927) 1927 Lab 11 (12)
(1927) 72 Lub C ts 239 (211) (E tt)
2 (1930) 1930 Vil 220 (221)
(1931) 1934 Lab 462 (464)
                    Bom 12}
2 (1929) 1929 Cal 492 (493)
3 (1875) 24 Suth W R 325 (326)
     (1929) 1923 Nag 119 (120)
                                         Note 12
                                                                                                                      (1925) 1925 Cal 671 (672)
(1325) 1925 Cal 671 (672)
(1325) 1925 Cal 98 (100)
(1337) 1923 Cal 300 (302)
                                                                                                                      (1921) 1923 C41 300 (302)
(1921) 1921 C41 661 (672)
(1921) 1917 C41 201 (203)
(1924) 1924 L4h 638 (633)
(1921) 1921 L4h 279 (280)
(1915) 1915 L4h 323 (324)
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2 (1915) 1915 (11112 (118) [See also (1932) 1932 Pat 352 (352) 11 Pat 762 Suit on promissory note

- Uleged alterations-Opinion ob timed by appellate Court shout date of stump held madmis-libe] 3 (1885) 1 C P L R 160 (161 162)

4 (1857) 1997 All W N 145 (145) Note 13

1 (1315) 1915 Mad 588 (584) (1916) 1316 Mad 575 (587)

(192a) 1925 Vad 191 (183)

(1913) 18 In I Cas 857 (859) 9 Nat L R

(1912) 15 Ind Cas 2,0 (2,0) to Oath

#### 15 Remand for trial de novo

The Rule contemplates a distorted of the case on the metris by the appellate Court itself. Where the appellate Court desires to take further evidence the ployer course is to follow the procedure laid down in Rr 27 and 28 and not to remaind the whole case. But in exceptional cases the appellate Court has an inherent power to remaind the case for taking additional evidence.

#### 16 Court of can take notice of subsequent events

As a general rule 1 Court of appeal in considering the correctness of the judgment of the Court below will confine itself to the state of the case at the time such judgment was rendered and will not take notice of any facts which may have rusen subsequently but in exceptional cases the Court will depart from this Rule specially where by so doing it can shorten httigation and best attain the ends of justice 1 See also Note 4 to 0 7 R 7 ante and Note 4 to R 33 infra

# 17 Party on whom onus is shifted by appellate Court if entitled to let in additional

Such a party is not entitled to let in additional evidence if he is not taken by surprise by the action of the appellate Court 1

# 18 Second appeal

N - 10

Note 16

1 (190°) 6 Cul L Jour 74 (78)

An order of an appellate Court admitting or rejecting additional evidence is neither a decree nor an appealable order and hence no appeal hes therefrom! But the order cru be questioned in the appeal from the appellate decree (S 105) As regards the grounds on which such an order can be attacked, the High Court will not ordinarily interfere with the discretion of the lower app Ha e Court? in admitting? or refusing to admit! additional evidence But

(193a) 193a Lah 32 (83)

3 (1977) 1997 Cal 140 (148)

(1915) 1915 411 64 (65)

4 (1931) 1931 Lah 500 ( 07)

	(1925) 1975 Pat 612 (615) 1 4"0 1 4"0 1 4"0 1 4"0 1 4"0 1 1 4"0 1 1 4"0 1 1 4"0 1 1 2 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1
	1 (1914) 1914 Oudh 14 (52) (See also (1926) 1976 Lah 494 (195) 7 Lah 297] W to 19
•	1
	-Order is not appealible-But appeal case be treated as revi or application of the case of
~ ı	the discretion las been is properly

2111

7. an objection can be raised on the ground that the lower appellate Court has admitted addational evidence in contravention of this Rule5 or has refused to exercise the discretion vested in it by that Rule 6 (Such objection being covered by S 100)

Additional evidence admitted in contravention of this Rule should be disregarded as inadmissible? But the decree should not be reversed or varied on that ground unless the decision, on the ments, has been affected thereby 8 (See C P C, S 99 and Evidence Act, S 167)

Where the lower appellate Court has admitted additional evidence the second appeal cannot, on that account, be treated as a first appeal so as to enable questions of fact to be gone into 9

#### 19 Privy Council

There is no restriction on the powers of the Privy Council to admit additional evidence in appeals before it 1 The rejection of an application for the admission of additional evidence does not involve any substantial question of law within S 110 so as to give a right of appeal to the Privy Council2

#### 26 Revision

Where an appellate Court admits additional evidence which it is not competent to receive in accordance with the provisions of the Code, the defect in its order amounts only to an error of law, and not a want of jurisdiction and hence, no revision lies from such an order,1

IS 569 \ Wherever additional evidence is allowed to be moduced, the Appellate Court may either Mode of taking ad take such evidence, or direct the Court from ditional evidence whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court

f1877-S 569: 1859-S 3561

(1930) 1930 Lah 750 (752) (1912) 13 1nd Cas 131 (132) ( \11) (1898) 1 Oudh Cas 199 (201) (1915) 1915 Mad 588 (599) (1915) 1915 Lah 323 (324) 1918 1J18 Lah 120 (121) 8 (1915) 1915 Wad 762 (762) (1931) 1934 Cal 269 (210) (1.33) 1933 Lah 323 (329) (1921) 1921 Sind 155 (157) 16 Sind L R 17 (1870) 14 Suth W R 19 (20) 9 (1897) 24 Cal 98 (101) (1896) 12 Cal 37 (38) CasSG (1875) 23 Suth W R 51 (51) (1919) 1919 Mad 1166 (1171) 42 Mad 737 Note 19 1 (1923) 1923 P C 128 (136) 2 Pat 676 53 Ind 1pp 183 (P C) [Compare (1869) 3 Beng L R -5 26 [P C]]

2 (1894) 21 Cal 484 (486 487)

(FB) 5 (1830) 11 Cát 139 (142 143)

[See also (1923) 1928 Cal 300 (301)] 6 (1901) 23 All 121 (122 123) (See also (1921) 1921 Bom 267 (269)

45 Bom 377]

7 (1931) 1931 P C 175 (177) (P C) (1932) 1932 111 264 (268)

(1907) 31 1-on 381 (391) 34 Ind App 115 (PC)

Note 20 1 (1920) 1920 Pat 266 (266) 5 Pat L J -03 (1909) 4 Ind Cas 878 (880) 12 Oudh Cas 405

## Synorsis

#### Mode of taking additional evidence Note No 1

#### 1 Mode of taking additional evidence

This Rule permits the appellate Court to either take the additional evicence itself or direct the lower Court to take in 1 The lower Court taking evidence under this Rule acts in a ministerial capacity. The parties may object to the admissibility of the evidence before the appellate Court, though they may not have taken any such objection before the lower Court?

Where bending proceedings for taking additional evidence before the lover Court (directed by the appellate Court) one of the parties to the appeal des, the application for substitution of legal representatives can be entertained only by the appellate Court and not by the lower Court. The appellate Court may under this Rule send the case back to the first Court to have a local enquiry mad. (Cf. O. 41, R. 27. Note 1)

R. 29. [5 570] Where additional evidence is directed or of allowed to be taken the Appollate Court shall specify the points to which the evidence is to be contined and record on its proceedings the points

so specified

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[1877—\$ 570:1859—\$ 357]

Synopsis

Points to be defined and recorded Note No 1

# I Points to be defined and recorded

When additional evidence is allowed to be given this Rule requires that the appellate Court should specify and record on the proceedings the points to which the evidence should be confined <sup>1</sup>

# JUDGMENT IN APPLAL

R. 3O. [S 571] The Appellate Court, after hearing the O parties or their pleaders and referring to any mate of the proceedings, whether on appeal or in the Court from whose decree the appeal is preferred, to which reference may be considered necessary, shall pronounce judgment in open Court, either at once or on some inture day of which notice shall be given to the parties of their pleaders.

[1877-S 571, 1859-S 349]

Order 41 R 28—Note 1

(1864) 1864 Suth W B Sup No 124 (1°5)
(1894) 1934 Lah 664 (660) Lacus a on every
important joint—Troper course is
to remit the case to trial Court for
additional evidence
(1921) 1921 Cal 122 (123)

C P C 343 & 344

30

# Sunonsis

After hearing the parties or their I In open Court etc pleaders

Note No

Other Tonics

Death of party pending appeal See Note 1 Pts (1) and (2)

1 After hearing the parties or their pleaders !

Compare O 20, R 1 ante

The Rule authorises a judgment to be pronounced only after hearing the parties or their pleaders. A judgment pronounced without hearing them is unauthorised by the Code Hence where before the hearing of an appeal a party to the appeal dies and it is heard and disposed of without his legal representatives being brought on the record the decree is a nullit, whether it is adverse to the deceased or is in his favour.

Where a party does after the hearing but before the judgment is pronounced, it is not valuated by the absence of his legal representatives on the record See O 22 R 6

2 In open Court etc

Where the provisions of this Rule as to the judgment being pronounced in open Court and after notice to the parties were not complied with it was held that an appeal field within 90 days of the appellant coming to know of the decision against him was within time and that in any case there was sufficient cause for the delay within the meaning of 5 5 of the Limitation Act 1 The judgment may be given at once after the hearing is over or on some future day? (See also Notes on O 20 R 1)

- 31 Contents date and signature of judg Appellate Court shall be in scritting and shall state-
  - (a) the points for determination,5
  - (b) the decision thereon,6
  - (c) the reasons for decision,7 and
  - (d) where the decree appealed from is reversed or vined, the relief to which the appellant is entitled, s and shall at the time that it is pronounced be signed and dated by

the Judge of by the Judges concurring therein [1877—8 574, 1859—8 359]

. . . .

(1916) 1916 Vad 5"1 (J75) (1920) 13"0 Oadh J" (J5) Note 2 1 (1919) 1919 Lah 102 (103) 1913 i Ja bo

### Local Amendment

MADRAS

tate-(a) the

the doc sion. at d(i) where the decree appealed from is reversed or varied the relief to which the appellant is entitled and shall bear the date on which it is pronounced and shall be signed by the Judge or the Judge's concurring therein provided that where the presiding Judge's specially empowered by the High Court to pronounce his judgment by dictation to a shorthand writer in open Court the tran crift of the judgment so pronounced shall after such re ision as may be decined i ece ary be signed by the Judge

	స్తు	nopsis		
] 11	Vote to Object and applicability of Rule Contents of judgment of appellate	. 1	O 41 R 11 Non compliance with Rule-Effect	0M <b>,9</b>
	Court-General 2		General	10
	(a) Judgment of aftermance. (b) Judgment of reversal (c) I omits for determination		(a) Second appeal—Naintainability of on ground of non con plance (b) Non compliance with the Rule by	11
	(d) Decision thereo:	7 1	dure of High Court	12
111	(f) here the decree appealed from in reversed etc -Cl (d)	3	Appeal in proceedings under S 476 of the Criminal Procedure Cade	13

#### Other Topics

Cons deration of evidence See Notes 7 and 8 Pt (8) Co sideration of grounds of appeal Sec Note 5 Pt (4)

1 Object and applicability of Rule

The objects of requiring an appellate Court to record in its judgment the particulars mentioned in this Rule are two fold, namely (a) to afford the parties an opportunity of knowing and understanding the grounds of the decision with a view to enable them to evercise, if they see fit and are so advised the right of second appeal conferred by S 1002 and (b) to enable the High Court in second appeal to Judge whether the lower appellate Court has properly appreciated the case and has decided it after applying its mind to it and considering the evidence 2 See also Note 3 to O 20, R. 3.

The provisions of this rule as also R 30 supra apply also to proceedings under the Agra Tenancy Act, III of 1926, but a judgment of the Board need not be dated, signed or pronounced in open Court See List II. Sch 2 of that Act

2 Contents of judgment of appellate Court-General

A judgment of the first appellate Court must be complete and selfcontained and must state the points for determination, the decision thereon and the reasons for the decision 2 Compare O 20, R 3

Order 41 Rule 31-Note 1 1 (1854) 10 Cal 932 (93J) (1914) 1915 L B 32 (93)

2 (1324) 1924 411 100 (100) Note 2

1 (1926) 1926 Oudh 408 (409) 23 Oudh Cas

271 2 (1916) 1916 All 200 (260) (1911) 9 Ind Cas 804 (1) (804) (411) (1910) 8 Ind Cas 157 (151) (Vad) Nature of case and grounds urged in appeal to be stried (1916) 1916 Mad 427 (42°)

(1928) 1928 Oudh 374 (375) (1905) 1905 U B R Civ 1 ro 34 (1915) 1915 L B 32 (33)

(1890) 1990 Lun Re No "2 page 197 (1875) 15 Suth W. R 1"0 (131)

#### 3 Judgment of affirmance 11.

The Rule makes no distinction between affirming judgments and reversing judgments, and in either case it is obligatory upon the appellate Court to comply with the requirements of the Rule Hence, where an appellate Court affirms the decision of the trial Court, a mere general expression of concurrence with the trial Court's judgment without giving any reasons, is not a sufficient judgment under the law 1 But an affirming judgment need not erter into detailed reasons to the same extent as a judgment of reversal 2 Further, where the case is comparatively a simple one, and a trial Court has dealt with it fully and accurately, and it is evident from the appellate Court's judg ment, that it has appreciated the case properly and has decided it after considering the evidence, the mere fact that it has not repeated the reasons given by the trial Court which it approves of, does not vitiate the judgment 3 See also Note 10, infra

(1871) 15 Suth W R 324 (326) Note 3 1 (1931) 1931 All 589 (989) 53 All 929 (1934) 1934 Lah 77 (78) (1934) 1934 All 100 (100 101) (1006) 1906 All W N 86 (86) (1888) 8 All W N 61 (96) (1886) 1888 All W N 285 (286) (1887) All 36 (37 28 31) (1860) 1 Agra H O R 73 (74) (1918) 193 Dem 235 (285 236) (1919) 16 Ind Cas 854 (855) (Mad) (1910) 8 Ind Cas 157 (151) (Mad) (1908) 31 Mad 460 (470) (F B) (1803) 22 Mad 12 (18) (1869 70) 5 Mad H O R 174 (17a) (1928)

(1924) 1927 Oudh 95 (96) 90 Oudh Cas 330 1 Luck 458 (1919) 1919 Oudh 131 (131) 21 Oudh Cas 309 (191") 1917 Oudh 3,4 (3"4) (1914) 1914 Oudh 265 (265) (1905) 8 Oudh Che 290 (292) (1919) 1919 Pat 162 (162) 49 Ind Cas 74 (733) (1927) 1927 Rang 203 (908) (1912) 17 Ind Cas 593 (899) (L P) (1911) 11 Ind Cas 915 (915) (L B) (1907) 14 Bur L Rep 155

(1900 02) 1 L B R 201 (205)

(1927) 1927 C:1 323 (324) (1923) 1923 C:1 163 (163 164) (1921) 13 146 C:3 194 (195) (C:1) (1968) 10 S:1b W R: 100 (100) (1868) 10 S:1b W R: 100 (100) (1871) 15 S:1b W R: 126 (125) (1866) 23 S:1b W R: 126 (125) (1872) 12 S:1b W R: 126 (125) (1874) 12 S:1b W R: 126 (125) (1874) 12 S:1b W R: 126 (125) (1874) 11 S:1b W R: 1318 (31.1) (1874) 11 S:1b W R: 1318 (31.1) (1921) 11 13 B:m 235 (23.5) 16 Int (1918) 1918 Bom 235 (235) 16 Ind Cas 161 (161 162) (1928) 1928 Oudh 450 (450) (1,19) 1919 Pat 13 (16) (1896) 1886 Pun Re No 25 1356 19 [See also (1681) 9 411 33 (95) Juls

ment of High Court]

#### 4 Judgment of reversal

It is specially important that an appellate judgment reversing the underment of the lower Court should be adequate and sausfactory 1 It must contain definite findings on the questions involved,2 and must give reasons for reversing the decision of the irial Court,3 It must come into close quarters with the judgment appealed from and must express an opinion on all the points on which the lower Court has based its conclusions 5 It has, however, been held in the cases cited below that it is not necessary for an appellate Court when reversing the decision of the trial Court, to meet the reasons given by such Court, and that it is enough if the appellate Court gives its own reasons for us our decision

#### 5 Points for determination

This rule requires the appella e Court to state in its judgment the points that arise for determination 1 These points must cover all the important quesnons involved in the case2 and must not be general and vague 3 The object of the legislature in making it incumbent on an appellate Court to raise points

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Note 4
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1 (1316) 1315 | 11 543 (543)
   (1.310) 7 h d C is 421 (421) (C il)
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(1 4) 1 Suth W R 19 1(17)) typell the Court ii i o. de ide the case upon a mere illinati n in the I laint di regarding

the evidence [See al o (13°1) 1931 Mad 169 (173)]

S e also the cases extel on Note 3 1 N 2

2 (1)2-) 1928 Mad 4-J (190) (1910) 7 Ind Cas 421 (421) (Cal)

(1926) 1926 Oudh 578 (547)

3 (1920) 1920 Cal 533 (579) (1907) 1 Cal W > 631 (632)

(1503) 2 Leng L R 20 (20) (1503) 2 Suth W R 77 (77)

(150J) 11 Sath W R 559 (560) (1570) 14 Sath W R 55 (53)

(1872) 17 Suth W R 257 (355) (1872) 20 Suth W R 403 (404) (1873) 21 Suth W R 284 (285)

(1876) 25 Suth W R 263 (364) (1576) 25 Suth W R 26 (27) Question of

imple ciedit to be given to i witness -Of mon of Court of first metance

not to be lightly districted (1471) 8 Ling L R 41p 3 (4, 5) (1926) 1926 I at 4°G (4 8)

(1923) 1923 Pat 275 (216) (1916) 1916 Pat 343 (350) (1892) 16 1 om 540 (545).

(1915) 1315 Oudh 218 (219) (1872 1892) 2 L B R G.J.

See the following cases showing that there is a prina facie prisemption in favour of the correctness of the lover Courts july ment -

(1871) 15 Suth W R 228 (229) (1676) 25 Suth W R 20 (31)

(1922) 1J22 P C 29 (40) (P C) (1921) 1921 P C 5. (56) 17 Nag L R 73(P C) (1867) 11 Moo Ind App 177 (141) (P C)

4 (1346) 1326 N to 425 (439)

(1 PC) 1926 Yag 15 (16) 5 (1560 67) 11 Mos Ind Apr 1"" (185) (P C)

(1.6) I Sath W R 100 (100) 6 (166) I Leng L R S N 2 (c)

(1915) 1915 Cit 99 (93 100 (1871) 16 Suth W R 1 (16)

(1569) 13 Suth W R 361 (362) (186J) 12 Suth W R 152 (152) (1871) 21 Suth W R 260 (260 261) First

Court believing defendant a witnesses - Appellate Court believing plaintiff a winespes-No recessions neces sary to be given

### Note 5

1 (1909) 10 Loin L R 402 (404)

(1870) 2 N W P H G R 109 (109) 2 (1029) 1920 Ctl 110 (114) 55 Ctl 1216 (1890) 12 All 46 (49) (1326) 1926 Lah 351 (332) Jower appellate

judgment desling with part only of subject matter - Romand should be ordered (1912) 15 Ind Cas 818 (818) 36 Bom 379

(1918) 1918 Cal 251 (2.2) (1917) 1917 Pat 429 (429, 430) 2 Pat L Jour

701

(1914) 1914 Mad 685 (686)

# ٠.

questions involved therein is not conclusive in second appeal

(1884) 1884 VII W N 99 (99) (1925) 1925 Cal 316 (317)

3 (1857) J 411 26 (31, 32) Not sufficient to state, the point to be determined

on appeal 1, whether or not the decreson is consistent with the ments 31. for determination, is to clear up the pleadings and focus the attention of the Court and of the parties, on the specific and rival contentions of the parties. But an appellate Court is not bound to decide a point which although taken in the grounds of appeal, has been abandoned or is not urged at the hearing of the appeal 5 Similarly, a new point or a point not raised by the parties or not necessary for the disposal of the appeal, need not be decided.

# 6 Decision thereon

There must be finding on each point raised for determination  $^1$  and it must be definite  $^2$  especially on questions of fact  $^3$ 

# 7 Reasons for decision-also O 20 R 3 ante

Under this rule the appellate Court must state in its judgment the reasons for its decision. It must set forth the evidence relied upon? and must come to its own independent conclusion on a consideration of such evidence. It must not proceed on the assumption that it is, in any way bound by the views of the trial Court though it must not forget that the trial Court has had the opportunity of watching the demeanour of the witnesses in Court. A mere statement that a point is proved or not proved.

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3a (1903) 7 Bom L. R 174 (174)
4 (1903) 8 Offall Cas 270 (1920)
[See also (1927) 1927 Lbh 768 (769)
Appellive judgement silent as to cer
tane points in the grounds— Pre
sumption is that the 3 were abun
doned]
(1919) 1019 0 (1112 (113) A statement in a
judgement that a jout is not seri
ovely joes den the first Court must
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outly 1 res so it had niss cours made to taken to be proof of its having been abundoned (1010) 5 Ind Cas 813 (814) (Mad) No issue is rused on a point covered by the piled (185) 3 Suth W R 176 (177) (1920) 1920 Cal 1774 (75)

(1884) 8 Dom 28 (20)
(1922) 1922 Oudh 122 (123) 22 Oudh Cas
not pres cd]
(See also (1872) 18 Suth W R 218
(221) Objection as to vilue and main
tambility of sijeal tiken alter
argument was over]
(1894) 8 Dom 28 (20)
(1922) 1922 Oudh 122 (123) 22 Oudh Cas
(1892) 1922 Oudh 122 (123) 25 Oudh Cas
(1893) 1922 Oudh 122 (123) 25 Oudh Cas
(1893) 1922 Oudh 123 (1893) 1922 Oudh 124 (1893) 1922 Oudh 125 (1893) 1922 O

rgument was over] (1874) 21 Suith W R 426 (437) 6 (1923) 1132 Lah 250 (250) (1923) 123 Lah 250 (250) (1973) 19 Suith W R 321 (321) 7 (See (1918) 1918 I C 53 (55) 40 M1 497 (See d.o. (1921) 1324

(P C) (1871) 15 Suth W R 277 (224)

(1571) 15 Suth W R 257 (221) 8 (130a) 3 C 11 W N 60 (69) Note 6

1 (1933) 1933 P C 33 (35) (P C) (1865) 2 \ W P H C R 142 (147)

suffiel force in (1979) 19 Suth W R 321 (321)
(See at 0 (1)21) 1)21 at 215 (2)
219) Several suits di posed of by
common judgment— typellate Court
should cor after evidence in each
crae separately
[But we (1862) 1 Hyde 103]

[But see (1862) 1 Hyde 103]
4 (1893) 2 Cal W Secentric (cccxl)
(1916) 1916 Pat 262 (263) 2 Lat L Jour S.

(1916) 1916 I at 34J (350) (1881) 10 Cal JUJ (935) (1895) 11 Loin 2/3 (3 C 324) (1917) 1917 Pat 389 (35J) (1919) 1919 I at 52I (J2I)

Note 7 1 (1503 1000) 2 L L R 313 certain evidence is the best evidence,5 or that the arguments of plaintiff's counsel represent the correct view of the case,6 or that a point is absurd, or ridiculous, or worthless,7 is not a proper judgment. Nor should the judgment be based on mere conjectures and presumptions or on evidence not legally admitted 9

But the whole evidence on the record need not be reviewed. It is enough if the evidence discussed is reasonably adequate for a proper decision of the case 10 Nor is it necessary to discuss a document not brought to the notice of the appellate Court 11

In the undermentioned case12 it was remarked by Markby, J., that reasons in S 359 of the Code of 1859 (new O 41, R 31) meant not the reasons for any conclusion of fact, but reasons showing the point of fact or of law upon which the decision runs. Having regard to the foregoing discussion this view seems to be wrong

Where a judgment does not discuss a document of obvious importance, at may be presumed that the Court has not considered at 13

8 Where the decree appealed from as reversed etc. Cl (d)

Where an appellate Court reverses or modifies the decree appealed from it must specify in its judgment the relief to which the appellant is entitled it is not enough merely to say, that the appeal is decreed, or that the decree is reversed Where the conclusions in the appellate judgment differ in important points from those of the trial Court, the appellate Court must specify in its decree the modifications necessitated by its conclusions 2

9 Summary dismissal of appeal under O 41 R 11

There is a conflict of decisions as to the applicability of this rule to cases of summary dismissal of an appeal under R 11 ante. On the one hand it has been held by High Courts of Calcutta,1 Madras,2 Allahabad,3 Rangoon,4 the Chief Court of Puniabs and the Judicial Commissioner's Court of Oudh5a

<sup>5 (1916) 1916 111 200 (200)</sup> 6 (1921) 1921 Luh 119 (120) 2 Luh 271, 7 (1863) Marsh 832 (1900 0°) 1 L B R 204 (205)

<sup>407, 405) (</sup>Cal) Dismissal of appeal under S 551 — Whether judgment should be written Cox C J — No Richardson J-Les] (But see (1934) 1934 Cal 26 (27) Where order dismissing appeal under this Rule is not subject to a further appeal it is not necessary to write a udgment though it would be satis

factors if one is written] 2 (t831) 3 Mad 1 (2)

<sup>8 (1931) 1931</sup> All 597 (599) (F B) Overruling (1908) 30 All 319 (1931) 1931 Att 589 53 All 528

<sup>4 (1926) 1926</sup> Rang 129 (131) 4 Rang 66

<sup>(1927) 1927</sup> Rang 208 (208)

<sup>(</sup>But see (1916) 1916 U B 9 (11)
2 U B R 92 Rule does not
apply in entirety But judgment
must at least show that Judge has understood case?

<sup>[</sup>But see (1920) 1920 Cal 869 (869)] Note 8 1 (1870) 2 N W P H C R 415 (416)

<sup>(1669) 1</sup> Beng L R (A C) 50 (54, 55) 2 (1897) 12 All 46 (48)

Note 9 1 (1807) 25 Cul 97 (98)

<sup>(1923) 1923</sup> Cal 558 (558) (1922) 65 Ind Cas 479 (450) (Cal) (1926) 1926 Cal 992 (992)

<sup>(</sup>But see (1900) 2 Ind Cas 405 (406.

1, that the Rule applies to such cases and the appellate Court is not exempt from writing a judgment in the manner prescribed by R 31 In the special circumstances of any case, however, a short judgment merely expressing con currence with the views of the lower Court without entering into reasons may be held sufficient 6 On the other hand, it has been held by the High Court of Patna62 and the Judicial Commissioner's Courts of Nagpur7 and Sind3 that the Rule does not apply and that the appellate Court is not bound to write a formal judgment in such cases. The Bombay High Court inclines to the latter views but holds that under Civil Circular No 51 of 1890 of that Court issued under the Indian High Courts Act, appellate Courts are bound to comply with the requirements of Rule 31 even in cases falling under Rule 11 10

### 10 Non compliance with Rule-Effect-General

(1544) 6 411 53 ( 3 )

This Rule is imperative and a judgment which is not in accordance with it, is not one according to law 1 But a substantial compliance with the rule is enough. What is substantial compliance depends on the facts and circumstances of each case 2 The important point is that it must be evident from the judgment of the appellate Court that it has properly appreciated the case, has applied its mind to it and has decided it after considering the evidence on the record 3 If the judgment satisfies this requirement, the appellate Court will be deemed to have substantially complied with the Rule, and its judgment will not be interfered with merely because it does not strictly fulfil the formalities laid down therein 4

11 Second appeal-Maintainability of on ground of non compliance A second appeal will be on the ground that the judgment of the lower appellate Court does not substantially comply with this Rule, and is therefore

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(1905) 8 Oudh Cas 250 (292)
                                                              (1920) 1920 Sind 12 (13) 14 Sind L P 1"
                                                              (1686) 1686 111 W N 285 (286)
(1689) 1683 AH W N 1°8 (173)
                                                              (1868) 1698 All W N 61 (62)
                                                              (1886) 1656 All W N 171 (171 172)
                                                              (1923) 1J23 Pat 2,5 (2,6)
                                                              (1909) 2 Ind Cas 404 (404) (Cal)
                                                              (1321) 13-4 411 100 (100 101)
                                                           2 (1923) 1923 Cal 163 (163 164)
    (1901) 5 Bom L R 233 (233)
                                                              (1916) 1316 Pat 343 (3.0)
    (1891) 1891 Bom P J 58 (56)
    (1894) 1594 Bom P J 113 (113)
                                                              (13 1) 1931 111 597 (600)
                                                              (1874) 21 Suth W R 200 (260 201)
            [But see (1885) 9 Bom 452 (4.3 4 4)
                                                           3 (1977) 1J27 Cal 323 (324)
           Rejection of appeal as time barred-
           Circumstances sho ving reasonable
cause for delay pleaded-Reasons
for rejection of appeal must be
                                                              (1926) 1926 Cal 545 (545)
                                                             (1917) 1317 Pat 358 (783)
                                                             (1316) 1316 I ah 139 (140)
                                                             (1914) 1J14 Oudh 965 (965)
            neu]
                                                             (18,1) 16 Suth W R 15 (16)
    (18J1) 1891 Bom PJ 239 (239) But if ap
           pellant not prejudiced decree not to be soversed
                                                             (1864) 1 Suth W R 214 (215)
                                           app.llate
                                                             (1919) 1919 1 at 486 (49 )
10 (1913) _0 h d Cas 966 (36") 37 Bom 610 (F B)
                                                             (1313) 1 HD Pat 13 (16)
                                                             (1J25) 1925 Cal 316 (317)
                                                             (1915) 1315 I th 242 (243)
(1319) 1313 I ah 336 (337)
                     Note 10
 1 (1547) 9 411 6 (27 24 31)
                                                             (1320) 1320 All 508 (809)
(1911) 3 Ind Can 601 (601) (411)
    (1377) 1333 Lah 332 (333) Judgment held
           to be rot a judgment in law and
                                                             (1838) 2 C (1 W N 63 (64)
            et mide
    (1556) 6 All W N 1"1 (1,2)
                                                          4 (1654) 3 131 .6 (31)
                                                             (1920) 1920 Su 112 (13) 14 Sud L E 18
(1931) 1331 All (600) (11)
    (148.) " All 610 (C.6)
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ro' a judgment according to law  $^1$  \ contrary view has, however been taken in some cases, on the ground, that the non-compliance with this rule cannot be considered to be an irregularity which may possibly have affected the decision on the meri s within S 100 Cl (c) 2. This view is against the general trens of opinion. Further, at least some of the cases laying down the view are cases in which the non-compliance with the rule was not of a substantial rature.

Findings of fact of the lower appellate Court for which reasons are not given are not conclusive in second appeal 4

12 Non compliance with the rule by lower appellate Court—Procedure of High Court. Where the lower appellate Court has not substantially complied with this Rule. The High Court may reverse the decree and remand the case for disposal according to law. It has however been held in the cases cited below?

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(1924) 1 114 (1) 100 (100 101)
                           Note 11
                                                                                 (190 ) 1 12 Lib 246 (247)
1 (190 | 31 Mal 40) (+ 0 4"
                                                                                (13 6) 1326 Lah 351 (357)
(1 123) 1 124 Lah (55 (653)
   (1835) 1 (4) 17 (15)
   (1924) 11 4 411 100 1100 101)
   (15%) 7 All ( 11 (G f)
   (1900) 8 O idl Ca 230 (21)
(1311) 11 It d Cas 115 (31) (L))
   (1709) 2 Ind C := 401 (404) (C :1)
   (1916) 1316 U B 9 (10) 2 U B R 3
             I rror may po sibly have sie ted de i ion on merits
   (131') 1 119 1 at 124 (190)
              (See also (18"0) 18:0 1 un Re No 61
                                                                                           1 Luck 458
                                                                                 (1976) 1928 Vad 16 (17)
(1977) 1927 Lah 419 (419)
(1926) 1378 Lah 655 (65)
                                                                                 (1912) 16 lt d Cas 397 (383) (Mad)
                                                                                 (1917) 1917 Oudh 374 (874)
(1916) 1916 Lah 189 (140)
                                                                                (1916) 1916 Lth 189 (140)

1916) 1916 L B 9 (10) 9 U B R 92.

(1JL) 1915 L B 72 (33)

(1914) 1914 Oadd 20, (265)

(1912) 17 Ind Coss 509 (899) (L B)

(1871) 15 Suth W R 724 (326)

(1873) 4 Suth W R 4 (176)

(1873) 5 Suth W R 176 (177)
                                                                 330
              1 Luck to8
    (1916) 1 JIB Lah 386 (383)
                                                                                 (1838) 2 Cal W N C95 (691)
    (1)17) 1,17 1 44 958 (35)
                                                                                 (1966) 190: VII W V 86 (86)
```

1 (18-7) 9 M1 26 (28) (1896) 6 All W N NT1 (171 1"2) (18-2) 1 L Lon 422 (430) (1897) 12 C All V N NT1 (171 1"2) (18-2) 1 T Lon 422 (430) (1897) 25 C All 7 (48) (1897) 29 Mad 49 (417 428) (1895) 22 Mad 19 (417 428) (1895) 22 Mad 19 (419 41) (1892) 11 C All L Bep 131 (182) (1891) 6 M1 (418 416) (1891) 6 M1 (418 416) [See al o (1871) 15 Suth W R 131 (1205) 31 Whit 469 (4.0 471) (F B) (1001) 31 Whit 469 (4.0 471) (F B) (1001) 11 Ind Cat 91a (91a) (15 B) gas 505 Re (1206) 1400 Whit 1 Ind Cat 91a (15 B) gas 505 Re (1206) 1401 (14 Ind (91a) (15 B) (16 E) (1

14gt -41)

Note >

1, that the High Court cannot do so but can only require the Judge in the lower Court, if he is still in service and in the same district, to state his reasons for his conclusions This view is against the general trend of opinion. Further some of the cases expressing such a view3 will on examination, be found to be not cases of substantial non-compliance with the Rule

The High Court may instead of remanding the whole case call for fresh findings from the lower appellate Court 4

13 Appeal in proceedings under S 476 of the Criminal Procedure Code

The judgment in an appeal in proceedings under 5 476 Criminal Procedure Code must, according to the general rule, give reasons for the decision 1

14 Applicability of rule to High Court

In the undermentioned case1 the High Court confirmed the decree of the lower Court but failed to give in its judgment any reasons for its decision An application was made to the High Court for leave to appeal to the Privy Council on the ground that the requirements of the present rule were not complied with On this application, Edge C J, said that the present Rule was not intended to apply to cases where the High Court, after hearing the judgment of the lower Court and the arguments thereon comes to the conclusion that both the judgment and reasons given by the lower Court for its decision are complete and satisfactory The learned Chief Justice gives no reason for his view, and it is not clear why the present rule or at least the principle thereof should not apply to the High Court 2 On the other hand the Privy Council itself has held that the High Court must give reasons for its decision in its judgments 3 See also Cl 42 Letters Patent But under O 49 R 2 where at the commencement of the present Code there were, in force, any Rules for the recording of judgments by Chartered High Courts, the present rule cannot in any way, affect the operation of such Rules 4

R. 32. [S 577] The judgment may be for confirming, varying or reversing the decree from which the appeal is preferred, ei, if the parties to the What judgment may direct appeal agree as to the form which the decree in appeal shall take, or as to the order to be made in appeal, the

Appellate Court may pass a decree or make an order accordingly

[1877-S 577: 1859-S 350]

Sunor sis Note No

Confirming varying or reversing decree 1 | Compromise decree in appeal

49 Ind App 76 (P C)] [See also (156J) 12 Suth W R 152 3 (1693) 11 All 460 (4"0) 16 Ind 417 "05 (152)]

<sup>3 [</sup>See (1856) 12 C il 139 (203)] 1 (1916) 1916 Mad 427 (427)

<sup>1 (1931) 1931</sup> Cal 454 (454 455) (1327) 1327 Cal 284 (284 285) 54 Cal 355

<sup>1 (188 ) 9</sup> AH 93 (95) (F 1)

<sup>2 (</sup>See (1321) 13-11 ( 50 (82) 48 Cal 481

o

### I Confirming varying or reversing decree

Under this Rule an appellate Court has no power to dismiss an appeal. The judgment must be one for confirming varying or reversing the decree appealed from But an appeal may be dismissed under R 11 ante or as being incompetent as where it is time barred or is barred under S 102 t

# 2 Compromise decree in appeal

1

Where an agreement set up by one party is denied by the other there was a conflict of decisions under the Old Code as to whether the Court had the power to determine the question as to the factum and validity of the alleged agreement and pass a decree if it finds such agreement to have been validly made In O 23 R 3 of the present Code (corresponding to S 375 of the former (ode) the Legistature has given effect to the view that the Court has such a power. This view has been applied to compromises en cred into during the bendency of appeals 1 as well as those entered into in the lower Court Sec O 23, R 3 Note 6

R. 33. [New] The Appellate Court shall have pouch to O Power f C et f pass any decree and male any order which ought to have been pussed or made and to pass or make Appeal such further or other decree or order as the case

may required and this power may be exercised by the Court notwith standing that the appeal is as to part only of the decrees and may be exercised in favour of all or any of the respondents or parties. although such respondents or parties may not have filed any appeal or objections 6

Provided that the Appellate Court shall not make any order under section 35-A, in pursuance of any objection on which the Court nom whose decree the appeal is preferred has omitted or a cfused to make such or der 12]

#### Illustration

Acla sas : fro eyas lecto le ifra i Vor Va de la suit against boll oblaits a decree agas st \ \ ag peals a d A and \ are rego de is The ameliate Court lecties to fato or of \ It las jouer to pass a decree aga it \

#### Synopsis

Note No Note No Scope object and applicabl ty of Rule Any decree or order which ought to Power may be exercised notwithstand ing that appeal is as to part only have been passed 2 of the decree Power may be exercised in favour of Such further or other decree or order as the nature of the case may respondents or parties who have

not filed appeal or cross objec require Power of appellate Court to take cogns 4 zance of subsequent events (a) Po er if cal be exerc sed infavour 46a

(1913) 21 I d Cas G39 (G41) (Mad) (1924) 1324 Cal 991 (392) (1929) 1929 Pat 102 (102)

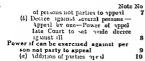
(But see (1802) 14 All 3.0 (352) This

Note 2

14 15

16 17

18



#### Note No. Illustration to the Rule Proviso Limitation Res judicata Remand Second appeal Privy Council appeal Revision

# Other Topics

Note 11

Alternative relief See Note 6 Pts (5) and (6) Applicability of the Rule to partition suits See Note 1, F N (7) Cioss objection igninst co respondent See Note 6 F N (19), also O 41 R 22

(1+0) 1+0 Mad 707 (707) (Do)

( ac also (137)) 137, I th 374 (37)]

(1) 0) 1 1'0 Cal -64 (-67)

Power to grant relief to respondent who has filed appeal or cross objection and fuled therem See Note 6 14 (23)

# 1 Scope object and applicability of Rule

This Rule is new and is based on O 58, R 4 of the Rules of the supreme Court in England. It is wider than O 41. R 4 Its object is to enable the appellate Court to do complete justice between the parties1 and to avoid contradictory and inconsistent decisions on the same questions in the same suit 2 For this purpose a discretionary3 power is conferred on the appellate Court to pass such decree or order as ought to have been passed or as the nature of the case may require notwithstanding that the appeal is as to part only of the decree or that the party in whose favour the power is proposed to be exercised has not filed any appeal or cross-objection. The discretion conferred is wide, and in a proper case, the appellate Court should not hesitate to exercise it 42 But as the power is in derogation of the general principle that a party cannot avoid a decree against him without filing any appeal or cross-objection at must be exercised with care and caution 5 No hard and fast rule can however

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Order 41 Rule 33-Note 1
                                                                4 (1914) 1914 Cal 722 (723)
                                                                    (1.316) 1916 Cal 136 (149) 43 Cal 7.0.
(1916) 1916 Cal 2.0 (251)
                                                                    (1911) 9 lad Crs 525 (826) (Lab)
                                                                    (1917) 1317 Cul 343 (845)
                                                                    (1320) 1920 Pat 77 (82) 5 1'st L Jone S.
                                                                   (1931) 1931 Born 288 (294)
(1326) 1326 Cal 57 (59)
2 (1916) 1916 Pat 400 (40I) 1 Pat L Jour 143
           [See also (1918) 1318 Mal 794 (801)
                                                                   (1926) 1,28 All 746 (750)
           40 VI id 816]
                                                                   (1327) 1327 Wrd 620 (621)
                                                                                                     0 Mad 614
   (1 30 a) 28 Mad 229 (234)
                                                                43(1311) 11 Ind Cas 610 (611) 31 \11 32(1 1"
   (1313) 1919 \[14 136 (197)
                                                                   (1316) 1918 Cal 13 (14)
                                                               (1336) 1936 D.T. de 501 (405 - 906) 33 Mad - 1
(1326) 1325 J. da 155 (156)
5 (1913) 21 Ind C1× 767 (764) (Mad)
(1933) 1938 Lab 682 (685)
                                                                   (1316) 1316 C d 261 (262)
(1314) 1314 C d 723 (723)
                                                  town 1
                                                                   (1.311) 11 1md C as 640 (641) 31 (11 12 (2.2)
(1.318) 1315 C of 13 (11)
   (1927) 1327 P C 252 (2.6) 6 Rang 29 (P C)
           (1)o)
                                                                  (13_0) 1320 1 at 77 (51 52) , Pat I J
   (1,12_) 1927 C (1,393 (3,33) 43 C (1,373 (Do)
                                                    (Do)
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(1.1.8) 1 123 I di 117 (118)

(132-) 1 - 12h 3 3 ((01) 3 Lah 21

ee laid down as to the circumstances under which the power may or may not be exercised and each case must depend on its own facts (See also Note 6)

There is no restriction as to the class of suits to which the Rule applies 7 The principle of the Rule applies also to applications for revision 8 It also applies to a suit to set aside a decree Thus, where a decree is passed a rainst several defendants, so ne of whom sue to have the decree set aside. tle decree may be set aside as against all 9 See also the following cases 10

2 Any decree or order which ought to have been passed

The Rule enables the appellate Court to pass any decree or order which eaght to have been passed

# Illustrations

and for one fourth in favour of the second defendant. The first defendant appeals. The appellate Court considers that the appeal must be dismissed but that the trial Court should not have passed a decree for one fourth in favour of the second defendant as he was a defendant and not a plaintiff. The appellate Court therefore in dismissing the appeal pas cs a decree for the entire sum in favour of the plaintiffs declaring at the same time that as to one fourth it is for the second defendant a share. Held that the appellate Court has power

to do so 1 2 Plaintiffs sue for a declaration that the proceedings taken against them by the defendants are ultra tires and nult and void Tho trial Court pisses an order of signdamus against them instead of giving a declarator) decree The defendants appeal The appellate Court considers that an order of mandamus should not have been passed but that a decree for a declaration should have been passed It has power to pass such a decree 2 For other instances see the undermen

tioned cases 3

6 (1914) 1914 Cal 722 (723) (1933) 1933 Mad 606 (80~) (1911) 11 Ind Cas 640 (641) 34 AH 32 (F Is) (1927) 1927 All 453 (454) 49 All 224 decree (1930) 1930 Mad 801 (806) 53 Mad 881 (FB)

7 (1922) 1922 Cal 399 (399) 49 Cil 379 Rule applies to partition snits

3 (1924) 1J24 Nag 154 (15J)

9 (1931) 1931 Mad 6 (8) 10 (1911) 9 Ind Cas 815 (816) (C41) applies to appeals pending at com mencement of present Code

(1910) 5 Ind Cas 23 (26) 33 Mad 241 (Do) Note 2

1 (1916) 1916 P C 182 (184 185) 44 Cal 759 44 Ind App 65 (P C) [See also (1916) 1916 P C 96 (101)

-Decree in favour of A and C-Appeal by B-Appellate Court can transpose C as plaintiff and main tain decree in his favoui)

43 Cal 660 (P C) A sung B and C

2 (1932) 1932 Rang 123 (128) 10 Rang 412 (FB)

3 (1929) 1929 Cal 322 (325) 56 Cal 21 Appeal from ex parte decree-Power of the appellate Court in appeal from ex rarte decree is not confined only to the investigation of the cause of

non appearance (1919) 1919 Lah 341 (344) In dismissing appeal appellate Court can amend

(1919) 1919 Pat 196 (198) (Do) (1918) 1918 Nag 41 (44) (Do) (1916) 1916 Mad 538 (540) (Do)

(1920) 1920 Cal 115 (117) 46 Cal 10.9 Even

specific performance of contract to sell immoveable property - Proper decree - Appellate Court has while dismissing defendant suppeal power

to pass a decree in the proper form (1915) 1915 Mad 37 (37) 25 Ind Cas 373 (975) (Do)

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3 'Such further or other decree or order as the nature of the case may require"

The appellate Court has power to pass not only any decree or order which ought to have been passed but also such further or other decree or order as the nature of the case may require. Accordingly the appellate Court has power to deal with the case in any way that may seem equitable to all the parties concerned.1

### Illustrations

1 A property, the subject of two mortgages, one in favour of S and the other in favour of B, is sold for arrears of revenue and purchased by T S sues for the enforce ment of his mortgage against the surplus sale proceeds and makes B, a defendant to the suit claiming priority over him The suit is decreed B appeals against the decree In the meanwhile there is a suit by B for setting aside the revenue cale and this suit is also decreed T, (the purchaser at the revenue sale) appeals against this decree Both appeals are heard together and are dismissed. The appellate Court can in dramissing the appeals, direct that S s rights should be enforced against the property matead of against the sale proceeds 2

2 A suit is erroneously dismissed on the merits instead of for default. An appeal is filed by the plaintiff The appellate Court can not only pass the order which the lower Court ought to have passed tar, an order of dismissal for default, but also a further order that the aut do stand restored and that the lower Court do

proceed to try the suit according to law 3

3 Where on an application to set aside an execution sale on the ground of the price being less than that payable under certain Rules, the lower Court refuses to set aside the sale, and on appeal, the appellate Court considers that the sale should be set aside, it has power to accept the purchaser a offer of a higher price, and to leave the sale undisturbed . See also the undermentioned cases \$

that suit had abited-Appellate Court can hold so (1923) 1923 Lah 422 (423)

(1923) 1923 Nag 80 (31) Trial Court reject ing plaint for want of Court fee-Appellate Court reversing order may reject plaint on another ground, 112, on the ground of suit being barred by limitation

(1913) 19 lud C1s 2 (2) 6 L B R 111 Trant Court decreeing suit on a particular ground - Appeliate Court can reverse decision ou that point but may maintain the decree on another bauota

#### Note 3

1 (1911) 9 Ind Cas 825 (826) (Lah) (1914) 1914 Wad 226 (230) 39 Wad 556

2 :

4 (19.0) 1930 Bom 290 (232) 54 Bom 348 5 (1906) 3 Cal L Jour 23 (36) Order appoint ing guardian-Alpeal igninst-tpsellate Court ein appoint (mother) al interna guardian lending appeal, as ancillary to the power which it guardian in sularses ion of the one

al pointed by the lower Court (1910) 7 Ind Cas 797 (737) (Mid) Lourt of appeal has the power to allow the appellant to amend the beading of 40 41 1641

(1918) 1918 Nag 228 (291) 14 hag L B 50 Appellate Court not to grant relief not seled for in plaint (1917) 1917 Pat 42 (48) 2 Pat L. Jour 633.

(Do)

(1923) 1923 All 285 (241 242) (Do)

(1917) 1917 Vad 688 (588) Vi pullvic Court has no puradaction under R 31 to grant extension of time, fixed for pryment of the price in a decree for specific performance

after the same (1922) 1J22 Lom 267 (269 26.) 46 Low 181 Decreo ex parte- ipual- ip lellate Court has lower to remain

(1925) 1325 Wad 735 (735) App Hate Court

can amend its own decree (1910) 6 Ind Cas 110 (147) (Cal) Apella e

Court can try case only on I sace on which parties went to trial (1323) 1323 Lah 115 (116) 3 Lah 3-2 1P

pellate Court mis 1 aus a fresh commission for the jurpe of examining accounts and remedition certain mistales and omissionsmale by another commissioner

(1923) 1323 Wad GI7 (Glo C43) 46 3141 679 If the record of a cae midet appeal is lost, the appellate Cours has power to re construct the read Ŧ

4 Power of appellate Court to take cognisance of aubsequent events

See also Note 4 to O 7 R 7 and Note 16 to O 41, R 27 for a full discussion As a general rule a Court of appeal, in considering the correctness of the judgment of the Court below, will confine itself to the state of the case at the tune such judgment was rendered and will not take notice of any facts which may have arisen subsequently 1 But the Court wall in exceptional cases, depart from this rule, especially where, by so doing, it can shorten huganon and best attain the ends of justice. In such cases it is not only competent to a Court of appeal, but it may be its duty to take nonce of events which have happened subsequently to the passing of the decree or order appealed against 2

# 5 Power may be exercised notwithstanding that appeal is as to part only of the

This rule expressly empowers the appellate Court on an appeal from one part of the decree to reverse or modify the other part 1

But where there are several suits and a separate decree is passed in each of them the appellate Court has no surisdiction in an appeal against one of them to set aside the other decrees ?

6 Power may be exercised in favour of respondents or parties who have not filed appeal or cross objections

The general principle is that a decree is binding on the parties to it. until it is set aside in appropriate proceedings 1 A party who wishes to have a decree against him modified or reversed, must comply with certain requirements as to filing of appeals, objections and so forth 2 Hence as an ordinary rule, an appellate Court must not reverse or vary a decree in favour of a party who has not preferred any appeal or cross objection against it, and this general rule holds good notwithstanding the enactment of R 333 But in exceptional cases the rule enables an appellate Court to pass such decree as ought to have been passed, or as the nature of the case may require, even if such decree would be in favour of parties who have not filed any appeal or cross-objections against the lower Court's decree 4 Ordinarily the power con-N . 1

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(1916) 1916 Cal 654 (656)
                                                               (1926) 1926 Cal 1042 (1044)
                                             15
                                                               (1925) 1925 Mad 206 (267 268)
                                                                       (See also Note & I ounts 7 8 and 9
                                                                       and Note 8 Point 5 ]
(1934) 1334 Mad 675 (6:6)
                                                           2 (1925) 1,25 Bom 2,0 (291)
(1901) 25 Bom 606 (613)
                                                               (1919) 1919 Lah 201 (202) 1919 P R No. 116
(1899) 1 Bom L R 218 (219)
(1931) 1931 Bom 2s0 (282)
(1331) 1931 Bom 288 (294)
                                                              Corspars also Note 8 Point 4
                                                                                  Note 6
(1)30) 1930 Bcm 254 (260) 54 Bom 125
(1917) 1917 Cal 716 (719) 44 Csl 47
(1911) 10 Ind Cas 675 (6 6) (Mad)
       [See also (1J17) 1917 P C 111 (115)
                                                              (1925) 1925 Lah 2 (9 10)
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1

(1929) 1929 All 334 (335) (1920) 1920 Cal 428 (434) (1937) 1932 All 32 (33) (1917) 1917 Lah 423 (426) (1916) 1916 P C 182 (184) 44 Cal 759 44 Ind App 65 (P C)

Note 5 1 (1920) 1920 Cal 428 (434). 6, ferred by this rule will be confined to those cases where, as a result of interference in favour of the appellant, further interference with the decree of the lower Court is rendered necessary, in order to adjust the rights of the parties according to justice, equity and good conscience 42

## Illustrations

- (a) A claims Rs 500 as due to him either from B or from C and in a suit against both of them claiming relief in the alternative obtains a decree against B B appeals making A and C respondents. The appellate Court comes to the conclusion that C and not B is linkle to 4. It has purisdiction while allowing Bs appeal to pass a decree in Favour of A seamed C<sup>5</sup>.
- (b) A sues B and C for a certain sum of money The suit is decreed against B and dismissed against C B appeals making i and C respondents to the appeal A his suit can while
- (c) A suit is brought on behalf of the public for a declaration (a) that the public are entitled to use the locks on a certain river without paying tolls to the defendant and (b) that the defendant is under an obligation to keep the locks in repair The trial Court holds that the plannful sentitled to use the locks without paying folls.

(1931) 1931 P C 234 (239) ÉS Ind App 3-0 4 Mad 774 (P C) [See also (1929) 1929 Rang 158 (159 100) 7 Rung 83 (1921) 1921 Pat 502 (203) (Dut son (1920) 1020 Oudh 155 (140) 30 Oudh Car 110 This case makes and reference to the cold Code 1

(1916) 1916 Cal 890 (890) (1910) 8 Ind Cas 387 (338) (Mad)

(1919) 1919 Mad 1102 (1105)

no reference to R 33 and follows a decision under the old Code I The following decisions under the old Code (which did not contain any provision corresponding to R 33) holding that the appellate Court had no poure to recrete or modify in fatour of a respondent a portion of a decree against which he had not

(1918) 21 Ind Cas 767 (768) (Mad) (1918) 1918 Cal 228 (225) (1908) 3. Cal 538 (540) (1916) 1918 Cal 237 (238)

> 537 \* vd 903 rent un pleading tenants and plaintiff s co

(See (1934) 1934 Pat 524 (526) Distinct and separate decree against non-appealing defendant—appellat. Court ought not to interfere in his favour! (1906) 31 Cal 648 (Cab Geo) (F B) Sut for contribution (1909) 3 Ind Cas 917 (918) 12 Ouds Cas 200 (1907) 1917 Mad 340 (350) Suit on most cas are called the case of the case o

missory note {1°93| 25 Cal 555 (558) Suit for contribut 01 (1893) 25 Cal 109 (112 113) Suit on hundi (1901) 3 Bom L R 172 (178)

cross objection ]

favour) 5 (1914) 1314 All 361 (362) but the defendant is under no obligation to keep the locks in repair and a decree is O 4 accordingly passed. The defendant appeals but the plaintiff neither appeals nor files cross objections against the decree The appellate Court comes to the con clusion that the plaintiff is not entitled to use the locks without paying the tolls, liable

een the

locks in repair "

- (i) 4 is the vendee of certain lands from B B fails to deliver possession of the lands to I sues B for po session or in the alternative for the return of the purchase money The trial Court awards is a decree for possession Buppeals The appel late Court con iders that A is not entitled to sue for possession, but is entitled to the return of the purchase-money The appellate Court can vary the decree accor dingly 8
- (c) I an auction purchaser sucs B the judgment debter for possession or in alternative C the decree holder for refund of the purchase money The trial Court decrees pos ession B appeals making 4 and C re pondents The appellate Court comes to the conclusion that 4 is not entitled to recover possession from B but is entitled to the refund of the purchase money from C A decree may be passed to this
- (f) 4 and B suc C for recovery of certain property. The trial Court passes a decree in is favour but dismisses B sout C appeals. Lineither appeals nor prefers cross objection The appellate Court holds that B and not A is the person entitled It can pa a decree in B s favour 10 See als Note 8

The cases given in the above illustrations were cases in which there was interference by the appellate Court in appellant's favour, Suppose there is no interference in appellant's favour in a certain case, can the appellate Court reverse or modify the decree in favour of parties who have not filed any appeal or cross-objection? For instance A sues B for Rs 1000 A decree is passed in As favour for Rs 400 only A appeals from the decree B files neither an appeal nor prefers cross-objections against the decree The appellate Court finds that A is not entitled to any amount Can it dismiss ms suit in toto or can it merely dismiss his appeal leaving untouched the decree for Rs 400 in his favour? Similarly in the above case, B (the defendant) appeals and A (the plaintiff) neither appeals nor files any cross-objection. The appellate

7 (1901) 2 Ch D 671 (719) Attorney General 1 Simpson

(1927) 1927 All 453 (404) 49 All 224 Plain tiff succeeding partly in trial Court - Appeal by defendant-No cross appetl or cross objections by plant till—Appellate Court reversing in favour of defendant the finding of trial Court but finding that the finding of the trial Court against plaintiff on the other point was wrong may pass decree in plaintiff a favour on that point

(1917) 1917 Lah 429 (426) (Do) (1928) 1928 All 77 (80) 50 All 218 Decree

mother can be directed to be enforced against projectice in another village

(1931) 1931 P C 234 (239) 58 Ind App 350 C P C 345 & 346

54 Mad 774 (P C) Confirming 1930 Mrd 154 (154)

8 (1908) 18 Med L Jour 586 (587 588) (1925) 1925 Lah 155 (156) Where plaintiff made alternative claims on one of which the trial Court decreed the

> trial Court in plaintiff s favour -Appellate Court reversing decree may grant the alternative relief to which he is entitled

9 (1913) 18 Ind Cas 381 (382) (Bom) (1927) 1927 Cal 831 (832)

10 (1915) 1915 P C 57 (59) 43 Cal 417 (P C). Confirming 12 Ind Cas 931 (936) [See also (1926) 1976 Oudh 101

[But see (1928) 1928 Att 746 (752)]

11. (

- Court finds that B is liable for the whole amount claimed by the plaintift and not merely for the portion of it decreed against him. Has it the power, under such circumstances, to pass a decree against B for the whole amount or can merely dismuss his appeal leaving untouched the decree which exempts him from the liability for the halance of the amount? On this question there is a divergence of opinion. The decisions fall into three classes:—
  - (a) Those which hold that the appellate Court has no jurisdiction to pass a decree in B's favour in such a case.<sup>11</sup>
  - (b) Those which do not advert to the question of jurisdiction but simply say that the appellate Court should not pass a decree in B's favour in such circumstances <sup>12</sup>
  - (c) Those which say that the appellate Court has jurisdiction to pass a decree in B's favour even in such cases though the question whether the power should he exercised in a given case depends on its own circumstances.<sup>13</sup>

(1934) 1934 Pat 524 (526) Distinct and separate decree against non appealing defendant — Appoliata Court ought not to interfere in his favour

(1914) 1914 Cal 722 (723) (Do) (1917) 1917 Cal 843 (845) (Do)

(1911) 11 Ind Cas 840 (641, 642) 34 All 82 (Do)

(1913) 18 Ind Cas 530 (531) (All) Suit by A against B and O — Decree partir

Held, that the amount count nor -- so reduced (1928) 1928 Nag 322 (323) Appellate Court

(1928) 1028 Nag 322 (323) Appellate Court

execution allowed — Appear of cree holder claiming higher rate of interest — Application for execution not to be dismissed as barred by limitation.

12 (1916) 1916 C.1 250 (251) Suit partly decreed and partly dismissed—Appeal by plaintiff, no cross objection by defendant—Suit not to be wholly dismissed.

13 (1930) Mad 501 (506) - 5 naphantiff disastanded with decreappealing—In proper case appellate Court con drimins plantiff's sun't folo though respondent has not preferred cross appeal or memoralizaof objections. Conferency 1925 Mad 266 (267, 268)

(1920) 1920 Cal 990 (991) (Do) (1931) 1931 Mad 513 (518, 519) (Do)

[1933] 1933 Mad 322 (331, 532). park-decree against some detendant to tred by High Coart — Against est ex parte decree set asido—Sunt interest as a shad of a labor for the set of the set

It is submitted that the view expressed in (c) above is correct for the () following reasons ---

- (1) This rule is general in its terms and contains no words which would warrant its being restricted to cases where the appellate Court interferes in appellant's favour 16
- (2) The following cases 15 out of the cases cited under (a) were

fendants who had not appealed (Sce (1912) 17 Ind Cas 638 (639) 8 Nag L R 174 Suit Jartly decreed and partly dismissed - typeal by plaintiff - to appeal or cross object tion by defendant- typellate Court can dismiss whole suit as barred by

1

Suit for declaration and possession-Court holdios plaintiff was not en titled to the property and passing money decree for amount paid by him towards a certain encumbrance on the property-Appeal by defen

às nugh 712 f as

against all defendants jointly and his suit is dismis ed in against some

defendant a favour (1921) 1921 All GCT (365) 43 VII 65 Sout by 1 against B and C - Dieree partly against B and partly against C -

. ...

by defendant-typelists Court can allow plaintiff to nithdraw whole suit [See also (1928) 1928 Cal 488 (489) Sust for declaration that defendant was not entitled to draw water from plaintiff s tank from certain bank-Sust decreed but decree also provid ing that defendant was entitled to tals water from another bank-This was not a point raised in the case at all—Appeal by defendant—Appel late Court affirming decree of trial Court as to former | art but expung

-Appellate Court can pass decree for possession in his favour without any liability to pay anything (1919) 1919 Cal 65 (65) 46 Cal 738

partly decreed and partly dismissed -Appeal by plaintiff-No appeal or

cross objection by defendant-Whole case may be remanded [See also (1877) 1 Cal L Rep 144

but defendant wrongly ordered to pay Court fee payable on a previous sut filed by him—Appeal by Plain tiff—Appeal dismissed—Appellate Court has poser to set aside the erroneous order against the defen

(1929) 1929 Cal \_8 (31) Suit for declara tion and possession of a portion of denuted land decreed - Appeal by

get joint pos ession of the portion decreed (1932) 1932 All 32 (33) Trial Court passing

(146) Decree partly favourable to plaintiff and partly to defendant-

by ISLOD 1881

can grant plaintiff respondent mort gage decree in lieu of money decree-

(FB) 1 (1933) 1933 Mad 606 (808) 15 (1889) 11 411 35 (38) (1870) 2 N W P H C R 44 (45)

14

- 33 Court finds that B is hable for the whole amount claimed by the plaintiff and not merely for the portion of it decreed against him. Has it the power, under such circumstances, to pass a decree against B for the whole amount or can it merely dismiss his appeal leaving untouched the decree which exempts him from the hability for the balance of the amount? On this question there is a divergence of op nion. The decisions fall into three classes -
  - (a) Those which hold that the appellate Court has no jurisdiction to pass a decree in Bs favour in such a case 11
  - (b) Those which do not advert to the question of jurisdiction but simply say that the appellate Court should not pass a decree in Bs favour in such circumstances 12
  - (c) Those which say that the appellate Court has jurisdiction to pass a decree in Bs favour even in such cases though the question whether the power should be exercised in a given case depends on its own circumstances 13
  - 11 (1921) 1921 Lah 211 (212) Suit partly de creed in plaintiff a favour and jurily against defendant — Appeal by plaintiff — No cross objections by defondant-Appellate Court dismiss ing appoal cannot dismiss suit
    - (1925) 1925 Pat 28J (287) 4 Pat 37 (Do) (1926) 1926 Nag 281 (285) (Do) (1911) 9 Ind Cas 121 (122) (Cal) (Do) (1889) 11 All 35 (38) (Do)
    - (1985) 1935 Cal 458 (459) I urporting to follow 1916 Cal 250 which does not use the word jurisdiction (1917) 1917 Lat 52 (53) 36 Ind Cas 537 (539) (1929)
    - Appellate Court cannot make ap pealing party pay no sappeal ng party a costs in trial Court (1914) 1914 All 247 (248) Where 1 laintiff obtained a mortgage decree subject to paying a certa n amount to a prior mortgagee and in an appeal by the latter the sum was reduced Held that the amount could not be
    - so reduced (1928) 1928 Nag 322 (328) Appellate Court has no power to reverse mortgage decree and pass money decree only when defendant has I of appealed or

- (1934) 1934 Pat 524 (526) Distinct and separats decice against non appeal ing defendant - Al pellate Court ought not to interfere in his favour (1914) 1914 Cal 722 (723) (Do)
- (191 ) 1917 Cal 343 (345) (Do) (1911) 11 Ind Cas 640 (641 642) 34 All 87
- for foroclosure not to be passed m thsenco of closs alleal or cross ob pections by plaintiff (1918) 1918 Cal 158 (169) (1918) 1918 U B 50 (51) 2 U B R 144 (1927) 1927 Born 128 (128)
- (1926) 1926 Cal J7 (J9) 13 (1930) 1930 Mad 801 (806) 53 Mad 851
  - Plaintiff dissatisfied with decree appealing-In proper case appellate Court can dismiss | laintiff s ault 11 toto though respondent has not pre-

the exparte decree against the de

limitation 12 (t916) 1916 Cal 2.0 (2.1) but partly de creed and partly dismissed - Appeal by plaintiff no cross objection by de fendant-Suit not to be wholly dis missed

not to be dismissed as barred by

It is submitted that the view expressed in (c) above is correct for the () following reasons -

> (1) This rule is general in its terms and contains no words which would warrant its being restricted to cases where the appellate Court interferes in appellant's favour 14

> (2) The following cases 15 out of the cases cited under (a) were

fendants who had not appealed (Sce (1912) 17 fud Cas 639 (639) 8 Nac L R 171 Soit partly decreed and partly dismissed — Appeal by plaintiff - No appeal or cross object tion by defendant- trpellate Court can dismiss whole suit as barred by limitation ]

(1929) 1929 Rang 1'9 (153) 7 Rang 58 Decree for mesne profits - tppcal by plaintiff for enhancing amount-ip pellate Court can modify decree in

defendant . favour

(1921) 1921 All 167 (368) 43 M 65 Suit by 4 against B and C — Decree partly against B and partly against C Appeal by B - o at peal or cross
objection by C-Appellate Court can exonerate C completely and make B liable for the whole clarm (But see (1913) 18 L. C 500 (531) (411)

(1933) 1933 Lah 40 (41) (Do) (1928) 1928 Cal 488 (489) (Do) (1915) 1915 All 284 (285) (Do)

(1929) 1929 All 398 (399) Suit for pre emp

but defendant wrongly ordered to pay Court fee payable on a previous suit filed by him—Appeal by plain tiff—Appeal dismissed — Appellate Court has nower to set aside the erroneous order against the defen

to modification that plaintiff should get foint possession of the portion decreed (1932) 1932 All 32 (33) Trial Court passing

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buit for declaration and possession-Court holding plaintiff was not en titled to the property and passing money decree for amount paid by him towards a certain cucumbrance on the property-Appeal by defen dant-Appellate Court can pass de ciee declines, plantiffs right as mortgagee (by subrogation) though he had not filed cross objections

(1924) 1924 Pat 160 (160) 2 Pat 712 Where the plaintiff claims relief as against all defend outs jointly and his suit is dismis ed as against some defendants only in an appeal against

the dismissal the appellate Court can dismiss the whole suit

(1916) 1916 Cal 261 (262) Suit partly de creed and partly dismissed - Appeal by defendant-ippellate Court can allow plaintiff to withdraw whole (See also (1928) 1928 Cal 488 (489) Suit for declaration that defendant was not entitled to draw water from plainfull's tank from certain bank-buit decreed but decree also provid

ing that defendant was entitled to take water from another bank-Thia was not a point raised in the case at all-Appeal by defendant-Appel late Court affilining decree of trial Court as to former part but expung ing latter part — Held appellate Court had power to do so ]

(1830) 18 Mad 500 (502) Decree for redemp tion—Appeal by defendant—No ap-peal or cross objection by plaintiff -Appellate Court can pass decree for possession in his favour without

any hability to pay anything (1919) 1919 Cal 65 (65) 46 Cal 788 Suit partly decreed and partly dismissed -Appeal by plaintiff-No appeal or cross objection by defendant-Whole case may be remanded

[See also (1877) 1 Cal L Rep 144 (146) Decree partly favourable to plaintiff and partly to defendant-Appeal by plaintiff — Remand by appellate Court — Second decision may be more favourable to defen

dant than former one) 14 (See (1930) 1930 Vad 801 (205) 53 Mad 881

(F B) ] (1933) 1933 Mad 806 (808) 15 (1889) 11 All 35 (38)

(1870) 2 N W P H C R 44 (45)

- decided under the previous Code which did not contain any provision corresponding to R 33 (3) The cases cited under (b) do not say that the appellate Court
- has no jurisdiction to pass a decree in B's favour in such circumstances
- In overcising the power under this rule, the Court should not lose ight of the other provisions of law such as the Court-fees Act or the imitation Act which are likely to be infringed by the exercise of such power 16 are and judicial discretion must, therefore, be exercised in view of all the ircumstances of the case 17 The following conditions should be satisfied before uch power is exercised in favour of a party -
  - (a) The Court must be satisfied that there are good reasons for such party not having filed any appeal or cross objection 13
  - (b) Interference in favour of such party must be rendered necessary by the conclusions to which the appellate Court comes in deciding the appeal 19

# Illustration

A decree is passed in an administration suit dividing the extite between A and B and rejecting the claim of C to be entitled to the whole estate in preference to both d share C does not file an) no power in such appeal to

(c) Interference must be necessary in the interests of justice, equity and good conscience 21

In Rukia v Mena Lal22 the High Court of Allahabad observed that he rule 'is restricted to cases where w thout disturbing the grounds upon

> appeal without his filing an appel or memo of objections himself?

> > 2U.

(1920) 1970 Lah 438 (440) 1 Lah 396 54

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Pure to be enroked only when party appealing to it can fairly be said to be equitably entitled to relief -(1928) 1928 Lah 599 (601) 9 Lah 291 (1931) 1931 Lah 3 0 (371) Plaintiff not com a ito the Court with clean

50 Mad 614 The rule cannot be read as giving a right to a respondent to urge something in his favour igainst unother respondent which has

12 Pat 261 R 33 gives discretion order to further ends of justice and not to farour one party as apalmet another !

nothing to do with the result of the 22 (1923) 1923 411 746 (750)

I.

which the judgment of the trial Court proceeds, the appellate Court considers O that the decree should be modified in order to do justice to all the parties concerned including such as have not set the law in motion. If these remarks were intended to lay down that under this rule an appellate Court has no pover to vary a decree in favour of a respondent who has not filed an appeal or cross-objection if it has upset the grounds upon which the lower Court's judgment is based, it is submitted that the view is incorrect 224

The appellate Court can interfere in favour of a party or a respondent. who has filed an appeal or cross objection and failed therein 23

7 Power if can be exercised in favour of persons not parties to appeal

The appellate Court can exercise its power under this rule in favour of parties to the suit who were not impleaded as parties to the appeal 1 A contrary view has however been taken in the undermentioned cases 2 It is submitted that this view is not correct as it is inconsistent with the express provisions of the rule which uses the words respondents or parties 3 See alsa Notes to R 4 ante

8 Decree against several persons Appeal by one Power of appellate Court to set aside decree against all

Where a decree is passed against several persons and one of them appeals against it it is competent to the appellate Court under this Rule to set aside the decree against all of them1 although such decree does not proceed on any ground common to all the persons against whom it is passed 2 But this power of the appellate Court cannot be exercised as a matter of course and in

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"2a (19.4) 1934 Pat 184 (141) 13 Pat 200
                                                                    (1928) 1978 All 746 (751)
                                                                (1928) 1079 All 740 (751)
(1918) 1918 Mad C65 (666)
[See also (1918) 1918 Nag 228 (231)
14 Nag L R 56]
3 (1914) 1919 Mad 190 (191)
(1926) 1276 Cal 1942 (1044)
23 (1923) 1975 Lah 2 (3 10)
    (1931) 1931 Mad 977 (278) Independent
            appeals by plaintiff and defendant-
            Latter a appeal abating-lie as res
            pondent in pluntiff s appeal can
                                                                   (1925) 1925 Mad 266 (267)
            invoke R 33
                                                                                       Note 8
                         Note 7
 1 (1916) 1916 Mad 887 (887)
     (1335) 1935 Cal 94 (26) 61 Cal 919
     (13°3) 1333 Mad 506 (80a)
     (1316) 1916 Cal Go4 (Go6)
                                                                    (1916) 1916 Pat 400 (401) 1 1 at L Jour 143
     (1916) 1916 Vad 538 (540)
(1915) 1915 Vad 927 (223)
                                                                    (1927) 1927 All 37 (3 ) 48 All a51
     (1921) 1921 All 367 (968) 43 All 85
     (1919) 1919 Mad 196 (197) Preferably they
             may be made I trities
                                                                   (1926) 1326 411 425 (426)
                                                                   (1924) 1924 Pat 336 (339)
     . .-
                                                                   (1914) 1924 Pat 330 (339)
(1916) 1916 Cal Cát (556)
(1920) 1920 Cal 428 (134)
(1916) 1916 Cal 830 (890)
(1918) 1918 Vlad 794 (799) 40 Mad 846
(1916) 1916 Pat 400 (401) 1 Pat L
             [Sec also (1911) J Ind Cas Sto (816)
            (Cal) Appellate Court is competent
             to make a decree in favour of a partu
             in second appeal though such person
                                                                                                     1 Pat L Jour
             was not a party to the first appeal]
                                                                           143 Decreo against several defen-
  2 (1919) 1919 Cal 127 (127)
                                                                           dants-One of them ex parte-Appeal
by one - Appellate Court can set
     (1933) 1933 Cal 787 (188)
(1918) 1918 Cal 287 (288)
                                                                           aside decree against all
     (1926) 1926 Nag 185 (136)
                                                                           [See also (1926) 1926 Mad 974 (975) 1
     (1920) 1920 L B 114 (114)
                                                                2 (1915) 1915 Mad 227 (229)
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33. the absence of special reasons 3 Moreover, where there are several defendants and the decree imposes a separate hability on each of them, and one of them appeals against that part of the decree which concerns him, it has been held that the appellate Court cannot set aside the decree against all the defendants, the reason given being that in such a case there is really a combination of several decrees one of which alone is the subject-matter of the appeal 6 See also Note 5 ante A contrary view, however has been taken in the following cases 5

Where a decree is passed against two defendants, against one of whom it is passed on confession of judgment, and against the other, after contest, and the latter appeals against the decree, the appellate Court cannot set aside the decree in favour of the former 6

9 Power if can be exercised against person not party to appent

Under this Rule, the appellate Court has no power to interfere to the prejudice of a person who was a party to the suit but who was not impleaded in the appeal 1 The decisions to the contrary are it is submitted not correct? See also Note 6 to Rule 4 and Note 13 to Rule 22, ante

10 Addition of parties in appeal

(1909) 2 Ind Cas 5.2 (552) 31 111 21

(1 111) 10 1nd Cas 270 (276) (Cal)

See also O 41, R 20 and the Notes thereunder. It has been held that the appellate Court has power under R 33 to add parties to the appeal 1 But

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3 (1930) 123 Ind Cas 381 (All)
                                                                        (1918) 1918 Cal 178 (175)
                                                                         (1918) 1918 Cal 134 (135)
   (1927) 1027 All 177 (178)
                                                                        (1929) 1929 All 248 (244) 51 All 575
(1925) 1925 Vad 266 (267, 268)
   (1024) 1027 Nag 198 (197)
   (1018) 1916 Lah 113 (114 117) 1917 Pun
                                                                        (191e) 1915 All 120 (121)
                                                                                 (See also (1926) 1926 Cal 335 (336).
Appollate Court cannot vary decree
            Re No 71
             [See also (1911) 9 Ind Cas 742 (744)
            (Lab)]
                                                                       against respondent against whom
appeal had abated]
(1920) 1920 Lah 488 (440) 1 Lah 396.
Gross objection against co defendant
4 (1921) 1921 All 58 (57 58) 43 All 320
   (1934) 1934 Pat 524 (526)
(1928) 1928 Mad 1144 (1146)
(1928) 1928 Cal 593 (595) 55 Cal 1198
                                                                                 who was not party to appeal not
   (1918) 1918 Mad 665 (666 667) 42 Ind Cas
                                                                                 allowed
            972 (973 974 975)
                                                                       (1931) 1931 Cal 738 (739 740) 53 Cal 923
   (1917) 1917 Cal 87 (88)
(1913) 18 Ind Cas 543 (544) (All)
                                                                                 [See also (1925) 1925 Rang 108 (110)
                                                                                2 Rang 541 Finding of lower Court
   (1916) 1916 Mad 907 (907)
   (1925) 1925 Mad 771 (+74)
                                                                                not to be reversed in absence of
5 (1919) 1919 Mad 196 (197)
(1925) 1925 Pat 40 (42) 3 Pat 327
6 (1913) 16 Ind Cas 755 (760) (Lah)
                        Note 9
1 (1912) 16 Ind Cas 387 (388) (Cal)
(1935) 1935 Cal 24 (26) 61 Cal 919
(1933) 1933 Mad 806 (608)
                                                                   2 (1929) 1929 Cal 315 (317)
                                                                       (1926) 1926 Cal 1012 (1014) (Obster)
                                                                                [See also (1J16) 1916 Mad 1219
   (1934) 1931 Pat 589 (5J1)
            193; Pat 589 (5J1) Plaintiff a claim
dismissed against A but decreed
                                                                                           N .. 10
            igai ist B-B appealed not joining
A-Appeal allowed against plaintiff
            - I laintiff appealed impleading A
            and B-Time for appeal against A having expired he cannot be added
            as a party - tlso appeal against A direct to High Court is not permis
            sible without appealing to lower
            appellate Court
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of passing a decree against him, it

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the power must be exercised very sparingly 3

### 1t Illustration to the Rule

The illustration to the Rule indicates a type of cases for which provision is intended to be made 1 But it is not exhaustive of the classes of cases to which the Rule applies, and does not restrict the scope of the Rule 2 Thus though the illustration contemplates that the person in whose favour the appellate Court interferes is a party to the appeal and that there is interference in favour of the appellant, these two conditions are not essential for the apparability of the Rule See Notes 6 and 7

#### 12 Proviso

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The proviso to the Rule was added by Act 1X of 1922. Its effect is that the appellate Court cannot make an order for compensatory costs under S 35-4 where the trial Court has refused to do so See also Note 3 to S 35-A, ante

### 13 Limitation

A sues B for Rs 1000 The claim is decreed for Rs 600 A appeals from the dismissal of his suit for the balance. It is competent to the appellate Court to dismiss his whole suit if it comes to the conclusion that it is time barred 1 But it has been held that if the appellate Court is not in a position to reject the whole claim, as for instance, where the defendant has confessed judgment as to a part of the claim, the appellate Court should not dismiss even that part of the claim which is the subject-matter of appeal 2 The reason given is that the obligation to dismiss a suit as time-barred under S 3 of the Limitanon Act arises only when the appellate Court is in a position to dismiss the aho'e claim 3

When a suit is decreed partially and the plaintiff appeals against the disallowance of the balance of his claim, the entire decree is imperilled because the appellate Court can in such appeal dismiss the whole suit and hence limita tion for execution of the decree runs from the date of the appellate decree 4 When a decree imposes a separate hability on each of the several defendants, and one of them appeals against that portion of the decree which affects him. is limitation postponed under Art 182 Cl (2), even for the execution of the decrees against the other defendant? On this question there is a conflict of dec s ons some cases holding that time runs from the appellate decrees and others halding that time runs from the lower Court's decree 6

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had not exercised its discretion pro-
perly in this case—Computa 1927 P C
22 (286) [P C]]
2 (1928) 1928 Lali 947 (348)
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Note 11

<sup>(1916) 1916</sup> Lah 113 (114 117) 1917 Pun Re No 71 (1927) 1927 Mad 620 (622) 50 Mad 6t4 3 (1915) 1945 Mad 227 (229) (1915) 1919 Mad 296 (197) (1926) 1926 Cal 1012 (1944) (1930) 1930 Mad 601 (804) 53 Mad 881

Note 13 1 (1912) 17 Ind Cas 638 (639) 8 Nag L R 174

peals the liability of a non appeal ing defendant respondent may be en hanced under this Bule as a result of the appeal]

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#### 14 Res Judicata 33.

A sues B and C in the alternative for a certain sum of money The suit is decreed against B and dismissed against C B appeals making A and Crespondents. The appellate Courts sets aside the decree against B It can at the same time pass a decree against C But its failure to do so does not operate as res judicata under S 11 Explanation 5 because it was not obligatory but only discretionary on the nart of the appellate Court to grant relief to A1 (See S 11 Note 25) Similarly the failure of A to ask for rehef being granted to him under R 33 does not operate as res indicata under S 11. Explanation 42

Where a defendant appeals as to a part of the decree against lum it has been held by the Madras High Court in the undermentioned case3 that he is precluded by res iudicata from urging in support of his appeal a point which goes to the root of the whole decree including the portion of it from which he has not appealed. It is submitted that this decision is inconsistent with the Full Bench decision of the same High Court in Panchanada v Vythinathas and other cases cited in S 11 Note 29 Foot-Note 10 Further the decision seems to overlook the provisions of the present Rule which enable the appellate Court to reverse the whole decree though the appeal is as to a part of the decree alone (See Note 5)

### 15 Remand

Sec 1919 Cal 65 cited in N 6 Foot note 13 above

# 16 Second Appeal

A sues B and C The suit is decreed against B but dismissed against C B appeals from the decree but A does not file any appeal or cross objections Bs appeal is allowed and As entire suit is therefore dismissed A files a se cond appeal impleading B and C as respondents. He is not entitled to file a second appeal against C because to allow him to do so would be to allow him to prefer an appeal directly to the High Court from the decision of the trial Court 1 The decisions to the contrary2 are not good law in view of the Povy Council case mentioned below 3

A sucs for Rs 1000 The trial Court passes a decree for Rs 600 The defendant appeals but A does not file any appeal or cross objection The defendant's appeal is allowed and As suit is dismissed in its entirety A files a second appeal. He cannot contend in the second appeal that his whole suit should be decreed. The utmost he can claim is the restoration of the trial Court's decree 4 The authorities to the contrary5 are not good law as they are opposed to the Privy Council decision in Nobinchandra v Chandra Madhab But where the omission to grant a rehef is due to a mere slip of the pen it

1

<sup>1 (1918) 1918</sup> Cal 223 (225) 2 (1918) 1918 Cal 223 (225) 3 (1930) 1930 Vind 471 (4 2 473] 4 (1906) 29 Mad 333 (335] (F B) Note 16

can be decreed on further appeal, though no appeal was preferred against the C
decree of the first Court?

The mere fact that a decree might have been passed in favour of a party to the sunt who was not impleaded as a party to the appeal does not make him constructively a party to the appeal so as to enable him to file a second appeal against the decree in the appeal 8 No second appeal hes against an order of remand passed not under R 223 ante, but under the present Rule 8. The refusal to take action under R 33 in the everage of its discretion by a lower appellate Court is not an error of law within S 100 so as to sustain a second appeal 9.

17 Privy Council Appeal

A sues B and C. The claim is decreed against B dismissed against C B appeals to the High Court but A does not file any appeal or cross objections B is appeal is allowed A appeals to the Privy Council implicating both B and C. His appeal against C is not maintainable because it amounts to a direct appeal to the Privy Council from the decree of the trial Court which is not allowed under the law!

#### 18 Revision

on the ground that it has no jurisdiction to do so in the absence of cross objections it fails to overcise a jurisdiction to do so in the absence of cross objections it fails to overcise a jurisdiction vested in it by law within S 115° It has been held that no revision lies against an order refusing to add certain persons as parines to the appeal, as such an order is interlocutory in its nature 2

R. 34. [S 576] Where the appeal is heard by more C Judges than one, any Judge dissenting from the judgment of the Court shall state in writing the decision or order which he thinks should be passed on the appeal, and he may state his reasons for the same.

[1877-S 576, 1859-S. 359]

DECREE IN APPEAL.

Date and centents of decree which the pudgment was pronounced

(2) The decree shall contain the number of the appeal, the names and descriptions of the appellant and respondent, and a clear specification of the relief granted or other adjudication made

(3) The decree shall also state the amount of costs incurthom, or out of what property, and

Note 17 1 (1926) 1926 P C 34 (35) 49 Mad 4.5 55 Ind App 84 (P C) Note 18

<sup>10 (1930) 1930</sup> Vad 707 (707) (See also (1933) 1933 411 113 (114)]

<sup>1 (1913) 21</sup> Ind Cas 767 (\*68) (Madi 2 (1916) 1916 Mad 1219 (1220)

in what proportions such costs and the costs in the suit are to be paid

(4) The decree shall be signed and dated by the Judge or

Judges who passed it

Provided that where there are more Judges than one and Judge dissenting from judgment need not sign decree in g and in the judgment of the Court to sign

the decree

[1877—S 579; 1859—S 360]

LAHORE

# Local Amendments

Add the following as a provise to Rule 35 (4) -

Provided also in the case of the High Court that in the absence of a Judge who passed a decree or one or more Judges who passed a decree, either the Registrar or the Deputy Registrar of the Court shall sign the decree on behalf of such absent Judge or Judges, but that noither the Registrar or the Deputy Registrar shall sign such decree on behalf of a Judge who dissented from the judgement of the Court

MADRAS

Substitute the following for sub rule [4] —

if a [9] The decree shell contain the number of the appeal the names and description
of the appellant and respondent, their addresses for service and a clear specification of the selief
granted or other adjudication made

Synopsis

Note No
Date of decree
Specification of relief
Costs
Decree in appeal supersedes that of the lower Court

Other Topics

Amendment of appellato decros Ses Note No 4, h N (t)

1 Date of decree

Under this Rule, the date which the appellate decree shall bear is the date on which the judgment was delivered. Hence, the date of the decree for purposes of limitation for filing a second appeal is the date on which the judgment is delivered 1 Compare O 20, R. 7, ante.

2 Specification of Relief

The Rule requires that the appellate decree must contain a clear specification of the relief granted. But where the decree did not specify the sum due to the appellant except by reference to the judgment and decree of the lower Court, it was held, that though the decree was informal, as the amount due to the decree-holder was ascertainable from the record, it was capable of execution and execut on should be allowed as a matter of equity, the defect in the decree being due to the mistake of the officers of the Court. As to the construction of the appel ate decrees, see the underment-oned cases?

Order 41 Rule 35—Note I 2 [1905] 29 Mad 81 (86) Decree omitting in 1830) 12 (1179 (81) Rote 2 admitted by all the parties to like 1 (1841) 13 (1171) (341 715) auti-Decree whould be construed.

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3 Costs

See generally S 35 and the notes thereon. The appellate decree must provide for costs of the appeal as well as of the suit 1 As regards the costs of the appeal, the appellate decree must state the amount of costs meurred by eather party in the appellate Court. A party cannot recover any sum as costs of the appeal if it is not entered in the decree 2 But the amount3 or particulars4 of the costs incurred in the lower Court need not be specified in the appellate decree and the same may be ascertained from the lower Court's decree 5

The appellate Court must finally determine by which of the parties the costs are to be paid it cannot declare that the costs shall be borne by the party who will be unsuccessful in a suit to be hereafter brought 6

The appellate Court can deprive a successful party of his costs for sufneight reasons. Thus where a decree is confirmed on grounds wholly different from those on which it was based by the lower Court the appeal may be dismissed without costs

4 Decree in appeal supersedes that of the lower Court

See S 38 Note 5 and S 148. Note 9 and the undermentioned case 1

5 Court fee

S 33 of the Code provides, that after judgment a decree shall follow In the undermentioned case it was held by Oldfield, I, that even after the isposal of the appeal and pending the preparation of a decree, a Court had power to direct the plaintiff-appellant to correct the valuation and to pay additional Court-fee. The reason given was that the collection of Court-fees was no part of a Judge's functions in the trial of a suit which can be said to

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with reference to the admission
1687)
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the head of the paper book of the

appeal (1867) Shath W R 114 (115) There is good deal of distinction between appellate decree simply reversing decree of lower Court and decree which reserving that decision, goes on to record undement for the other

> done under orders contraductory of the final order in the suit

Note 3 1 [See (1871) 16 Suth W R 266 (267) ]

2 (1912) 15 Ind Las 828 (829) 5 Sind L B 1870) 13 Suth W 1t 23 (23 24)

Lut compare (1871) 15 Suth W R 530 (530)

' (1874) 21 Soth W R 74 (74) 4 (1872) 18 Soth W R 286 (286) 5 (1902) 5 Ind Cas 342 (343) (Cal)

6 (1875) 23 Suth W R 80 (90)

7 (1660) 8 Moo Ind App 170 (192) (P C) Note 4

1 (1900) 23 Mad 60 (67) Appollate decree is the only executable decree Decree to be amended as the appellate decree and appellate Court alone can

(1894) 18 Mad 214 (216) (F B) (1865) 2 Bom H C R ( \ C J) 101 (102) (1910) 5 Ind Cas 304 (301) (Cal)

(1832) 6 Mad 43 (46 47) Appeal withdrawn -Lower Court s decree is the execut sble decres

(1867) 1 All 293 (295) Time fixed for per formance of act directed by decree

runs from appellate decres (1869 70) 5 Mad H C R 215 (223) (Do ) (1920) 1920 L B 118 (121) 10 L B R 280 Appollate decres should embody so

much of the lower Court's decree as it is intended to affirm so sa to avoid the nucessity of reference to

to Executing Court can construe it

with reference to pleadings. Note 5 1 (1855) 7 All 528 (534) Muhmood J.

contra

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ROMBAY

have ceased with its determination, and that the Court-Fees Act fixes no time for the collection of Court-fees.

6 Chartered High Courts

This Rule does not apply to Chartered High Courts in the exercise of their appellate jurisdiction (See O 49, R. 3).

7 Form of appellate decree -See Appendix G Form No 9

R. 36. [S 580] Certified copies of the judgment and decree in appeal shall be furnished to parties on application to the Appellate Court and at their expense

[1877—S 580; 1859—S 360]

R. 37. [S 581] A copy of the judgment and of the decree, certified by the Appellate Court or such decree to be sent to officer as it appoints in this behalf, shall be sent to the Court which passed the decree appealed from and shall be filed with the original proceed-

ings in the suit, and an entry of the judgment of the Appellate Court shall be made in the register of civil suits

[1877—S 581: 1859—S, 361]

### Local Amendments

ALLAHABAD

Delete the words 'and shall be filed with the original proceedings in the suit in last5 and 6 of the Rule

Ald a new paragraph as follows -

Where the appellate Court is the High Court the copies aforesaid shall be bled with the original proceedings in the suit '

Add the following as R 38 -

- 38 (1) in address for service filed under O 7, R 19 or O 8, R 11, or subsequently altered under O 7 R 21 or O 8, R 12, shall hold good during all appellate proceedings unsuing out of the original suit or petition.
  - (2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court bolow, and notices and processes shall issue from the appellipte Court to such addresses.
  - issue from the appellate Court to such addresses

    (3) Rules 21 22 23 and 24 of O 7 shall apply, so far as may be, to appellate
  - proceedings"

The following shall be added as R 33 -

38 (1) An address for service filed under O 7, R 19, or O 8, R 11 subsequently
Address for service ultered under O 7 R 21 or O 8 R 12 shall
filed to hold good during

appellate proceedings

(2) Every memorandum of appr the opposite parties in the Court below and notices and processes that issue from the appellate Court to such addresses

(3) Rules 22, 23 and 24 of O 7 shall apply, so far as may be, to appellate proceedings '
LAHORE

The following shall be added as R 3S fu O 41 —

38 (1) An address for service filed under O 7 R 19, or O S, R 11, or subsequently

altered under O 7 R 24 or O 9 R 12 shall hold good during all appellate proceedings arising out of the original suit or potition

(2) Fv

(3) Rules 21 22 23 24 and 25 of O 7 shall apply so far as may be to appellate proceedings

# NWFP

.tdd the following Rules -

- 38 (1) the address for service filed under O 7 R 19 or O 8 R 11 or subsequently altered under O 7 R 22 or O 8 R 12 shall hald good diving all appellate proceedings arising out of the original sub-original sub-original.
  - (2) I very memorandum of appeal shall stale the addresses for service given by the oppoints pirties in the Court below and notices and processes shall issue from the appellate Court to such addresses.

    (3) Rules 21 and 22 of 0.7 shall sprive so far is may be to appellate proceedings?

OUDH

- 38 (1) An addre s for service, filed under O 7 R 10 or O 8 R 11 or subsequently ultered under O 7 R 26 or O 8 R 12 shall hold good during all appellate proceedings ar amp out of the original sunt or petition
  (1) Frery memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below and notices and processes shall issue from
  - the appellate Court to such addresses
    (3) Rules 21 22 23 and 24 of O 7 shall apply so far as may be to appellate proceedings

### PATNA

Add the following Rule -

- 38 (1) An address for service filed under O 7 R 19 or O 8 R 11 or subsequently aftered under O 7 R 22 or O 7 R 12 shall hold good for all notices of appeals end all appellate proceedings arising out of the original suit or petition.
  - (2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below and notices and processes shall issue from the appellate Court to such addresses.
  - (3) Rules 21 and 22 of O 7 shall apply, so far as may be to appellate proceedings

SIND 4dd the following as R 38 -

- 38 (1) An address for service filed under O 7 R 19 or O 8 R 11, subsequently
  Address for service altered under O 7 R 24 or O 8 R 12 shall hold good
  filed to hold good du rung all appellate proceedings arising out of the original
  subset to any alteration under yeb
  ings
  - (2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below and notices and processes shall issue from the appellate Court to such addresses.
  - (3) Rules 22 23 and 24 of O 7 shall apply so far as may be to appellate pro sed

#### MADRAS

After O 41 susert the fellow ng as Orders 41 A and 41 B -

#### ORDER VLI A

appeals to the High Court from Original Decrees of Subordinate Courts.

1 The rules contained in O 41 shall apply to appeals up the High Court of Judicature at Wadras with the modifications contained in this Order

- (1) The memorandum of appeal shall be secompanied by the prescribed fees for service of notice of appeal and the receipt of the accountant of the Court for the sum prescribed by the rules of Court
- (2) Notwithstanding anything contained in R 22 of O 41 the period proscribed for entry of appearance by the respondent and filing by him of memorandium of cross objections, if any, shall unless otherwise ordered be that't days from the service of notice uson him.
- 3 (1) If the respondent intends to appear and defend the appeal he shall within the period specified in the notice of appeal enter an appearance by filing in Court a memorandum of appearance.
- (2) If a respondent fails to enter an appearance within the time and in the manner provided by the sub rule above he shall not be allowed to translate or print any part of the record.

Provided that a respondent may apply by petition for further time, and the Court may thereupon make such order as it thinks fit, the application shall be supported by ordered to be given on affidart is to the reason for the applicants default, and noise there's shall be given to the appellant and all parties who have entered an appearance Unice otherwise ordered the applicant shall pay the costs of all purities appearing on the Application

- 4 (1) The memorandum of appeal and the memorandum of appearance chall state an address for service within the City of Madras at which service of any notice order or process may be made on the party fing such memorandum.
- (2) If a party appears in person, the address for service may be within the local limits of the jurisduction of the Court from whose decree the appeal is preferred

Provided that if such party subsequently appears by a pleader he shall state in the valuablet an address for service within the City of Madris, and shall give notice thereof to each party who has appeared.

- (3) If a party appears by a pleader, his address for service shall be that of his pleads, and all notices to the party shall be served on his pleader at that address
- S The Court may direct that service of a notice of appeal or other notice or process shallbe due by sending the same in a registered curve prepaid for acknowledgement and addressed to the address for service of the party to be served which has been filed by him in the lower Court Provided that, after a party has given notice of an address for service in accordance with Rule 3 service of any notice in process shall be made at such address.
- 6. All notices and process, other than a nutice of appeal, shall be sufficiently served if left by a party or his pleader, or by a person employed by the pleader, or by an officer of the Court between the hours of 11 am and 5 pm at the address for service of the party 10 be served.
- 7 Notices which may be served by a party or his pleader under Rule 6, or which assessing the office of the Registrar may, indess the Goort otherwise directs, be sent by registered post, and the time at which the nutice so posted windle be clierted in the ordinary course of post shall be considered as the time it service thereof and the posting thereof shall be a inflicent service.
- 8 If there are several respondents, and all do not appear by the same pleader, they shall give notice of appearance in such of the other respondents as appear separately.

- 9 A list of all cases in which notice is to be issued to the respondent shall be affixed
- to the Court notice loard after the case has been registered

  10 (1) If upon a case being called on for howing by the Court, it appears that the record
  has not been translated and tranted in accordance with the rules of the Court
- may bear the appeal or dismiss it, or may adjourn the bearing and direct the party in default to pay costs, or may make such order as it thinks fit (2) If the Court proceeds to hear the appeal, it may refuse to read or refer to any part of
- the record which is not included in the printed papers

  11 When costs are awarded in piece the Court otherwise orders, the costs of a party appear
- ing upon any application before the Registrar or the Court shall be Rs to end the cost of appearing when the appeal is in the daily cause het for fluid hearing and is adjourned shall be hs 30. At the request of any party the Registrar shall cause the order to be drawn up and the said cost to be inverted therein.

#### Uemorandurs of objections

- 12 (i) If the ishowindgment mentioned in R. 22 (3) of O 41 is not filed the respondent shall together with the memorandum of objections file so many copies thereof as there are parties affected thereby
- (2) The 1 rcs ribed fees for service shall be presented together with the memorandum to the Registrar
- 13 It any party or the pleader of any party to whom a monorandum of objectious has been fundered has refused or neglected for three days from the date of tander to give the acknowledgment monitoned in R 22 (3) of O 41, the respondent may file as affidant stating the facts and the Regular may dispense with service of the copies mentioned in R 12 (1)
- 14 Bule 31 of O 41 shall not apply to the High Court. If judgment is given orelly a shorthead note thereof shall be taken by an officer of the Court and a transcript made by him shall be signed or initialled by the Judge or by the Judges concurring therein after making such corrections as may be considered necessary.

#### ORDER ALI B

#### Letters Patent Appeals

- 1 The Rules of O 41 A shall apply, so far as may be, to appeals to the High Court of Madras under Cl 15 of the Letters Petent of the said Court
- Provided that it shall not be necessary to file copies of the judgment and decree appealed from
- 2 Notice of the sireal shall be given in manner prescribed by O 41 A, R 6, or if the party to be served has eppeared in person in manner prescribed by R 5 of the said order."

# ORDER XLII.

# APPEALS TROM APPELLATE DECRETS.

# Local Amendments.

#### MADRAS

Substitute the following for O 42 -

### ORDER XLU.

# Appeals from appellate decrees

1 The rules of O 41 and O 41 A shall apply, so far as may be, to appeals to the High Court of judicature at Midras from appealate decrees with the modifications contained in this Order

Provided that in appeals from appellate decrees the memorandum of appeal shall be accompanied by a copy of the decree appealed from and four printed copies of the judgment on which it is founded, one of them being a certified copy, and also four printed copies of the judgment of the Court of first instance one of them being a certified copy;

2 (1) The memorandum of appeal shall be printed or typewritten and shall be accompanied by the following papers.

One certified copy of the decrees of the Court of first instance and of the specilate Court.

and four printed copies of each of the judgments of the said Courts, one copy of each judgment being a certified copy.

(2) If any ground of appeal is based upon the construction of a document, a printed

or typewritten copy of such document shall be presented with the memorandum of appeal.

Provided that if such document is not in the English language and the appellant
appears by a pleader in English translation of the document extitled by the pleader to

be a correct translation shall be presented,

(8) If the appellant fails to comply with this Rule the appeal may be dismissed "

Procedure
appellate decrees.

R. 1. [S. 587.] The rules of Order XII shall apply, so far as may be, to appeals from

[1877—S. 587; 1859—S. 37]

### Local Amendments

# ALLAHABAD.

Substitute the following for R 1 —

- "I The rules of O 41 shall apply, so far as may be, to appeals from appellate de rest subject to the following provisions --
  - 'It shall not be necessary for an appellant in a second appeal to produce a copy of the judgment of the Court of first instance or any judgment other than it e judyment on which the decree appealed against may be founded and the rece def the case shall be sent for at the expense of the appellant.

#### Sunopsis

Procedure applicable to second appeals 1 Inherent power of remand—See 0 th, 3 Amendment of the Rule 2 R 23 ante.

APPEALS FROM MICLLATE DECREES

1. Procedure applicable to second appeals The Rules relating to first appeal apply, so far as may be, to second appeal also See the various Rules of O 41 and the notes thereon and also the cases cated below 1

2. Amendment to the Rule

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See the following cases' bearing upon the amendments of the Rule by the High Courts of Ulahabad and Lahore

3 Inherent power of Remand -Sec O 41 R 33 auto

### Local Amendments

LAHORE Add the following as R. 2 -

2. In addition to the copies specified in O 41 R 1 the momorandum of appeal shall be accompanied by a copy of the judgment of the Court of first instance unless the appellate Court dispenses therewith

# ORDER ALIII

### APPEALS FROM ORDLES

- R. 1. [S 588] An appeal shall he from the following orders under the provisions of section 104, Appea s from orders namely .-
- (a) an order under Rule 10 of Order VII returning a plaint to be presented to the proper Court;
- (b) an order under Rule 10 of Order VIII pronouncing judgment against a party;
- (c) an order under Rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit:
- (d) an order under Rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed ex parte:
- (e) an order under Rule 4 of Order X pronouncing judgment against a party;
  - (f) an order under Rule 21 of Order XI,

Order 42 Rule 1-Note 1 1 (1927) 1927 Lah 912 (J14) Every second appeal must be accompained by a copy of the decree of lower at poliate

Note 2 1 (1918) 1918 All 389 (3J0) 40 All 1 (FB) Copy of the judgment of trial Court should be filed along with the me morandum of second appeal

jection

filed under S 100 of this Code-In a second appeal under S 12 of the Oudh Courts tot respondent is not entitled as of right to file cross ob-C P C 347 & 348

(1921) 67 Ind Cas 60 (Lah) (Do) (1996) 1926 Lah 638 (638) (Do) (1996) 1936 Lah 626 (624) (Do) (1921) 1921 Lah 73 (78) 2 Lah 227 (Do) (1921) 1921 All 242 (243) (Do)

(1921) 1921 All 23 (°3) 43 All 660

- (g) an order under Rule 10 of Order XVI for the attachment of property,
- (h) an order under Rule 20 of Order XVI pronouncing judgment against a party,
  - (i) an order under Rule 34 of Order XXI on an objection to the diaft of a document of of an endorsement,
- (1) an order under Rule 72 or Rule 92 of Order XXI setting aside or refusing to set aside a sale.
- (k) an order under Rule 9 of Order XXII retusing to set aside the abatement or dismissal of a suit
- (1) an order under Rule 10 of Order XXII giving or refusing to give leave,
- (m) an order under Rule 3 of Order XXIII recording or refusing to record an agreement, compromise or satisfaction,
- (n) an order under Rule 2 of Order XXV rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit,
- (o) an order under Rule 2, Rule 4 or Rule 7 of Order XXXIV refusing to extend the time for the payment of mortgage money,
- (p) orders in interpleader suits under Rule 3, Rule 1 or Rule of Order XXXV,
- (q) an order under Rule 2 Rule 3 or Rule 6 of Order
- XXXVIII,

  (r) an order under Rule 1, Rule 2, Rule 4 or Rule 10 of
- Order XXXIX,
  - (s) an order under Rule 1 or Rule 4 of Order YL,
- (i) an order of refusal under Rule 19 or Order XLI to re aunut, or under Rule 21 of Order XLI to re hear, an appeal,
- (u) an order under Rule 23 of Orde XLI remanden! a case, where an appeal would be from the decree of the Appellate Court.
- Court, (v) an order made by any Court other than a High Court refusing the grant of a certificate under Rule 6 of Order XLV,
- (w) an order under Rule 4 of Order XLVII granting an application for review
  - [1877—S 588, 1859—5s 36 94 363, 65]

#### Local Amendments

# ALLAHABAD

Rule 1 (u) For the words an order under Rule 23 of Order 41" read "any order '

Rule 1 (w) of Order 43 shall be deleted

CALCUȚTA

Invert the following after Claoso (1) -

(1) (a) an order under Rule 57 of Order, XXI directing that an attachment shall cease or directing or omitting to direct that an attachment shall continue "
MADRAS

Substitute the following for Role 1 (d) of Order -

(d) an order under Rule 13 or Rule 15 of Order IX rejecting an application (in a case opec to appeal) for an order to set aside a decree or order passed ex parts '
OUDH.

In Rule 1 (u) for the words an order under Rule 23 of Order 41 read any order RANGOON

4dd the follo ving between Clinces (1) and (1) -

(ii) a garmishee order under Rule 63 C or Rule 61 E and an order as to costs in garmishee proceedings under Rule 63 G of Order 21

1 Substitute the words and order for the words 13 order inder Rule 23 of Order Mall appearing in Clause (n) of Rule 1 of Order Mall of the Code of Civil Procedure

I Appeals from Orders

pealable under this clause 1

See So 104 and 105 See also the notes under the various Rules referred to in the several clauses of this Rule

2 Clause (a) Order returning plaint for presentation to the proper Court Sec O 7, R 10, Note 11 and the following cases 1

3 Clause (e) Order rejecting application under O 9 R 9 to set aside dismissal of suit

This clause refers to an order rejecting an application to restore a suit dismissed for default. Hence where an application to restore a suit dismissed for default is itself disquissed for default the order of dismissal is not ap

4 Clause (d) Order rejecting application for setting aside ex parte decree -Ses also 0 9 R 13 hore 29

This clause refers to an order rejecting an application to set aside an ex parte decree No appeal hes from an order allowing an application for setting aside an ex parte decree 1 Nor does an appeal he from an order rejecting an application to set aside an ex parte order 2 See also Note 7 to S 141 ante.

5 Clause (j) Order setting aside or relusing to set aside a sale

See O 21, R 89, Note 29, R 90, Note 50 and R 92, Note 13 and the undermentioned cases 1

Order 43 Rule 1-Note 2 1 (1918) 1918 Lah 116 (117) Appeal hes from order roturning plaint to be

presented to proper Court
(1921) 1921 All 177 (177) No appeal hes
from order of District Judgo return
ing a memorandum of appeal for
presentation to projer Court
(1920) 1,30 Lah 823 (833)

Note 3

1 (1932) 1J32 Nag 101 (102) 28 Nag L R 83 Overruling 1923 Nag 293 Note 4

1 (1916) 34 Ind Cis 702 (702) (Oudh) Ez

parte dorreo in resumption suit uoder Oudh Root Act—Exparte doctes set ande—Ao appoil hes under the Cods—But order is appoalable under Oudh Rent Act

2 (1.109) 1909 L B R 703 (204) F b Order uoder O 21 R 60

(1912) 15 1nd Cas 9°5 (925) 39 Cul 393 Order under Land Acquisition Act not amounting to a vard

#### Note 5

1 (1908) 4 Mad L Tim 96 Order under R 92 of O 21, or one refosing to set aside 6 Clause (I) Order under O 22 R, 10

See O 22, R 10, Note 20 and the undermentioned case 1

7 Clause (m) Order recording or refusing to record compromise See O 23, R 3, Note 31 and the cases cited below 1

8 Clause (a) Order under Order 38

An unconditional order of attachment before judgment can only be passed under O 38 R 6 and not R 5 Hence, where a Judge proposes to pass an unconditional order of attachment under R 5 the order must nevertheless be treated as one under R 6 and will therefore be appealable under this clause 1.

9 Clause (r) Orders under Order 39

This clause allows an appeal against an order passed under O 39 R 1, R 2, R 4 or R 10 But no second appeal lies against such an order 2 (See S 104 (2))

10 Clause (s) Orders under O 40 R 1 or R 4

See Notes under O 40, Rr 1 and 4 and the undermentioned cases 1

11 Clouse (t) Order rejecting application to restore appeal See the undermentioned case 1

12 Clause (u) Order of remand under O 41 R 23 See Notes O 41 R 23 and the undermentioned cases 1

a sale under R 80 of that Order 18 (1991) 1024 Mad 857 (8)

appealable (1933) 1938 Lah 210 (210) An order con

firming the sale amounts to a refusal to set aside the sale and honce is appealable

Note 6 1 (1906) 2 Nag L B 178 (179) Case under old Code

Cods Note 7 1 (1925) 1925 Cul 921 (1925) Order relusing to

order refusing to record compromise and no apport lies (1935) 1935 411 739 (759) No second appeal

(1935) 1935 411 738 (739) No second appeal

(1933) 1

orders under O 49 B I
(1933) 1933 Cal 94 (95) Appeal from order
under O 23 R 3—Decree made
before presentation of appeal—Appeal is still competent

Note S 1 (1929) 1329 Lab 445 (445)

Note 2 1 (1933) 1933 Lath 203 (205) Order refusing to discharge an injunction issued under O to it 2 is appealable

(1933) 1933 All 86 (86) Append her from order refusing to grant temporary impunction

(1931) 1931 Lom 509 (510) Order refusing to commit for contempt for disobering temperary injunction—Appealties (1991) 1924 Mad 857 (857 858) No appeal against order resumm notice on an application for temporary injunction

under O S9 R 3 2 (1885) 1885 Rom P J 72 (72) Note 10

1 (1904) 1904 I un Eo No 26 Ordered Condiaccepting amount stated by the Receiver to have been realised of him and referring decree holder to a suit for the decision of his chimagainst Receiver is not appealable under this chause

(1933) 1933 Lab 216 (216) Order gives

is not appealable
(1933) 433 Vad 570 (572) 56 Mad 915
Cl 15 of Letters Patent is not controlled by C P Code An appeal
therefore hes against decision of a
Judgo of the High Court passel in
appeal from an order under C 40

(1931) 1331 Nag 64 (64) No appeal bes

(1 133)

Note 11
1 (1931) 1931 \ld 11 33 (34) 23 All 516 0 let refusin, to ristore revenue appearing buch order as order pared in

refusing to restore retenue appeal in such or ler is order passed in appeal within the meaning of agra Tenancy Act > 213 and is a open to appeal

Note 12

1 (1890) Il Boin 14 (17) Court hearing an affinal agest at order of remarklis Procedure

R. 2. [S. 590.] The Rules of Order XLI shall apply, so far as may be, to appeals from

orders. [1877—S 590; 1859—S 366—See S 108, Cl (b)]

### Local Amendments

MADRAS

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Substitute the following for R 2 -

2 The Rules of O 41 and of O 41 \ shall apply so far as may be to appeals from the orders executed in R 1 and other orders of any civil Court from which an appeal to the High Court is allowed under any provision of law

Provided that in the case of appeals against interlocutory orders made prior to decree the Court which passed the order appealed from shall not send the records of the case unless an order has been made for stay of further proceedings in that Court."

### ALLAHABAD

Add the following 19 R 3 -

3 In every appeal under R 1 in every insechancea was and in every suit diserise d for d-plath; I cloum d order shall be drawn up stating clearly the determination of the appeal or ease the costs incurred and the parties if any by whom such costs are to be paid.

MADRAS

4dd the following as R 3 - 3 (1) The provisions of O 42 shall apply so far as may be to appeals from appellate

3 (1) The provisions of O 42 shall allly so the as mey se to oppose from all panets
(2) A memorandum of appeal from an appellate order shall be occompanied by a

certifed copy of the judgment and of the order of the Court of first instance and by a cettified copy of the judgment and of the order of the appliance Court (3) If any ground of appeal is based upon the construction of a document a printed of typewritten copy of such document shall be presented with the immorandum

of appeal

not restricted to the consideration of the form of the order but may

(1934) 1334 All 450 (400) It is only where the entire case has been remaided r te

ly is Jourt and

Appeal to High Court against the order hea und r O 43 R 1 (1934) 134 Lah JO7 (908) Order of remand

—Case disposed of by that Court on one issue only—Appeal hes (1933) 1933 Lah Gio (Gio) No distrection

is made between partial and total is mand and an appeal hes even though a portion of order of remand only is challenged

(1933) 133 Oudh 191 (192) 8 Luck 676 An appeal against an order of remand should be filed only as a miscalla neous appeal under O 43 B 1 (1933) 133 Oudh 20/351) No appeal hes

where the order of remand is pur ported to be under O 41 R 25 (193, 133, Oudh 233 (334) Order under

O 41 R 25-No appeal hes 1933) 1333 Cal 436 (497) 37 Cal W N 190 (191) No appeal his where the order of remand is purported to be made under O 41 R 25

(1927) 1327 All 406 (406) Order of re mand passed by lower appellate Court under inhorent powers noder S lot before the amendment of Cl (u) into its present form by the Alla

babad High Court is not appealable (1930) 1330 Oudh 85, (868) Ameniment of rule by Allahabad High Court— Appeal hes against order of remand

under inherent power (1911) 10 Ind Cas 849 (843) Remand under

O 41 R 23—Appeal lies (1919) 1919 Pat 478 (479) Case disposed of

on merits—Appeal—Appellate Correversing decision on morits and emanding case—Further appeal—avalorem court fee to be paid

(1928) 111 Ind Cas 780 (Oudb) of remand passed in appeal and appeal appealable order - Appeal are order of remand not comp or the first appeal and the first appeal appeal appeal appeal appeal appeal appeal appeal appeal

(1938) 111 Ind Cas 706 ([a]) of an appeal is not terre oner fact that the order are carried out by the trial form

3

1.

Provided that, it such document is not in the English language and the appellant appears by a pleader, an English translation of the document certified by the pleader to be a correct translation shall be presented."

OUDH

Add the following as R. 3 -

"3 In every appeal under R 1, in every miscellaneous case, and in every suit dismissed for default, a formal order shall be drawn up stating clearly the determination of the appeal or case, the costs incurred and the parties, if any, by whom such costs are to be paid."

### ORDER XLIV.

## PAUPER APPEALS.

R. 1. [S. 592.] Any person entitled to prefer an appeal,

who is unable to pay the fee required for the memorandum of appeal, may present an application accompanied by a memorandum of appeal, and may be allowed to appeal as a pauper, subject, in all matters, including the presentations of and analysis.

including the presentation of such application, to the provisions relating to suits by paupers, in so far as those provisions are applicable:

Provided that the Court shall reject the application unless.

Provided<sup>6</sup> that the Court shall reject the application unless, procedure on ap upon a perusal thereof and of the judgment and

plication for admis decree appealed from, it sees reason to think sign of appeal that the decree is contrary to law or to some issage having the torco of law, or is otherwise erioneous or unjust. [1877—8, 592; 1859—8s, 369, 370.]

Local Amendment.

ALLAHABAD

Add another proviso as follows

"Provided further that no application under this Rule shall be allowed unless a notes of the application has been given to the proposed respondents."

Synopsis

Note No Note No Legislative changes Power to grant time for payment of Court fee 'Who is unable to pay the fee re-Power to order security for costsquired '-See Notes to O 33, R 1, See O 41 R 10 2 Cross objection or cross appeal by a Application accompanied by a memopauper respondent-See Notes to 3 randum of appeal 0 41, R 22 10 Subject to the provision relating to Appeal H suits by paupers Letters Patent appeal 12 In all matters including the presenta-Pravy Council appeal t3 tion of such application Limitation Revision Provise to the Rule

1 Legislative changes

1 The words 'under the Code or any oth siter the words "Any person entitled ' 2 The words "including the presentation of successions."

The words "including the presentation of some 11 control of the son is to override the decision in L.L.R. 20 Mid 200 (See Note 6, 18/10) for order does not apply to a peals under the Agra Tenaucy tot (III of 1/20) and the

Madras Estates Land Act (1 of 1903)

### 2. 'Who is unable to pay the fee required" - See Notes to O 33 R 1 ante

### 3 Application accompanied by a memorandum of appeal

Unlike the plaint in a pauper stut which forms an integral poron of the pauper application itself the application for leave to appeal as a pauper is a distinct document from the memorandum of appeal accompanying the application. The memorandum of appeal itself cannot be treated as an application for Icave to hopeal as a pauper 1

### 4 Subject to the provision relating to suits by paupers

The granting of leave to appeal as a pauper is subject to the provisions relating to suits by paupers as provided in O 33. Thus if the appellant has entered into an agreement with reference to the subject-matter of the appeals or has not stated with the utmost good faith, in his application, the whole of his assets2 then his application for leave to appeal is hable to be resected.

The application for leave to appeal as a pauper should be verified at its foot as required by O 33 R 23 But though it is not so verified if it is accompanied by an affidavit in which the statements contained in the application are stated to be true and there is no falsehood or concealment in the application the Rule will be deemed to have been sufficiently complied with 4 It has been held that the presentation of an application under this Rule without a list of properties as required by R 2 is n t invalid and the same could be sunpied after the limitation period 5

### 5 In all matters including the presentation of such application

In the absence of these words in the corresponding section of the old Code it was held by the High Court of Madras1 that the Rule as to prosentation in person by a pauper applicant now contained in O 33 R 3 did not apply to pauper appellants. It is now clear that the application should be presented in the same manner as the case of a person summe in forma pauperis e, in person But a pardanashin lady is however exempled from personal appearance under S 132 of the Code and therefore she need not present the application to appeal in forma pauperts in person 2 It has been held by the Chief Court of Oudh that the memorandum of appeal need not be presented in person 3

#### 6 Provisa to the Rule

The proviso is mandatory I In Sakhu But v Gannat, I L R 28 Bom

451, Jenkins C J, observed as follows	· —	_
Order 44 Rule 1—Note 3 L (1915) 1J15 All 310 (311)	3 (1926) 1926 Oudh 13 (14)	
[But see (1869) 1 All H C R 246]	η μ	

Note 4

1 (1930) 122 Ind Cas 831 (831) (Pat)

(1901) 30 Mad 547 (548) 2 (1930) 1930 Pat 368 (369) 3 (1908) 11 Oudh Cas 19 (20)

4 (1923) 1923 Lah 684 (084) 5 (1839) 1809 Pun Re No 19 page 111

Note 5

1 (1903) 26 Mad 269 (8"0) (But see (1874) 21 Suth W R 303

9 (1902) 24 All 1"2 (173) (1885) 8 Mad 501 (505)

ng 92 from videac. usu falls within the proviso

(1932) 1933 All 712 (712) Applicant entitled to be heard only if Judge after read ing judgments thinks it to be wrong

That proviso is a very necessary safeguard introduced by the legislature for the benefit of htigants who find themselves opposed by paupers and in our opinion the Court should be careful to see that the proviso is satisfied It is to be noticed that the Court must come to its conclusion upon a perusal only of application, the judgment and the decree This proviso is apt to be overlooked, but it would provide a safeguard against this, if the Judge or Bench admitting a pauper appeal were to express and record very briefly the reasons for granting leave so that the Bench before whom the appeal ultimately comes may have an assurance that the leave was properly given "

A party cannot therefore be allowed to appeal as pauper unless the decree appealed from appears to be contrary to law or to some usage having the force of law or is otherwise erroneous or unjust 2 But unlike R 11 of O 41 which empowers the Court to call for the records, the Court is restricted under this proviso to a perusal of the judgment and decree appealed against and has no discretionary power to go into the record 3 The High Courts of Allahabad,4 Patna5 and Lahore8 have held that a mere issue of a nonce to the respondent under App G, Form No 11 is no ground for holding that the Court is satisfied as to the conditions laid down in the proviso, and that the respondent appearing in answer to the notice is entitled to urge that the application should be rejected on the ground that the conditions of the proviso have not been sausfied The High Court of Madras? has, on the other hand, held that a nonce issued to the respondent under Form No 11 is only to state the objections of the respondent in respect of the pauperism of the applicant, and that the respondent has no locus stands to urge at that stage that the proviso is not satisfied

7. Power to grant time for payment of Court fee

The rejection of an application for leave to appeal as a pauper does not toso facto carry with it the rejection of the memorandum of appeal filed

2 (1925) t925 Lah 301 (891)

(1933) 1933 Mad 519 (520) 56 Mad 323 The more fact that the appellant has a privid facte good case is not enough 1931 Vlad 138 (198) 33 Vlad 215 Di seited from (1920) 1970 Mad 230 (231)

(19.0) 1930 hat 143 (143) Decree altered

in material particular by specessor of Judge-Leave can be granted

(1896) 1896 Atl W N 31 (34)

(See also (1934) 1935 Pesh 22 (23) 1t is not necessary that the Court should discuss every ground in its order rejecting an application to file api cal in fort a pauperss] (See also (1935) 1333 Mad 31 (52) 58 Mad 298 Mad 298 Appeal in forms pau peris from decree of Agoney bab-Judge-Though the Code is not applicable to the Agency Tracts lesso of Lourt to appeal as a pauper as necessary and appeal cannot be ad mitted as a matter of course]

3 (192 ) 1925 Ran, 249 (2.0) (1910) 8 Ind Cas 376 (377) 13 Oudh Cas

135 The

ontitled to urre the same ground [But see (1933) 1933 \11 925 (925) .6 All 268 Overruled in 1934 All 1001 (F Ell [But see (1933] 1933 All 11 (12) 51

Atl 304 (Do)] 5 (1931) 1931 Pat 183 (181 185) (PB) Orental

ing 1924 Pat 79t 1928 Pat 118 1319 Pat 27 and 1929 Pat 31

52.

As to the Court's powers to order the payment of Court-fees after the disposal of the appeal see the following cases 5

- 8 Power to order security for costs -S c O 41 R 10
- 9 Cross objection or cross appeal by a pauper respondent See Notes to 0 41 R 22 10 Appeal

An order under this rule is not appealable either under S 104 or under O 43 R 11 As to the maintainability of a Letters Patent Appeal see next note

11 Letters Patent Appeal

I.

It was held by the High Court of Allahabad1 and Madras2 in cases decided under the old Code that an order rejecting an application under this rule was not appealable under Cl 15 of the Letters Patent. The decisions of the Madras High Court abovementioned were however dissented from in a later Full Bench case of the same High Court,3 though the point for decision in the Tull Bench was not with reference to an order under this rule. In a

Note 7 (1691) 13 All 30a ( 03) 1891 All W N 99 1. (1918) 1918 Mad 10 9 (1040) 40 Mad 687 (1932) 1932 Oudh 343 (344) Court fee 18 (1935) 1.20 Alt 620 (625) Lut if application under this kule is made without

ı (1858) 22 Lom 849 (857 861) (18J ) 21 Lom 5 6 (5 9) (1909) 4 Ltd Cas 896 (897) 1009 Pnn Ra No º4

(1926) 1 26 Oudh 13 (14)

(1906) °G All 329 (331) [Sec (19°5) 1985 Pesh 22 (23) But Court is not bound to grant the (But see (1935) 1985 Rang 336 (329)

13 Rang J0] 3 (1922) 1J22 Lah 225 (226) 3 Lah 35 (1J16) 1J16 L B 124 (124)

(But see (1916) 1916 L B 58 (59) Even in the case of an appeal in forn a pauperis]

cation for teave to appeal in forma pauperes - Rejection as being pre sected beyond time is only order rejecting motion to present appli cation and not order rejecting application itself under 0 44 R 1 - Subsequent application under S 5 Limitation Act is not main tamable as no appeal is pendingl

(tc06) 1 06 Pun Re No 5 (192.) 1925 Mad 780 ("87) (18 4) 18 Bom 464 (467) Note 10

1 [See also (1870) 18 0 Pun Re No 62.] Note 11

1 (1839) 11 All 3"5 (3,7)

2 (1503) 26 Vard 437 (438) (1686) 9 Mad 437 (447) 3 (1910) 8 Ind Case 540 (347) 35 Mad 1

 recent case the Madras High Court without definitely deciding the question as to the appealability or otherwise under Ci 15 of the Letters Patent, refused to interfere in appeal on the ground that the matter is one of exercise of discretion by the Court See 450 S 104 Note 6.

12 Privy Council Appeal

This rule contemplates the appellate Court perusing the judgment of a subordinale Court, and not the Court where judgment is appealed from perusing its own judgment of 44 does not therefore apply to appeals to His Majesty in Council and the High Court has no jurisdiction to grant leave to appeal in Jorma paupers to the Privy Council But the pentioner may apply in England for such leave in accordance with the rules that govern such applications 3

#### 13 Limitation

Under \(\text{VII}\) 170 Schedule I of the Limitation Act the period of limitation for presenting an application for leave to appeal in forma paupers is 30 days from the date of the decree appealed against \(^1\)

#### 14 Revision

See Note 26 to S 115 and the undermentioned cases 1

R. 2. [S 593] The inquiry into the pauperism of the applicant may be made either by the Appellate Court or under the orders of the Appellate Court by the Court from whose decision the appeal is

preferred

Provided that, if the applicant was allowed to sue or appeal as a pauper in the Court from whose decree the appeal is preferred, no further inquiry in respect of his pauperism shall be necessary, unless the Appellate Court sees cause to direct such inquiry

1 Inquiry into pauperism

If the pauper applicant-appellant had been allowed in the trial Court to sue as a pauper no fresh inquiry as regards his pauperism is necessary unless the appellate Court sees reason to require it. Otherwise enquery into his pauperism is necessary and such enquiry may be made by the appellate Court itself or under its direction, by hie trial Court in the latter case, the report of the trial Court as regards pauperism does not operate as a final disposal of the application, and does not affect the power of the appellate Court to consider and decide whether leave should or should not be granted.

4 (1926) 19\_6 M id (5.0 (6.6)

(1695) 19 Bo n 48 (50) (1913) 18 Ind Cas 518 (518) (L I ) (1696) 12 All 79 (93)

(1690) 13 \11 461 (485) (F B) Note 14

(14 7) 8 Suth W R 48 (48)
2 (1 12) 19 Ind Cas 12J (12J) (Cal)

1 (1885) 1835 Fun Ro No 21 page 40
(1934) 1931 All 424 (193) of All Six Appellant allowed to appeal as pauper—Government pleader not heard—Order as rovisable
Order 44 Rule 2-Nole 1

Note 13 1 (U 5) 1 15 411 310 (311)

1 (1904) 30 Wad 547 (547)

### ORDER XLV

### APLEALS TO THE KING IN COUNCIL

defined

R. 1. [S 394] In this Order, unless there is something repugnant in the subject or context. the oppression decree" shall include a final order

[1877-5 594 See Ss 109 & 100 supra]

Smonnes

Decree

Note No Note No When appeal lies to the King in Council 2

# 1 Decree

The words decree shall include a final order have been substituted for the words decree includes also judgment and order which occurred in the old Code

As to the meaning of the words final order see Note 4 to S 109 ani and the recent case of Abdul Rahman v Cassun and Soust in which their Lordships of the Privy Council to affirmed the view expressed in Firm of Ramchan I Manumal v Firm of Govardhandas Vishindas Ratanchand that the test of finality is whether the order finally dispos s of the rights of th parties

#### 2 When appeal lies to the King in Council

Sce Ss 109 and 110 As to cross appeals see No e 14 to 5 110 and the cases noted below 1

Application to Court whose decree R. 2. [S 598] Whoever desires to appeal to His Majesty in Council shall apply by petition to the Court whose decree is com plained of

F1877-S 598 1

Synopsis

Note No
1 Limitation

Note No

Scope of the Rule Appeals in forma pauperis

1 Scope of the Rule

A party desirous of appealing to His Majesty in Council should apply by a petit on to the Court whose decree is complained of Where there are two appeals from two decrees although they are decided by a common judgment two separate applications are necessary even though both the decrees were based on one common judgment 1

Where A appeals to the High Court making B a party to the appeal and succeeds in the appeal B is on itled to pre ent a position for leave to appeal

#### Order 45 Rule 1-Note 1

- 1 (1933) 1933 P C JS (60) II Rang 58 60
- Ind App 76 (P C) 2 (1920) 1920 P C 86 (87) 47 Ind App 124 14 Sind L R 191 47 Cal 918 (P C)
- Note 2 1 (1854 57) G Moo Ind App 464 (465 467) (1859 6t) 8 Moo Ind App 498 (499) Order 45 Rule 2-Note 1
  - 1 (19 0) 1920 Pat 267 (2 0)
- (1932) 1932 Lah 441 (442)

2 to the Privy Council and the High Court, in such petition, is not competent to go into the question whether he has any locus stands to maintain the application 2

### 2 Appeals in forma pauperis

See Note 13 to O 44. R 1

An order for leave to appeal in forma pauperis takes effect from its date and has no effect whatever on costs incurred before that date 1

### 3 Limitation

An application for leave to appeal to the Privy Council must be filed within 90 days of the date of decree or order appealed from, under Art 179 of the Limitation Act, 1908 Where the decree is modified on review, the time will begin to run from the date of the decree passed on review 1

Where the Court is closed on the last day prescribed for the application it may be presented on the next re opening day 2 In calculating the period of limitat on the day on which the decree or order appealed from is pronounced or dated should be excluded 3 S 12 sub-S (2) of the Limitation Act of 1877 was restricted to applications for leave to appeal as a pauper and hence it was held that the time spent in getting a copy of the decree could not be excluded in computing the period of him auon 4 Under the present S 12, sub S (2) of the Limitation Act 1908 such time can be clearly excluded in computing the period of linutation for an application for leave to appeal under thus Rule 5 Sub-S (3) of S 12 of that Act is however not applicable to applications for leave to appeal and therefore the time spent in obtaining a copy of the judgment cannot be excluded \$

S 6 of the Limitation Act 1908 does not apply to applications for leave to appeal 7

See also Note 8 to S 109 and the undermentioned cases 8

R. 3. [S. 600] (1) Every potition shall state the grounds of appeal and pray for a certificate either that, as regards amount or value and nature, the case Certificate as lo value or fitness fulfils the requirements of S. 110, or that it is

otherwise a fit one for appeal to His Majesty in Council.

(2) Upon receipt of such potition, the Court shall direct notice to be served on the opposite party to show cause why the said cortificate should not be granted.

[1877—S 600]

2 (1.)25) 1925 Pat 712 (712) Note 2

1 (1314) 1914 P C 227 (227) (P C)

Note 3

1 (1924) 1924 Lah 82 (8\_) 4 Lah 185

2 (166J) 12 Sath W R 2J3 (2J4) (Bit see (186s) 1 Long L R (O C) 39 (40) Six months period exting during holitys - application for leave made on te opening day-Leave c uld not be given | 18 0) 13 Suth W R 17 (18) (P C)

59 Cal 251 8 (1926) 1923 \11 285 (256)

7 (1835) 18 Mad 434 (185 486) 8 (1920) 1920 Pat 2 7 (269) Appl cat on for copies not filed in time—Time can not be excluded

5)

(1871) 15 Sath W R 2.5 (257) Leave gran ted - Cannot be cancelled subsequently on the ground of limitation.

# Local Amendments

#### BOMBAY

In sub-rule (2) of R 3 of O 45 after the words to shove use the tie said certificate should not be granted the following words shall be inserted namely — unless it thinks fit to relive the certificit

#### NAGPUR

For subrule (2) of R 3 of O 45 the follows g subrules shill be substituted namely -

(2) Upon receipt of such jetiston the Court after sending for the record and alter fixing a day for heiring the applicut or his pleude and hearing him accordingly if he appears on third day may dismiss the petition.
(3) Unless the Court dismisses the petition under sulfrule (2) is shall direct notice to be serred on the opposite party to show cause with vide sind certificate should be applied to the petition.

#### Sunonsis

Note No
e to appeal 5
tition 6
7
8
9

### Otler Topics

Notice See Note 1 Special leave by the Judic al Committee See Note 1 truly (2) and (6)

#### 2 44 (1) (0) 424 (0)

not be granted

1 Legislative changes In sub-rule (2) the words 'shall d re though have been substituted for the words may direct notice which occurred in the corre polding action of the

### Code of 183?

2 Scope of the Rule

This Rule must be read with S 109 Cl (c) and S 110 A party
wishing to file an appeal to His Majesty in Council should file a petition to the
High Court under this Rule for the issue of a certificate that the case fulfils

the requirements of S 110 or is otherwise fit for appeal.\footnote{1}

This Rule does not restrict the power or preregative of the Judicial Commiree to grant special leave to appeal See Notes under S 112 ante and the following cases\footnote{2} In Motichand v Ganga Prasad\footnote{2}\text{\text{Notes}} \text{ Lord Davey in delivering the judgment of the Board observed as follows — Where a party in an Indian case comes to this Board and asks for special leave to appeal the matter being under the appealable value their Lordships think that he should first apply to the Court below for a certificate under the second part of \$600 namely that it is otherwise, a fit one for uppeal to Her Marsty in \$600 namely that it is otherwise, a fit one for uppeal to Her Marsty in

3 Certificate as to fulfilment of the requirements of S 110 Sec Note 10 to S 103 and Notes to S 110 ante.

#### 4 Certificate as to fitness

Council

It is the certificate granting leave to appeal and not the order for

Order 45 Rule 3-Note 2

1 (1875) 12 Bom H C R 8 (8) (1895) Bom P J 462 Ne fresh vakalatnama

2 (1897) 19 All 95 (9 ) 23 Ind App 167 (P C) Special leave granted without secu

separately

(1907) 30 Mad 185 (188) 34 Ind 1pp 93 (PC)

22 [1901] 24 All 174 (1"8) 29 Ind App 40 (P C)

such certificate, which the Judicial Committee will consider and act upon and unless the certificate upon which leave to appeal is based is in such a form as to justify that leave, it will be held not to have been properly given 1 in Radhakrishna Ayyar v Swaminatha Ayyar2 their Lordships of the Judicial Committee pointed out that where an appeal is certified to be otherwise fit it is of the utmost importance that the certificate should on the face of it show clearly the grounds upon which it is based. There should be an indication of the nature of the question that is involved in the appeal and that the discretion conferred by S 109, Cl (c) was invoked or was exercised. Their Lordships think it should be brought to the attention of the Indian Courts that these certificates are of great consequence, that they semously affect the rights of lingant parties, and that they ought to be given in such a form that it is impossible to mistake their meaning upon their face. Even if the High Court refuses a certificate it is desirable that the reasons for such refusal should be stated 2

The respondent can raise a prehumary objection before the Judicial Committee on the ground that the order granting leave is ulira vires and that hence the appeal is not maintainable 4 But objection as to valuation, should be taken at the earliest possible opportunity 5 The Privy Council will not interfere with any question of valuation unless it can be shown that some i cm has improperly been made the subject of valuation, or excluded therefrom, or that there is some fundamental principle affecting the valuation which renders it unsound 6

Certificate if can be granted after final adjudication by the Indicial Committee - The ceruficate under this Rule cannot be granted after there has been a final adjudication in the matter by the Judicial Commutee In Vekt v Cheun Ram? the planniff's stat which was decreed in the trial Court was reversed by the High Court The plaintiff then filed a petition for leave to appeal to the Judicial Committee as also an application for review. The latter application was granted and the High Court reversed its original judgment The defendant took the matter in appeal to the Privy Council which held that the application for review was not maintainable and dismissed the suit restoring the first judgment of the High Court Subsequently the plaintiff pressed his original peution for leave to appeal and the High Court granted leave holding that the petition was still alive, and not disposed of The Pravy Council reversed the order granting leave holding that there was no suit existing after the decas on of the Judicial Committee and that no leave could therefore Le granted

5 Ex parte grant of leave to appeal

An ex parte order granting leave to appeal is hable to be rescinded if it is obtained by any misrepresentation or concealment of fact which ought

6 (1921) 1921 P C 50 (52) 48 Cal 110 47 Ind Note 4 App 255 (P C) (1916) 1916 P C 18 ( 0) 38 VII 4-3 13 Ind 1 (1901) 23 All 415 (418) 28 Ind App 182 (PC) 2 (1)21) 1921 P C 25 (26) 44 Mad 293 48 App 187 (P C) Ind App 31 (P C)

[See also (1922) 1922 P.C 257 ( ) [See also 1921 P C 123 (128) 48 Ind 41 Mad 475 43 Ind Mp 11 (PC) Order of Council date 1 9-2-120 App 3"6 (P C)]
3 (1902) °9 Mad 194 (195) 23 Ind App 67 shows certificate not conclusive as 4 (1897) 15 Beng L R 221 (226) 2 Ind App 205 to valuation 1

7 (1925) 1925 P G 1"1 (1"J) (P C) Rever . 1924 Lab 225

(I C) ! (1860) 13 You It d App 85 (95) (P C)

### 6 Non prosecution of petition

The petition is hable to be struck off for default if the applicant does not prosecule it diligently 1 The Court can however restore the petition on

Court, as required by the rules 3

sufficient cause being shown 2 The Privy Council may also dismiss an appeal presented to it for want of prosecution where no further proceedings are taken in the High

### 7 Letters Patent Appeal

No appeal lies under Cl 15 of the Letters Patent from an order granting1 or refu ing- a certificate for leave to appeal

An order granung or refusing leave to appeal can be reviewed 1

9 Form -See typendix ( Form No 12

R 4 [New ] For the purposes of pecuniary valuation, suits of incolving substantially the same questions for determination and decided by the same judgment Consolidation of may be consolidated, but suits decided by separate

involve substantially the same questions for determination

Sinopsis

Consolidation of suits Inherent power to consolidate

Note No 1 Judg 2 Costs Judgment meaning of

### 1 Consolidation of suits

There was no provision under the old Code corresponding to this rule and there was a conflict of opinion as to whether, and when two suits could be consolidated together for the purpose of reaching the pecuniary limit necesary for an appeal to the Privy Council According to the High Court of Al'ahabad suits though decided by separate judgments could be consolidated provided the questions involved in them were substantially the same, and the property affected by the suits were also the same 1 According to the High Court of Calcutta such consolidation was not permissible unless the suits had been decided by the same judgment 2 The present rule gives effect to the latter view

3 (1854 57) 6 Moo Ind App 346 (347) (P C) 1 (1890) 17 Cal 455 (458) (18 6) 1 Cal 102 (103) (1876) 25 Suth W R 5°9 (231) (1815) 24 Suth W R 1.0 (151) 2 (1881) 7 Cal 339 (347) (1875) 24 Suth W R 148 (149) (1897) 2 Cal W N 46 (4") (Notes) (1890) 14 Suth W R O G 34 (38) On appeal Note 8 1 (1884) 16 Cal 992 (294) (1912) 17 Ind Cas 271 (727) 39 Cal 1037

(But see (1866) 6 Suth W R Ms 121 (121)]

Note 6 1 (1855) 12 Cal Gu8 (6L0)

> Order 45 Rule 4-Note 1 1 (1686) 18 All 196 (198) (1901 02) 6 Cal W N 41 (40) (FE) (1666) 5 Suth W R (PC) 34 (38)

and no consolidation is permissible under the present Code unless the suits have been decaded by the same judgment. The object of the rule is that where there are appeals from one judgment involving substantially the same question for determination before the Privy Council, they may be consolidated if, in the aggregate, the value of the appeals amount to the appealable minimum 3 But in interpreting the words 'same judgment," the spirit of the rule should be observed and a narrow interpretation should not be given to it 4 Where the judgment in one suit is merely a copy of the others or where the judgment in one suit merely refers to the judgment in the other, and, adopting its reasons passes a decree accordingly,6 the suits must for the purposes of this rule be regarded as having been decided by the same judgment. Where the evidence in the two suits was, at the request of the parties considered as a whole, and the Court came to a decision on the whole of the evidence in favour of a party, it was held by the High Court of Allahabad that it was a proper case to which the procedure sanctioned by this rule should be applied 7 But the rule allows consolidation only for the purpose of making good a defect in pecumary valuation, and not a defect of any other kind In the case cited below the same judgment affirmed the lower Court's judgment in part relating to one defendant and modified it in part relating to another defendant. In regard to the former part, there was no substantial question of law involved and in regard to the latter part the appealable value was less than Rs 10,000 Both defendants applied jointly for leave to appeal It was held that leave should be refused \$

The rule applies only to appeals to the King in Council and not to appeals to the High Court 9

### 2 Inherent power to consolidate

The rule does not limit the inherent power of the High Court to consolidate appeals to the Privy Council for the purpose of security for the costs and for saving expenses though such power cannot be exercised for settling pecuniary valuation when the rule forbids it in cases governed by different judgments 2

### 3 Judgment meaning of

The word judgment refers to the judgment appealed against and not the judgment of the Court below 1 The fact that there was a common judg ment in two suits in the trial Court is no ground for consolidating the sin's under this rule unless there is a common judgment in the High Court also

The effect of an order of consolidation of several appeals under this rule is to make them a single appeal, and if costs are awarded against the rese

_		1 20 01 60	1		Note 2.
-3				•	1 (1918) 1315 1 at 1 to (197) 3 fat L Jour
140	•				2 (1921) 13-1 1 at 97 (39) Glat L Jour 3
					Note 3
4 (13.					1 (133) 1732 Vad 125 (1.6) .5 Vad 100
ى <sub>لىد</sub> ى (19) ك	JUE 44		••		1 (131) 1321 1 at 37 ( 3) 6 lat L Jour )

O

pondents they are 10 ntly and severally hable for the whole costs 1 As to security for costs in consolidated appeals see Note 5 to R 7.

below

R 5 [New ] In the event of any dispute arising between the O parties us to the amount or value of the subject-Remission of dis matter of the suit in the Court of first instance, or pute to Court of first instance as to the amount or value of the subject matter in dispute on appeal to His Majesty in Council the Court to which a petition for a certificate is made under Rule 2 may, if it thinks fit, refer such dispute for report to the Court of first instance, which last mentioned Court shall proceed to determine such amount or value and shall return its report together with the evidence to the Court by which the reference was made

1 Remission of dispute as to amount or value of the subject matter

This rule gives effect to the practice followed under the old Code a practice sanctioned by the Judicial Committee of ascertaining by evidence and enquiry as to the true value of the subject matter in appeal when there is a d spute regarding the same 1

I remand under this Rule is unnecessary and should not be made when an issue as to valuation was raised and decided in the trial Court and the parties acquiesced in the finding on that issue "

Where there is a remand under this rule the Court to which the remand is made should uself carry out the investigation and cannot remit it to some other officer 3 But it has power to hold a local enquiry for the purpose of determining the value of the subject matter 4 See also the undermentioned case •

Where a question of the value of the subject matter of the suit has been raised in the High Court and a report with reference to value has been made under this rule it is desirable that full information with reference to these proceedings be included in the record to be sent to the Privy Council 6

R. 6. [S 601] Where such certificate is Crefused, the petition shall be dismissed Effect of refusal of certificate

[1877—S 601]

Note 4

1 (1993) 1923 I at 215 (216)

Order 45 Rule 5-Note 1 1 (1905) 9 Cal W N 3 0 (371)

- (1906) 33 Cal S93 (S94) 33 I d App 106 (1 C)
- 2 (1918) 1918 Bom 224 (225) 42 Bom 609 (1977) 1927 Cal 418 (419)
  - (1921) 1921 1 at 9 (98) 6 Pat L Jour 97 [Sec 1so (1915) 1915 Oudh 166 (168) Defendant a of objecting as to plaint valuation—Held he cannot object C P C 349 & 350

- m. H sh Court)
  3 (1916) 1016 Cal 102 (102) 43 Cal 225
  4 (1925) 1025 Cal 414 (1415)
  5 (1934) 1034 Rang 292 (205) 12 Rang 355
  Polit on by creditor for adjudication of insolvency dismissed by High Court—Terre to appeal to Prive Council applied for—Question of value of subject matter should not be referred if respondent will be re quired to file schedule of his assets
- 6 (1933) 1933 P C 232 (232) 12 Pat 679 (P C)

6

### Synopsis

Reasons for refusal Costs

Note No

Note No

1 Reasons for refusal

In the undermentioned case<sup>1</sup> the Judicial Committee observed as follows - Their Lordships desire to add that it would be convenient if the High Court on future occasions in refusing a certificate for leave to appeal would be good enough to state the grounds on which they refused it '

2 Costs

Where an application for leave to appeal is dismissed with costs, the proper Court to execute the order as to costs is the trial Court 1

3 Appeal

Under O 43, R 1, Cl (v) an appeal hes against an order made by any Court other than a High Court refusing the grant of a certificate under this rule and the period of limitation is 30 days from the date of the order under Art 153 of the Indian Limitation Act

4 Review -See Note 8 to R 3 ante

R. 7. [S 602] (1) Where the certificate is granted, the applicant shall, within ninety days or such Security and depo further period, not exceeding sixty days, as the sit required on grant of certificate Court may upon cause shown allow from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later date.—

(a) furnish security in each or in Government securities for

the costs of the respondent, and

(b) deposit the amount required to defray the expense of translating transcribing, indexing and transmitting to His Majesty in Council a correct copy of the whole record of the suit. except-

(1) formal documents directed to be excluded by any order

of His Majesty in Council in force for the time heing,

(2) papers which the parties agree to exclude,

(3) accounts, or portions of accounts, which the officer empowered by the Court for that purpose considers unnecess

sary, and which the parties have not specifically asked to be included; and

(4) such other documents as the High Court may direct to be excluded. Note 2

Order 45 Rule 6-Note 1

1 (1907) 31 Cal 5(0 (~62) (No honever (1551) & Cal .01 (2) } Hell High Court can est u et. b order]

Provided that the Court at the time of granting the certificate may after hearing any opposite party the appears, order on the ground of special hardship that some other form of security may be furnished

Provided further, that no adjournment shall be granted to an on osite party to contest the nature of such security

(2) There the applicant prefers to print in India the copy of the record except as aforesaid, he shall also within the time mentioned in sub-rule (1) deposit the amount required to defray the extense of printing such copy

#### Local Amendments

In Rule (1)(a) Order LLV Code of Civil I rocedure assert the words except when the Secretary of State for Ind a in Council is the applicant between the words the respondent and and C ....

الاز د.	11/219
Amendments after 1903 1 Seepre of the Rule 2 Date of the degree meaning of 3 Security and depost 4 Security in case of consolidated appeal 5 Form of security-Proviso 6	Extension of time Record not to include unnecessary papers Delay Appeal  Solay 10

1 Amendments after 1908

The following alterations have been introduced by the Amending Act XXVI of 1920 -

- (1) The words Amery days or such further period not exceeding sixty days as the Court may upon cause shown, allow have been substituted for the words six months
- (2) The words in cash or in Government securines after the word security have been newly added
- (3) The proviso to sub R (1) is new

2 Scope of the Rule

The Rule prescribes the cour e to be followed by the applicant (appellant) after the issue of a certificate as to fitness of appeal. He should furnish security for the costs of the respondent and also deposit the expenses for translating transcribing indowing and transmitting the records within the time fixed by clause (1) 1 The Rule does not according to the Chief Court of Oudh apply to cases where special leave to appeal is granted by the Privy Council under S 112, and the High Court has no jurisdiction to call upon the appellant to deposit security without any order of the Privy Council 18 The High Court of Calcutta 2 on the other hand has held in a case arising under the old Code that it has been the practice of that Court to

Order 45 Rule 7 Note 2 ca it deposit ng security amount only I (18 5) 1J Suth W R 305 (306) Letatic er

Reasons for refusal Costs

Synopsis Note No

Note No

1 Reasons for refusal

In the undermentioned case! the Judicial Committee observed as fol lows - Their Lordships desire to add that it would be convenient if the High Court on future occasions in refusing a certificate for leave to appeal would be good enough to state the grounds on which they refused it

2 Costs

Where an application for leave to appeal is dismissed with costs the proper Court to execute the order as to costs is the trial Court 1

3 Appeal

Under O 43 R 1 Cl (v) an appeal hes against an order made by any Court other than a High Court refusing the grant of a certificate under this rule and the period of limitation is 30 days from the date of the order under Art 153 of the Indian Limitation Act

4 Revew -See Note 8 to R 3 a te

R. 7. [S 602] (1) Where the certificate is gianted, the applicant shall within nincty days or such sit required on grant further period, not exceeding sixty days, as the of certif cate Court may upon cause shown allow from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later arte.—

(a) furnish security in each or in Government securities for

the costs of the respondent, and

(b) deposit the amount required to defray the expense of translating transcribing indexing and transmitting to His Majesty in Council a correct copy of the whole record of the suit, oxcept-

(1) formal documents directed to be excluded by any order

of His Majesty in Conneil in force for the time being.

(2) papers which the parties agree to exclude

(3) accounts or portions of accounts, which the officer empowered by the Court for that purpose considers unnecessary, and which the puties has not specifically asked to be included, and

(4) such other documents as the High Court may direct to

bo oxcluded

Order 45 Rule 6-Note 1

Note 2 1 (190 | 31 Cal 860 (862) Is a lo e er (1801) 6 Cal -01 (VI). Hell High Court can exe ute su b

1 (1906) 29 Mad 194 (195) 33 Ind App 6

order]

Provided that the Court at the time of granting the certificate may, after bearing any opposite party who appears, order on the ground of special hardship that some other form of security may be furnished:

Provided turther, that no adjournment shall be granted to an

opposite party to contest the nature of such security

(2) Where the applicant prefers to print in India the copy of the record, except as aforesaid, he shall also within the time mentioned in sub-inle (1) deposit the amount required to defray the expense of printing such copy

f1877—S 6021

Local Amendments

Oudh

In Rule 7 (1) (a) Order V.L.V. Code of Civil Pro educe insert the words except when the Secretary of State for India in Council; the applicant between the words the respondent and and

Amendments after 1908 to Sopposition of the Sopposi		~ 3	P	
	Amendments after 1908 Scope of the Rule Date of the decree meaning of Security and deposit Security in case of consolidated appeal	1 2 3 4 5	Record not to inclu- papers Delay	ide unnecessery 8

I Amendments after 1908

The following alterations have been introduced by the Amending Act XXVI of 1920 -

- (1) The words Ninety days or such further period not exceeding saxty days as the Court may, upon cause shown, allow have been substituted for the words six months
- (2) The words in cash or in Government securities after the word security base been newly added
- (3) The proviso to sub-R (1) is new

2 Scope of the Rule

The Rule prescribes the course to be followed by the applicant (appellant) after the issue of a certificate as to fitness of appeal He should furnish security for the costs of the respondent and also deposit the expenses for translating transcribing, indexing and transmitting the records within the time fixed by clause (1). In Rule does not according to the Chief Court of Oudh apply to cases where special leave to appeal is granted by the Privy Council under S 112, and the High Court has no jurisdiction to call upon the appellant to deposit security without any order of the Privy Council. The High Court of Calcutta on the other hand, has held, in a case arising under the old Code, that it has been the practice of that Court to

Order 45 Rule 7 Note 2 crutdepositing security amount only 1 (1875) 1) Suth WR 305 (306) I ctinoter

- treat the section as applicable, and that the High Court has power to extend the time for depositing the costs of transmitting the records under the section
- The words date of the decree' mean the date on which the decree is pronounced and not the date on which it is signed by the Judge 1

4 Security and deposit

3 Date of the decree meaning of

The appellant should furnish security for the costs of the respondent. The security should after the amendment of the section by Act XVVI of 1920 be in cash or in Government securities unless the Court acting under the provisor orders that some other form of security may be furnished. Where Government securities are furnished as security, the market value thereof at the time of deposit should be taken into consideration 2 Solicitors for the respondent in England can claim payment of their bill of costs from the money deposited as security 3 A Full Bench of the High Court of Allahabad' has held that it is open to the decree holder by way of caution to attach the security deposited by the judgment-debtor so as to prevent him from dealing with it any further.

5 Security in case of consolidated appeal

When two appeals are consolidated for valuation, security has to be furnished in respect of each of the appeals. It is not enough if security is given in one appeal alone 1.

6 Form of security-Provise

If an appellant to the Pray Council wishes to furnish a security in any other form than in cash or in Government bonds, he must apply for a special order to that effect and obtain it simultaneously with the order granting the certificate. It cannot be applied for or granted afterwards 1

7 Extension of time

Prior to Act XXVI of 1920 the security or the deposit had to be furnished or made within six months from the date of the decree complained of or within six weeks from the date of the grant of the ceruficate, whichever

Note 3 (1886) 19 Med 140 (183 144) Security bed

Note 3 1 (1910) 5 Ind Cas 844 (945) (Cal)

can be enforced (1866) 5 Suth W R Mis 47 (48) Securit

ts to securities that could be taken be fore the ar endment see the following cases — (1860) 12 South W R 187 (187) Widow » in

terest should not be taken as secunity (1917) 1917 Pat 132 (133) 3 Pat L Jour

(1917) 1917 Pt 132 (139) 3 Pt 1 Deorge 132 Decree offered as security for costs Hell acceptance of security does not operate as stay of execution of the decree

(1809) °6 Cal 216 (219) Surety not pre clude t from questioning the valudity of the bond in execution appellant deposits money and acceds in the appeal the coar of his no hen on it for his fex as the money is not subject matter of the suit and is also not fruit of the attent.

4 (1900) 1930 111 225 (242) 52 111 619 On appeal from 1929 411 794 Note 5

Note 5 1 (1919) 1919 Pat 92 (93) 4 Lat L Jour 103-Note 6

1 (1925) 1925 Wed 419 (450) 19 Wed 409 (1926) 1.26 Rei g 44 (44) (1921) 1921 L B .5 (...) 11 L L B 213 was the later date. The period of six months has, under the Rule as now amended, been reduced to 90 days; but the Court may extend the said period by a further period of sixty days "on cause shown" Under the Rule, as it originally stood, it had been held by the Privy Council and by the High Courts that the period of six months could be extended by the High Court for "cogent reasons.'1 It was held that the misapprehension of the appellant as to the date of the re-opening of the High Court could not be considered to be a "cogent reason" justifying an extension of time 2 As to whether the poverty of the appellant was a "cogent reason," it was held by the High Court of Madras and the Chief Court of Lower Burma that it was not;3 while the Chief Court of Punjab held that it was a sufficient ground for extending time 4 Even under the present Rule, the High Courts of Madras and Rangoon have followed their earlier view on the point 5

Can the period of six weeks or the period of sixty days be extended by the High Court? It has been held that the period of six weeks cannot be extended by the High Court 6 There is a conflict of opinion as to whether the period of sixty days could a clt be enlarged by the High Court. According to the High Court of Bombay, the High Court has by virtue of R 9 of the Prive Council rules, such power, while according to the High Courts of Allahabad 8 Lahore 84 Madras, 9 Patna, 10 Rangoon 11 and the Chief Court of Oudh 12 the High Court has no such power and cannot extend the time beyond that which is provided in this Rule.

#### 8 Record not to include unnecessary papers

N . . 7

No 44

The Judical Committee has repeatedly pointed out and condemned the practice of printing an enormous mass of wholly wrelevant and unnecessary matter in the preparation of the record 1 Only so much of the records as are

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[See also (1922) 1922 All S7 (58) 44
                                                         All 212 Act 26 of 1920 not retros-
(1875 76) 1 Cal 142 (143)
(1876 77) 2 Cal 272 (273)
(1900) 4 Ind Cas 919 (920) 1903 Pun Re
      No 57
                                               9 (1932) 1932 Mad 484 (48a, 456), 55 Mad
(15-1] 1881 AH W N 76 (76)
(1852) 1882 All W N 55 (55)
                                                                  Note 8
                                                1 (1933) 1933 Rang 212 (212) Party cannot
                                                        include in record of appeal to Privy
                                      ı Re
                                                        Council documents and statements
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which were not proved and which are clearly madmissible (1322) 1922 P C 317 (324) 44 All 435 . 49 Ind App 262 (P C) (1928) 1923 P C 44 (44) (P C) (1919) 1919 P C 83 (84) 47 Cal 415: 46 material to the appeal should be printed and transmitted to the Privy Council 2. It has been held in the undermentioned cases that where there is an appeal against the regular decre such proceedings as application for review of the judgment and orders thereon ought not to form part of the record to be transmitted to England.

The Registrar of the High Court should determine in the first instance what papers should be included in the paper book 4

9 Delay

Where there was a great delay of three years in the preparation of the records, the office was called on to report the reason for the delay so that if the delay was due to maction on the part of the appellant, the appeal may be certified as not being effectually prosecuted by the appellant! If there is great delay, the Judicial Committee will peremptorily order the Courts in India to transmit the records at once?

10 Appeal

An order refusing to extend the time for furnishing security is not a "judgment within the meaning of Cl 15 of the Letters Patent and is not appealable as such 1 Local Amendments

BOMBAY

After R 7 the following Rule shall be inserted namely —
7 A No such security wis mentioned in R 7(1) Cl (a) shall be required from the
Secretive of State for India in Council or where the Local Gorennent has
undertaken the defence of the suit from any public officer sued in repeat of an
act alleged to be done by him in his official call year;

NAGPUR

Insert the following as new R 7 A —
7 A No such security as is most oned in R 7(1) C! (a) shall be required from the
Secretary of State for India in Council or where the Local Government has
undertaken the defence of the suit from any public officer sucd in respect of an
act alleged to be done by him; in his official capt recit

SIND

Insert the following as Rule " 1 in the first Schedule — A ho such security as a mentioned in Cl (1) of sub rule (1) of Rule 7 shall here 7 A ho such security may quired from the Secretary of State for India in Coal When security may call or where the Local Covernment has in dertaked the defence of the sult from any public other suf

in respect of an act alleged to be done by human his official capacity

(1°6°) 7 Suth W R 50 (91) 3 (1811 46) 3 Moo Ind \pp 1 ( ) (r C)

(1863) 11 Suth W R 145 (145) (1863) 10 Suth W R 1 (4) (1 B) 4 (1971) 1921 Pat 124 (121) 6 L At L Jour

[See (1922) 1922 Cul 4 9 (401 4)
4J Cul 9f Any pplication to alter
the Registrar a order mu 1 femile

43 Cal 96 Any pplication to anothe Registra a order mut to make to the Lench who granted leave and to to the Bench who heard the appeal—Convenience in Iract el

(1894) 21 Cal 4°6 (4°9) On an application that a certain limited meaning should be placed on an endorse ment by a Lench clerk on certain

(1967) 7 Suth W 18 201 (292) Records slould be trunslated into Lu<sub>n</sub>llsh wherever see sary (See also (1 67 60) 12 Moo Ird App 13, (20) (PC)

Note 10 1 (1591) 19 Cal 182 (15 ).

5

Admission of appeal and procedure there on.

R. 8. [S 603] Where security has been furnished and deposit made to the satisfaction of the Court, the Court shall—

- (a) declare the appeal admitted,
- (b) give netice thereof to the respondent,

(c) transmit to His Majesty in Council under the seal of the Court a correct cony of the said record, except as aforesaid and

(d) give to either party one or more authenticated copies of any of the papers in the suit on his applying therefor and paying the reasonable extenses mourred in preparing them

> Sunonsis Note No Form of notice

To the satisfaction of the Court Notice to respondent Cl (b) Effect of omission to notify

Note No Transmission of record

1 To the satisfaction of the Court

A deposit made out of time is not one made to the satisfaction of the Court 1

2 Notice to respondent-Clause (b)

Under Cl (b) of the rule the respondent should be served with the nouce of the appeal. Notice by substituted service can also be ordered 1

3 Effect of amission to notify

The accidental omission to notify to the respondents of the admission of an appeal to the Privy Council is not a sufficient ground for a re hearing of the appeal decided by the Privy Council provided such respondents in fact kney of the admiss on 1

- 4 Form of notice -1 ide App G Form No 10
- 5 Transmission of record -See Note S to R 7 ante

R. 9. [S 604] At any time before the admission of the appeal the Court may, upon cause shown, leveke Resocation of ac the acceptance of any such security, and make ceptance of security further directions thereon

R. 9-A. [New] Nothing in these Rules requiring any O notice to be served on or given to an opposite party or respondent shall be deemed to require Power to discense with notices in case of deceased parties any notice to be served on or given to the legal representative of any deceased opposite party or deceased respondent in a case, where such opposite party or respondent did

Note 3

O 45 R 8 Note I 1 (1923) 1923 All 5 2 (573) Note 2

<sup>1 (1837 41) 2</sup> Moo Ind App 263 (269) (P C)

<sup>1 (1921) 59</sup> Ind Cas 7 (8) (PC) (1894) 19 All 200 (211) 24 Ind App 49 (PC)

9.A not appear either at the hearing in the Court whose deci is complained of or at any proceedings subsequent to the deci of that Court

Provided that notices under sub-rule (2) of Rule 3 a under Rule 8 shall be given by affixing the same in some of spicuous place in the Court house of the Judge of the Distri in which the suit was originally brought, and by publication such newspapers as the Court may direct

### Local Amendment

### RANGOON

Substitute the following for Rule 9 4 -

9 A Nothing in these Rules requiring any notice to be served on or given to

of posite larty or respondent shall be deemed to require any not Power to dispense to be served on or given to an opposite party or respondent w with notices in case of did not appear either at the hearing in the Court whose dec deceased parties is complained of or at any proceedings subsequent to the dec of hat Court or on or to the legal representative of any su opposite party or respondent if deceased

Provided that notices under sub rule (9) of R 3 and under Rule 8 shall be git by affixing the same in some conspicuous place in the Court house of the Judge of the di tri 11 which the suit was originally brought and by publication in such newspapers as t Court may direct

10 Power to order further security or payment madequate.

R. 10. [S 605] Where at any time after the admission of an appeal but before the transmission of the copy of the record, except as aforesaid, to H Majesty in Council, such security appear

or further payment is required for the purpose of trans lating, transcribing, printing, indexing or transmitting the coll of the record, except as aforesaid,

the Court may order the appellant to furnish, within time to be fixed by the Court, other and sufficient security, or to make, within like time, the required payment

Synopsis

Note No 1 Scope of the Rule

### Other Topics

application for enforcement where to be made. See Note 1 It (1)

1 Scope of the Rule

An application for the enhancement of the amount of security for costs furnished by an appellant to the Privy Council, after admission of the appeal, ought to be made under this rule and not under R 9 The latter rule is applicable to applications before admission of the appeal 1

R. 11. [S 606] Where the appellant fails to comply O

and the appeal shall not proceed without an order in this

hehalt of His Majesty in Council

and in the meantime execution of the decree appealed from shall not be stayed

[1877—S 606]

1

I Fails to comply -Sr Notes to R 7 above

R. 12. [S 607] When the copy of the record, except as O atore-and has been trummitted to His Majesty in Council, the up ellant may obtain a refund of the halance (it any) of the amount which he

has del osited under Rule 7

R. 13. [5 608] (1) Notwithstanding the grant of a O certificate in the admission of any appeal, the derice appealed from shall be unconditionally

(2) The Court may it it thinks it, on special cause shown by any party interested in the suit, or otherwise appearing to

the Court, — "
(a) impound any moverble property in dispute or any

part thereof, or

(b) allow the decree appealed from to be executed, taking such security from the respondent as the Court thinks fit for the due performance of any order which His Maresty in Council may

make on the appeal, or

(c) stay the execution of the decree appealed from, taking such security from the appellant as the Court thinks fit for the

due performance of the decree appealed from, or of any order

which His Majesty in Council may make on the appeal, or

(d) place any party seeking the assistance of the Court under such conditions or give such other direction of the subject-matter of the appeal, as it thinks fit, by the appoint-

ment of a receiver 11 or otherwise

[1877—S 608] Synopsis Note No Note No. Legislative changes Stay of execution after special leave to appeal is granted by the Privy ž Court Stay of execution if can be ordered Council before the granting of certificate Stay of execution by Privy Council 8 Taking such security from the respon 9 dent 4 10 Stay of execution on taking security 11 from the appellant Cl (c) 5 ading Stay of execution in view of applica 12 tion for special leave Appeal 13

Other Tomes Application for stay-Practice See Noto S Lxtent of Security See Note 4 H N (9) and Note 5 F N (2)

#### l Legislative changes

1 The words the grant of a certificate for the admission in Cl (1) have be a substituted for the words the admission of any appeal under this chapter 2 The words adm tting the appeal which occurred after the word Court in the

old section have been omitted in Ci (1) of the present Rule (As to the effect of this omission see Note 3 )

3 The words by the appointment of a receiver or otherwise have been nevly added in Ct (c)

#### 2 Court

The word Court in this rule means the High Court and not the Subordinate Court of original jurisdiction A subordinate Judge or a District Judge has no jurisdiction to stay execution of a decree of the High Court The provis ons of this Rule are meant entirely to govern all questions regarding the execution of the decree under appeal before the Privy Council and the provisions of O 41 R 6 do not apply thereto 1

### 3 Stay of execution if can be ordered before the granting of certificate

In cases decided under the old Code it was held by the High Courts of Allahabad 1 Calcutta2 and Madras3 that an application for stay of execution could not be granted before the appeal to the Privy Council was finally admitted. The reason for such a view was the wording of para 1 of the corresponding S 608 of the old Code which referred to the Court admitting the appeal. The High Court of Bombays on the other hand held that the words admitting the appeal had no reference to le time when the Court was to give directions but merely descriptive of the Court which was to give them and that the High Court could stay execution of 15 decree although the appeal had not yet been admitted. The words admitting the appeal have now been omitted in this rule but the omission has been held not to affect the construction of the rule and that even now no stay can be ordered under this rule before the certificate is granted 5 It has been held in the cases cited below that the High Court has inherent power to stay execusor in appropriate cases even before the certificate is granted

### 4 Taking such security from the respondent

Under CI (b) of the rule the Court may allow execution of the de cree directing the respondent to furnish security for the due performance of any order which the Judicial Committee may make on appeal 1 The object of the se unity is to indemnify the appellant for any loss that may be occa ioned by the execution being taken out 2

Where the high Court orders execution to proceed on the decree-

Order 45 Rule 13-Note 2 1 (1917) 1917 Pat 85 (66) 3 I at L Jour 10 (1925) 13-5 Rang "51 ( 55) 3 Rang Los (1963 0) 5 Mad H C R 93 (99) Note 3

1 (1590) 1590 AH W \ 97 (97) (1901) Cat W N 367 (563) (1871) 16 S th W R 2 9 ( 9)

3 (1303) 4 Ind Cas 106 (10 ) (Mad)

4 (140 ) 13 hon 10 (11 1 ) - (1312) 16 I d Cas bis (516) 68 d L R 56

6 (192a) 1975 S nd 916 (21 1 (1913) 18 Ind Cas 20 (203) 40 C 1 955 Note 4

1 (1915) 2 Ind Cas - 2 (5 3) (Lat ) 9 (15 0) (185)

(tSE9) (thich b Suth W R V & 62 (w2) I xteus mentity

lolder furn shing security and the latter does not do so the order operates in fact as a yelloce and The fallure on the part of the respondent decree-holder owns escurity will not their force deprive him of the benefit of S 15 of the Limitinon Act so as to bar a fresh application for execution after the Pray Courch appeal is dismised.

5 Stay of execution on taking security from the appellant Cl (c)

The grant of an order for stay of the execution of the decree pendano, appeal is in the discretion of the Court and the appellant should show p call cad c for the exercise of the discretion in his favour. As a general rule execution ought not to be stayed unless it would so upset things that in the event of the appeal being sulcessful the status quo ante could not be restored or culd be restored only with great difficult. The principle underlying the granting of stay of execution is that the successful party in linguition and for obtain merels a barren success.

Proceedings between a prelimitary decree and the final decree as for instance in partition suits are proceedings in the suit and not in execution. The High C art has therefore no power to stay such proceedings under this ru! The Privy Goune I which has sersin of the appeal can alone a asy such proceedings. Similarly proceedings in a Revenue Court to eject the defendant instituted after obtaining possession in execution of the decree of the High Court are not proceedings in execution of the decree within the meaning of this rue the

When e the Court orders security to be furnished it is advisable to scetly defined by the time within which the security must be tendered and to scale such further directions as may be necessary to ensure the intention of the Court being carried out.

6 Stay of execution in view of application for special leave

The High Court of Calcutal has held that it has inheight power to order stay of a ceution of its decree in view of an application for special leave to appeal to the Judicial Committee

7 Stay of execution after special leave to appeal is granted by the Privy Council It has been held by the Privy Council in Nitjamani v Madhusudan

Scn<sup>2</sup> that the High Court has power to stay execution of a decree although an appeal a, anist that decree has been admitted by special leave of the Priva Council Their Lordships observed. The learned Judges of the High Court are

3 (1920) 19 0 Pat 2 4 (3 6) 5 Pat L Jour 39
[S al o (1873) 19 Suth W R 186
(16 )]

Note 5

(1909) 1 Ind Cas 512 (812) (Cu1) [See al o (1928) 1928 Bom 159 (16°) Stay of sut trefused pending appeal to maintainab lity of suit] [See (1934) 1934 Lah 2.5 (2 8 289)

(15 9) 4 Cal L Rep 125 (129) [See also (1866) 6 Suth W R Mis 17 (1°0) 14 Suth W R 361 (°61) S cur ty for future mene profits generally taken

o (1919) 1.513 All 14 (15) 18 All LJ 142

Note 6
1 (1913) 18 Ind Cas 201 (209) 40 Cal 955
Holmwood J however dissenting
Note 7

1 (1911) 11 Ind Cas 354 (384) 38 Cal 335 38 Ind App 74 (P C) 13, Other Tomes

Application for stay—Practice See Note 8
Listent of Security See Note 4, F N (2) and Note 5 F N (2)

### 1 Legislative changes

1 The words the grant of a certificate for the admission in Cl (1) have it a substituted for the words "the admission of any appeal under this chapter

2 The words admitting the appeal which occurred after the word 'Court in the old section has been omitted in Cl (1) of the present Rule (As to the effect of this omission see Note 3)

3 The words by the appointment of a receiver or otherwise" have been newly added in C1 (c)

### 2 Court

The word 'Court" in this rule means the High Court and not the Subordinate Court of original purishetion. A subordinate Judge or a District Judge has no jurisdection to stay execution of a decree of the High Court The provisions of this Rule are meant entirely to govern all questions regarding the execution of the decree under appeal before the Privy Council and the provisions of O 41, R 6 do not apply thereto 1

### 3 Stay of execution, if can be ordered before the granting of certificate

In cases decided under the old Code it was held by the High Courts of Allahabad, Calcutta<sup>2</sup> and Madras<sup>3</sup> that an application for stay of execution could not be granted before the appeal to the Prvy Council was finally admitted The reason for such a view was the wording of para 1 of the corresponding 5 600 of the old Code which referred to the Court admitting the appeal. The High Court of Bombay<sup>5</sup> on the other hand, held that the words "admitting the appeal had no reference to the time when the Court was to give directions but merely descriptive of the Court which was to give them and that the High Court could stay execution of the decree although the appeal had not yet been admitted. The words admitter the appeal have now been omitted in this rule but the omission has been held not to affect the construction of the rule and that even now no stay can be ordered under this rule before the certificate is granted <sup>5</sup> It has been held in the cases cited below<sup>6</sup> that the High Court has unherent poner to stay execution in appropriate cases even before the certificate is granted.

### 4 Taking such security from the respondent

Under Cl (b) of the rule the Court may allow execution of the decree directing the respondent to furnish security for the due performance of any order which the Judicial Committee may make on appeal. The object of ire security is to indemnify the appellant for any loss that may be occalioned by the execution being taken out.

Where the High Court orders execution to proceed on the decree-

6 (1925) 1925 Sand 216 (217) (1913) 18 Ind Cas 207 (203) 40 Cat 1 5

Note 4 1 (1915) 97 Ind Cas 572 (573

1 (1915) 27 Ind Cas 572 (573) (Lah) 2 (1870) (19-2)

(1866) 6 Suth WR Mrs 62 (p2) 1 x1cm security

4 (153 ) 19 1 cm 10 (11 12) 5 (1312) 16 Ind Cas 515 (546) 6 Smd L R 56

N - 3

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loder furn shing security and the latter does not do so the order operates in Officer as a layout exclusion. The falure on the part of the respondent decree-holder or give security will not then force deprive him of the benefit of S 15 of the Latitation let so as to bar a fresh application for execution after the Privy Council appeals to stimms ed 3.

## 5 Stay of execution on taking security from the appellant Cl (c)

The grant of an order for stay of the ovecution of the decree pending, appeal is in the discretion of the Court and the appellant should show by call case to the evere so of the discretion in his favour. As a general rule execution ought not to be stayed unless it would so upset things that in the event of the appeal being sulcessful the status quo ante could not be restored or all be restored only with great difficulty. The principle underlying the granting of stay of execution is that the successful party in laugation of the ultimate visu cessful party is to reap the fruits of that hugation and row obtain merch a lattern success.

Proceedings between a preliminary decree and the final decree as to instance in particularly are precedings in the suit and not in execution. The High tour has therefore no power to stay such proceedings under this ru! The Frax Council which has set in of the app alocal alone say such proceedings. Similarly proceedings in a Revenue Court to eject the defendant instituted after obtaining possession in execution of the decree of the High Couliare not proceedings in a Revenue of the decree within the meaning of this rule.

Whe e the Court orders security to be furmished it is advisable to specify define ely the time within which the security must be tendered and to give such further directions as may be necessary to ensure the intention of the Court being carried out.

### 6 Stay of execution in view of application for special leave

The High Court of Calcuttal has held that it has inherent power to order stay of e ecution of its decree in view of an application for special leave to ap cal to the Judicial Committee

7 Stay of execution after special leave to appeal is granted by the Privy Council

It has been held by the Prny Council in Nitjamani v Madhusudan Scn<sup>3</sup> that the High Court has power to stay execution of a decree although in appeal against that decree has been admitted by special leave of the Prny Council Their Lordships observed. The learned Judges of the High Court are

3 (1920) 1/20 Lat 3°4 (3°6) 5 Pat L Jour 39 (1909) 1 Ind Cas S12 (812) (Cu) (See all o (1873) 19 Suth W R 186 (157)]

(1979) 4 Cal L Rep 12 (129) [See also (1866) 6 Suth W R Ms 17 (177)]
(1570) 14 Suth W R 361 (461) Security for

(150) 14 Suth W R 361 (.61) Security for future means profits generally taken for three years

C (1919) 1913 All 14 (15) 19 Att L J 142 4º All 170

N . 6

Note 6 1 (1913) 18 Ind Cas 207 (200) 40 Cal 955 Holmwood J however dissenting

Note 7 1 (1911) 11 Ind Cas 384 (384) 38 Cat 535 38 Ind App 74 (P C) m a much better position than the members of the Board to determine in any particular case whe'her execution ought to be stayed and if so upon what terms and conditions and to what extent stay of execution ought to be granted.

The contrary stay taken in the earlier decreases are no longer good.

The contrary view taken in the earlier decisions are no longer good law

### 8 Stay of execution by Privy Council

As a general rule, in appeals pending before the Privy Council an application to stay proceedings in execution ought always to be made in the instruction to the High Court which has ample power to deal with the matter according to the circumstances of the particular case, and has knowledge of the detruls which the Judicial Committee cannot possess on an interlocutory application. But if the High Court refuses to grant stay, the Privy Council may if it thanks it, either order stay itself? or direct the appellant to apply again to the High Court with its opinion as to the advisability of granting stay?

### 9 Security after execution

The High Court can under sub-R (1) direct the respondent to furnish security for the due performance of any order which may be made by His Majesty in Council, even in cases where the decree his been executed <sup>1</sup>. But the party seeking to obtain such security must show special cause such is waste or improper dealing with the property on the part of the respondent <sup>2</sup>.

### 10 To give such other directions

Where a mortgage suit decreed ex parte was directed by the High Court to be re heard and during the pendency of an appeal to the Prity Council against that order one of the parties applied for stay, it was held by the C-leutta High Court that it had power under this rule as well as under in inherent powers to stay further proceedings in the suit.

### 11 By the appointment of a Receiver

Under Cl (d) of the rule the Court has power to appoint a Receiver to safeguard the interests of the appollant. But the principles on which a Receiver should be appointed are the same as those contuned in O. 40. In the abete of any allegation of waste or risk of loss, no Receiver ought to be appointed under this rule. The High Court has power to appoint a Receiver even in cases where special levie to appeal is granted by the Judicial Committee.

12 Powers of the High Court pending appeal to the Privy Council Poner to amend decree — According to the High Courts of Calcatta<sup>1</sup>

1a (1900) 27 Cal 1 (4) 23 Ind App 281 (PC)
(1.04) 4 Ind Cus 182 (183) (Cal)
(1.10) 7 Ind Cus 182 (183) (Cal)
(1.10) 8 Ind Cus 182 (183) (Cal)
(1.10) 8 Ind Cus 182 (183) (Cal)
(1.10) 9 Ind Cus 182 (183) (Cal)
(1.10) 1 Ind Cus 182 (1

1 (19.6) 19.6 Loru 425 (4.6 427) 20 Loru 423 (15.6) 13 Mad 140 (142) [1 ut sec (18.6) 2 South W. R. Mis 23 1 (1910) 5 Ind Cas 7.3 (72.) (Cal) and Lahore2 the decree can be amended even after leave to appeal is granted ( and Lefore the records are transmitted to the Privy Council The High Court of Allahabad3 on the other hand seems to hold a contrary view, namely that it cannot amend the decree which is the subject of an appeal to His Majesty in Council See Note 9 to S 152 under the heading. Amendment pending appeal against decree !

Poucr to add parties -The High Court has no power to direct the addition of parties after leave to appeal to the Privy Council is granted 4 (Compare also Note 32 to O 1, R 10)

Power to implead legal representatives or to order abatement -Where legal representatives have to be brought on record on the death of a party penging appeal to the Prive Council, the practice of the Judicial Committee is that, on an application, the High Court will make an enquiry, take evidence and transmit the same to the Privy Council with its own opinion as to the substitut on of parties 5 The same rule of practice would appear to hold in the case of abatement 6

Power to stay proceedings - This rule has no application where the party applies for stay of proceedings in the Court below as distinct from the say of the execution of a deerce See also points 3 and 4 in Note 5 ante.

Power to record compromise - Where after the certificate has be n granted and the appeal declared to have been admitted, the parties compromise the suit and apply to the High Court to pass a decree in accordance therewith, it has been held by the Court of Bombay that it has no power to do so 8 The reason is that the Court having once made a decree cannot even by consent make a second one superseding the first

13 Appeal

An order refusing to stay execution in the exercise of the descretion under this rule is not a "judgment" under Cl (15) of the Letters Patent and is not appealable 1

R. 14. [S. 609.] (1) Where at any time during the pendency of of the appeal the security furnished by either Increase of secu party appears madequate, the Court may, on rity found inade quate the application of the other party, require further security

2 (1970) 1929 Lab 427 (427) 3 (1916) 1916 All 170 (170) (F B)

Note 13

1 (t901) 24 Mad 359 (3.9)

(333 335)] G (1303) 4 Ind Cas 456 (457) (Cal) [See also (1924) 1924 Rang 217 (219)

2 Rang 91] 7 (1934) 1934 All 535 (586) 56 Alt 907 Nor has the Court inherent purisdiction (1991) 21 Mad 355 (559) (1891) 21 Cal 473 (475) [See also (1872) 17 Suth W R 464 (464) Order of District Judge releas ing surety - Held no appeal hes therefrom ].

to do so (1934) 1934 Cal 823 (\$24) But High Court has inherent power to do so (1934) 1934 Luh 238 (239) (Do) 8 (1933) 1933 Bom 244 (244 245) 57 Bom 369

- (2) In default of such further security being furnished as required by the Court,—
  - (a) if the original security was furnished by the appellant, the Court may, on the application of the respondent, execute the decree appealed from as if the appellant had furnished no such security.
    - if the appellant had furnished no such security,
      (b) if the original security was furnished by the respondent the Court shall, so far as may be practicable, stay the further execution of the decree, and restore the parties to the position in which they respectively were when the security which appears inadequate was furnished, or give such direction respecting the subject matter of the appeal as it thinks fit
- R. 15. [S 610] (1) Whoover desires to obtain execution?

  Procedure to en of any order of His Majesty in Council shall force orders of King apply by petition, accompanied by a certified in Council copy of the decree passed or order made in appeal and sought to be executed to the Court from which the appeal to His Majesty was preferred.
- (2) Such Court shall transant the order of His Wijesty in Council to the Court's which passed the first decree appealed from or to such other Court as His Mijesty in Council by such order may direct and shall (upon the application of either putty) give such directions as may be required for the execution of the same, and the Court to which the said order is so transmitted shall execute it accordingly, in the man ner and according to the provisions applicable to the execution of its original decrees
- (3) When any momes expressed to be phyable in British currency are phyable in India under such order, the amount of phyable shall be estimated according to the rate of each might to the time being fixed at the date of the indiang of the order by the Secretary of State to India in Council with the confunction of the Loids Commissioners of His Wajesty's Training for the adjustment of financial transactions between the Indianal (open muents)
- (4) Unless His Wigety in Council is pleased otherwise to direct no order of His Wigety in Council shall be moperative on the ground that no notice has been served on or given to the leaffaction of any deceased opposite party or deceased accounted in a case where such opposite party or respondent did not appear either at the hearing in the Court whose decreases complained of or it any proceedings subsequent to the

decree of that Court, but such order shall have the same force C and effect as if it had been made before the death took place [1877-S 610.]

# Local Amendment

### ATLAHABAD

For Rule 15 (1) substitute -

15 (1) Whoever desires to obtain -

(a) execution of any order of His Wijests in Council or

(b) where an appeal has been dismissed by His Wagesty in Council for want of pro a ution an order of the Court from which the appeal to His Majesty was preferred terminating proc cdirgs and determining the co ts shall apply to the said Court by a polition accompanied by a certified cory of the decree passed or order made by His Majesty in Council of which exe ution is desired or to which effect is to be given and a memorandum of all costs incurred in India that are claimed in tursuance thereof

	Synoj sis	
terial To what Court order should be trans mitted 'Shall give such directions etc	t Application by assignce of order Council Liability of surety Resitution Mesne profits Interest Costs Rate of exchange—Sub Rule (3)	10 11 12 13 14 15 16 17 18

Other Tonics

Execution against persons not party to arreal Sec Note 11 Its (1) and (2)

Interest on costs-Sea Note 13 Pt (1)

#### 1 Legislative changes -

- The provision contained in Paragraphs 3 and 1 of the corresponding section in the old Code which related to the enforcement of the liability of the surety for costs have been omitted under the present Rule in view of 5 140 of the
- Paragraph 4 has been newly introduced by 1ct XXVI of 1970
- Whoever desires to obtain execution

It is not necessary in all cases that each person interested in the execution of a particular order of His Majesty in Council should obtain a separate transmission of the order when it has been already transmitted to the lower Court at the instance of one of the successful parties 1 Under O 21. R 15 it is open to some of the decree holders who have obtained permission. to execute the Privy Council decree on behalf of all the decree-holders 2 But where the decree is in favour of several persons declaring that each is entitled to a separate and distinct share each plaintiff is bound to apply separately for execution and an order of transmission obtained by some of the plaintiffs alone cannot be taken advantage of by the others 3 Where a party having obtained an order in council delays or refuses to lodge the order, the opposite party can apply under this rule asking for a summary order against that party

Order 45 Rule 15-Note 2

<sup>1 (1932) 1932</sup> Mad 440 (443)

<sup>(1921) 1924 \</sup>Ind 95 (9u) 2 (1920) 1920 Pat 672 (673)

<sup>3 (1917) 1917</sup> Pat 258 (256) 2 Pat L Jour 496

15, to lodge the order so that execution might follow in terms of the judgment of the Board 4

### 3 Shall apply by petition

The provisions of the rule are mandators and an execution application filed without having filed a potition for transmission under this rule is incompetent. But where no such objection was taken in previous execution proceedings it cannot be allowed at a later stage of the proceedings.

#### 4 Accompanied by a certified copy

A certified copy of the decree sought to be executed should be filed along with the pention 1 A production of a copy of the udsment is not enough? But the object of the requirement of a certified copy of the decree is only to ensure that proper intumation upon the subject of any order in council should be supplied to the Courts in India. The rule should not be construed as restretting the only possible evidence of the decree or order to the certified copy. Where, therefore, along with an application for the execution of the decree of the Privy Council a plain print copy of the decree was filed with an affidant showing that it was the decree of the Privy Council, it was held that it must be held to be a true copy of the decree within the meaning of this rule 4.

The practice in regard to Pray Council decrees is that the original decree is given to the successful party or to one of the successful parties and it is the duty of that person to file that original decree in the High Court 2

### 5 'To the Court from which the appeal to His Majesty was preferred

The application under sub-R (1) should be made to the Court from whose decree the appeal was preferred to the Privy Council An application made to any other Court is not competent 1

### 6 Jurisdiction of Patna High Court

The High Court of Patna has no jurisdiction to execute an order in Council passed in an appeal from the Calcutt High Court The proper Court to which an application for execution should be made is the High Court of Calcutta.

# 7 Functions under the Rule merely ministerial

The duties of the High Court in receiving and transmitting orders of His Majesty in Council under this rule are purely ministerial. It is this not competent for the High Court to consider and discuss the effect of propriety of the order in Council and disallow costs or interest or to hold

2 (1,00) . ... --

Note 5 1 (15"4) 22 Suth W R 102 (102) that the decree of the Privy Council is void and incapable of execution on the ground that one of the appellants died during the pendency of the appeal 3 If a party feels aggreed by the order, the proper course for him is to apply to the Privy Council for redress,

#### S To what Court order should be transmitted

The High Court should transmit the order for execution to the Court which passed the decree Where hosever, such Court ceases to have territorial juried enton over the matter the order can be transmitted to the Court which has unfad chorn to execute it 1

#### 8a. Shall sive such directions etc.

Under Sub R (2) of the Rule it is the High Court that can give necessary directions in relatin to execution. But it has been held that neither the High Court nor the Subordinate Court has power to stay execution or adjourn an application for execution on the ground that an application for review of the de rec was pending before the Privy Council.

#### 9 Application by assignee of order in Council

Where an order of the Prny Council is transmitted under this rule to the District Court as the Court which passed the first decice the latter Court has jurisdiction to entertain an application made by an assignce of the decree under O 21 R 16 to recognise the assignment and to allow him to execute the decree 1

#### 10 Liability of surety

The hability of the surety can be enforced under S 145 of the Code But the surety is not precluded from questioning the validity of the security bond in execution proceedings. Where the surety bond amounts to a mortgage it should be enforced by a separace stat and not by way of execution.

#### 11 Restitution

Where during the rendency of an appeal to the Privy Council certain property which had been decreed to the plaintiff and which had been delivered to him was attached and sold away in Court auction in execution of another decree against the plaintiff and subsequently the Privy Council allows the appeal of the defendant and dismisses the suit the defendant is entitled to recover back the property by way of restitution. His right to restitution is not affected by the fact that the auction purchaser is not a party to the Privy Council appeal. The fact that the party applying for restitution is not a party

- 3 (1990) 19 O Pat 6 2 (673)
- [Sec (1882) 4 Att 137 (140)]
  4 (1914) 1911 Vad 222 (221) 38 Vad 832
  Note 8
- 1 (1893) 70 Cal 105 (106)
- (1915) 1915 Mad 602 (192) [See 20 Suth W R 419 (419)]
- Note 8a 1 (1929) 1922 Oudh 84 (3")
- 1 (1929) 1922 Oadh S. (87) (1872) 17 Suth W R 340 (341) Where the Pray Cou cil left the amount due to plant fi to be determined by the High Court
  - (18"3) L R 1 Ind App 342 (345) (P C)

    The Fru p Council stieff gave directions in the following cases
    - C PC 351 t 352

- (1874) 22 Suth W R 101 (10t)
- (1866) 5 Suth W R 271 (2 5) 2 (1931) 1931 Pat 203 (203)
- Note 9 1 (1914) 1911 Mad 929 (291 925) 28 Mad 92
- 1 (1914) 1914 Mad 222 (224 275) 38 Wad 832 Note 10
- 1 (1898) 26 Cal 216 (219)
- 2 (1905) 32 Cal 494 (495) (500) (1934) 1934 Oudh 139 (140) 9 Luck 534 Personal habit to tan be enforced under S 145—But Inbility against hypothecated property can be en
- forced only by a separate suit
- 1 (1906) 28 All 337 (339)

o, to the Privy Council appeal does not disentitle him to apply for such restitution if the order of the Privy Council also entires to his benefit 2

As to whether proceedings by way of restitution are or are not proceedings in execution, so as to necessitate an application under this rule, see Notes 30 and 33 to S 144 and the undermembed cares 3

#### 12 Mesne profits.

A party who is dispossessed of immovable property in pur uance of a decree of the High Court is entitled to get buck, by way of restitution in t increby the property of which he was dispossessed, but also mesne profits for the period for which he was out of possession.

#### 13 Interest

No interest on costs can be allowed by the High. Court or the Court of the first instance, when the order of the Pray Councils silent as to interest. But if interest is awarded by the Pray Council but no rate is specified the executing Court can grant interest at the rate granted in the decree of the High Coverat a reasonable rate? (See also Note 17 to 5 34 and Note 35 to S 35)

#### 14 Costs

When the successful party in appeal before the Priv Council is warded the costs of the appeal in England and also the costs neutred in the Indian Courts, he is entitled to get also the costs of translating the records of the appeal and of transmitting them to England 1. The amount of such costs is left to be accertained by the High Court and is not assessed by he Privy Council office 4.

### 15 Rate of exchange-Sub R 3

Under the Code of 1882, according to the view taken by the Calcium High Court the rate of exchange meant the rate existing at the time when the order in Council is made and not at the time when execution is taken the High Court of Allahabad, on the other hand held that the words the time being 'refer to the year in which the amount is realised or the overcution taken out and not the year in which the decree or order of by

theation for restitution governed by Act. 183 of the Limitation Act (1927) 1927 Pat. 08 (.03) 6 I id 2.2. Proceedings for restitution are not proceedings in accounting

(1930) 1,330 Lab 951 (957) Question left open Note 12

1 (1892) 15 Mad 203 (210) (1874) 21 Suth W R LJJ (195) (18-0) 5 Cal L Rep 189 (131) (S.a also (18-9 70) 13 Moo Ind App 490 (LJJ (PC)) N'r' '7 [See also (1913) in Henc L R (103 also) 2 Ind App 13 (PC) 2 (1872) 18 Suth W II 103 (103) Note 14

(1874) 21 Suth W R 147 (147) (1874) 21 Suth W R 195 (156) (1872) 18 Sath W R 103 (104) (1871) 16 Suth W R 302 (302) (1872) 18 Suth W R 253 (254)

asone 1 by the introduct on of recvant matter in the appeal rec-(1984) 10 Cal 100 (10)

2 (1981) 10 Cal 100 (10 ) (1372) 18 Suth W It 53 (30) (1571) 15 Suth W It 3.6 (3.7) Note 15

1 (1636) 23 Cal 357 (441) (1834) 25 Cal 253 (285)

(1305) 32 (41 431 (301) (19 3) 4 Cal 223 (230).

<sup>2 (1924) 1924</sup> Mad 95 (96) 3 (1915) 1915 All 434 (43a) 37 411 567 Drs inquished in 1973 411 239 (1928) 1928 Vil 293 (214) 40 All "67 4p lication for restriction governed by 4rt, 183 of the Limitation Let

Council was passed <sup>a</sup> B<sub>3</sub> the introduction of the words "at the date of the making of the order in sub-rule 3 of this Rule legislative recognition has been given to the Calciuta view.

#### 16 Letters Patent Appeal.

An appeal hes from an order of a single Judge of the High Court refusing to transmit for execution the order of His Majesty in council Such an order is a judgment within the mening of Cl. 15 of the Letters Patent.

#### 17. Dismissal for want of presecution

Where an appeal preferred against the decree of the High Court is dismissed by the Judicial Committee for want of prosecution, the order is not a judicial determination at all and limitation for execution of the High Court's decree runs from the date of the decree of the High Court.

#### 18 Limitation

An application to execute the decree or order of the Privy Council under this Rule is governed by Article 183 of the Limitation Act 1

R. 16. [S. 611.] The orders made by the Court which O executes the order of His Majesty in Council, and the control of the council, and the council of the c

NOTE -For "The Rules of the Judicial Committee", see Appendix.

### ORDER XLVI.

### REPERENCE.

R. 1. [S. 617.] Where, before or on the hearing of a suit or an appeal in which the decree is not subject to appeal, or where, in the execution of any such decree, any question of law or usage hav-

ing the force of law arises, on which the Count trying the suit or appeal, or executing the decree, entertains reasonable doubt, the Count may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained, and lefer such statement with its own opinion on the point for the decision of the High Count.

[1877—S. 617; 1861—S. 28.]

2 (1556) 8 All 650 (652)

(1914) 1914 P C 65 (66) 86 AU 864: 41 Ind App 104 (P C)

(1916) 1916 Pat 25t (250): 1 Pat & Jour 386 (1916) 1916 Cal 488 (498); 48 Cat 908. (1832) 8 Cal 218 (228) (F 3). Art 180 of Act XV of 1877

Note 17 1 (1914) 1914 P C 66 (67) 39 All 850 (P C) decree

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### Sinopais

Legislative changes Note No. 2 Scope of the Rule 2 Reference hes only where question of arises in suit appeal or execution of

Note No. 1
Court meaning of Note No. 2
No reference on question of fact Reasonable doubt
Statement of facts and Court's opinion of Reference by Presidency Small Cause

### Other Tonics

Applicability of the Rule See Note 3
Pts (3) to (8b)
Reference by Court without surreduction

"Decree not subject to appeal

See Note 5 Pt (5)
Practice and procedure See Note 8

- 1 Legislative changes
  - 1 The word final which occurred in the old section has now been substituted by the words not subject to appeal (See Note 4)
    - 2 The words or the construction of a document . . . ments have been omitted
  - 2 Scope of the Rule
- À right of reference is fundamentally distinct from the right of appeal the former vests in the Court and the latter vests in the sudor 1 The object of the provision for reference is to enable the subordinate Courts to obtain, in non appealable cases, the opinion of the High Court in advance on a question of law and thereby avoid the commission of a nerror which could not be remedied later on 2 But the right of reference is subject to the conditions prescribed by this Rule and unless they are fulfilled, the High Court cannot entertain a reference from a subordinate tribunal 3 The Rule requires the following conditions to be satisfied to enable a subordinate Court to make a reference.—
  - There must be a pending suit or appeal in which the decree s
    not subject to appeal or a pending proceeding in execution of
    such decree (See Note 3)
  - (2) A question of law or usage having the force of law must arise in the course of such suit, appeal or proceeding, and
  - (3) The Court trying the suit or appeal or executing the decremust entertain a reasonable doubt on such question (S27 Note 7)

The provisions of this Order are made applicable to proceedings under the special or local Acts mentioned hereunder 4

3 Reference has only where question arises in suit appeal of execution of decree A reference can be made only in a suit ar appeal or in execution of a decrect and only on a matter about which the parties are litigating that is on a matter wherein the Court is called on to adjudicate on the opposite

Order 46 Rule 1-Note 2 1 (1928) 1928 All 371 (375) 50 All 839 2 (1991) 1921 Cal 262 (264) 48 Cal 766 them)

4 The U P Municipalities Act No II of 1016 S 319 The Dekkhan Agricultur Is Rehef Vet AVII of 1879 S 6 The Cantoniments Act No II of 1924 S. 81 The Indian Succession Act NAIX of 19 S 381 and 388 Nate 1

Courts of the necessity of dec ding difficult que tions arising before

Note 3 1 (1901) 25 Bom 927 (329) contentions of the parties 2 Thus no reference can be made under this Rule in the following cases —

- In a proceeding against a pleader under the Legal Practitioners Act, 1879.
  - (2) In a proceeding under the Land Acquisition Act, 1894 4
  - (3) In an application for review 5
  - (4) In an application for a new trial 8
  - (5) In an application for sanction to procedute?
  - (6) In an enquiry as to the proper Court-fee payable on a memorandum of appeal 8
    (7) In an enguiry in an application under S 15 of the Calcutta
- Rent Ac 44 or in any proceedings under the Agra Tenancy Act 45 or in an application under S 93 of the Bengal Tenancy Act 6

The question on which a reference can be made must have arisen before of of the herring of a suit or an appeal or in a pending proceeding in execution of a decree. A question arising absent in the hearing of a suit or appeal or in the hearing of a suit or appeal or in the subject of a reference under this Pule unless it arises in execution of the decree.

The quest in mu t all o be one which actually arises for decision in the proceedings before the Court. The Rule is not intended to provide for suppositions cases which do not actually arise for decision <sup>10</sup>

The right of reference is analogous to a right of appeal in that it is not a more ma or of procedure, and, consequently cannot be exercised in proceedings other than those referred to in the section by the application of S 141 of the Code which only makes the procedure of the Code in respect of suits applicable to miscellaneous proceedings. (See No e 7 S 141)

#### Decree not subject to appeal

No reference can be made in a suit or appeal unless the decree that might be pased there n is one against which no appeal lies <sup>1</sup> Similarly no reference can be made in a proceeding in execution of a decree unless the decree is a non-appealable one <sup>2</sup> The reason is that in appealable cases a remedy to correct possible errors is provided by the appeal.

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2 (1989) 19 Lom 79 (79 60)
3 (1989) 19 Lom 79 (79 60)
4 (1983) 188 Lom 1 1 9'29 (229)
5 (1982) 17 Suth W R 10 9' (10)
1 (1982) 187 Suth W R 10 9' (10)
1 (1982) 187 Suth W R 10 9' (10)
1 (1982) 187 Lith W R 10 9' (10)
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1 (1984) 187 Lith R 10 9' (10)
1 (1985) 187 Lith R 10 9' (10)
1 (1985) 187 Lith R 10 9' (10)
1 (1985) 187 Lith R 10 9' (10)
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8 [1900] 1905 All W N 180 (180) [1800] Gal 756 [758] Probate application assigned by the first of the Agra Tenancy of of the Agra T

(1880) 1880 Pun Re No 100 Order in execution appealable — No refer ouco (1893) 17 Bom 735 (736)

(1910) 5 Ind Cas 584 (JS4) (411) 3 (1880) 7 Cal L Rep 144 (144)

#### 1, Court, meaning of

The word Court in this Rule means a Court of Civil Judicature . Thus a Collector executing a decree transferred to him under S 68 of the Code2 or a Rent Con roller enguiring into an application under S 15 of the Coleuta Rent Act3 or a Registrar acting under the Indian Registration Act4 is not a Court and cannot make a reference under this Rule. Where a Court refuses to entertain an appeal on the ground that it has no jurisdiction to do so it has no power to make a reference on that matter under this Rule 5 (See also Note 1 to S 114, ante )

### 6 No reference on question of fact

I reference is allowed only on a question of law or usage having the force of law. No reference can be made on a question of fact 1

#### 7 Reasonable doubt

A reference can be made on a question of law only if the Judge entertains a reasonable doubt about it 1 There cannot ordinarily be a reasonable doubt on a question clearly decided by the rulings of the High Court to which the Judge making the reference is subordinate unless the authority of those rulings can be questioned in view of a more recent decision of the Privy Council 14 Where however, the rubing of a High Court is doubted in a later decision of the same Court and has been dissented from by the other High Courts, there may be room for a reasonable doubt sufficient to enable a subordinate Court to make a reference on the question 2 But even in such a case the referring Court must entertain a reasonable doubt about the question and the mere fact that there are conflicting rulings is not by itself sufficient 3 Similarly the Court cannot make a reference on a question on which it entertains no doub merely because the part es apply for it 4

A reference is not bad merely because the question arises out of the action of a third person not a party to the suit \$

8 Statement of facts and Court's opinion

In making the reference the Court should draw up a statement of the facts of the case formulate the precise question of law or usage having the force of law on which opinion is sought for and must also give its opinion on the aucstion 1

### Note 5

- 1 (1913) 1919 Oudl 18 (19) 22 Oudh Cas 319 2 (1919) 1J19 Oudh 18 (19) 22 Oudh Can
- 319 3 (1925) 1975 Cal 391 (391)
- 4 (1596) 1896 Bom P J 496 (497)
- 5 (1889) 1 111 21" (715)
  - (1313) 18 Ind Cas 814 (315) 1913 I un Re Sa 61
    - Note 6
- 1 (1911) 11 Ind Cas 6"1 (67") (\*pmer) Note 7

- (1914) 1914 Lah 147 (1) (147) 90 Ind Car 194 (191) 1914 Pun Re No 8 (1889) 13 Lom 54 (55)
- (1J27) 1J27 Mad 1186 (1187) (1931) 1931 Vad "1 (72) Subordinate Court
- E THOS COMPAND FOR HOLD & of the
- 2 (19%) 3 (1913) 18 Ind Cas 9:7 (977) 15 Oudh Cas
- Note 8 1 (1902) 1902 Pun L R No 93 at 1 150 .65 (1891) 15 Born 3,6 (383) Case under the 1 residency Small Cause Courts tet (1896) 20 Dom 770 (783) (Do)

Where there was no statement of the case, no statement that the question arose on the trial of a suit and no statement of the Court's opinion. t . High Court refused to answer the reference and sent it back for amendn cat =

9 Reference by Presidency Small Cause Courta

See S 69 of the Presidency Small Cause Courts Act (VV of 1882) as and and district IV of 1906 and the undermentioned cases 1

Court may pass de cree continuent upon decision of High Court

R. 2. [S 618] The Court may either stay the proceedings or proceed in the case notwithstanding such reference, and may pass a decree or make an order contingent upon the decision of the High Court on the point referred:

but no decree or order shall be excented in any case in which such reference is made until the receipt of a copy of the dement of the High Court upon the reference.

[1577—S. 619], 1861—S. 29.1

Judgment of High Court to be transmit ted and case disposed of accordingly

High Conit

R. 3. [S 619] The High Court, after hearing the parties O if they appear and desire to be heard, shall decide the point so referred, and shall transmit a copy of its judgment, under the signature of the Registrar, to the Comt by which the reference was made, and such Court shall, on the receipt thereof, proceed to dispose of the ease in conformity with the decision of the

F1877-S 619. 1861-Ss 32 and 33 l

1 Dispuse of the case in conformity with the decision of the High Court

Upon receipt of the decision of the High Court, it is the duty of the r feiring Court to dispose of the case in conformity therewith. Thus where a Small Cause Court passed a decree for the plantiffs, contingent on the oversion of the High Court and the High Court gave the opinion that the Lumbifs could not recover, it is not open to the referring Court after the receipt of the opinion to allow the suit to be withdrawn by the plaintiff, judgment should be entered for the defendant 1 The judgment by the High C urt on a reference under this rule is not, by itself a decree but simply a st tement of the grounds in conformity with which the referring Court is to dispose of the case as provided by this rule. Therefore the High Court cannot review its indement passed on a reference made to it 2

2 (1877) 7 Suth W B 16, (167) Note 9

1 (1 03) .0 Cul 1.3 (162) Condition of this

condition precedent to a reference (1891) 15 Bom 3:6 (.33) The process que tion of law or usage must be for

mulated (1892) 16 Lom 618 (6'4) Reference must to made before the Judge has dela vered judgment

Order 46 Rule 3-Note 1 a que tion of law or usage or con 1 (1597) 21 Cal 129 (132) struction as the can mentioned is a 2 (1686) 10 Lom 68 (69)

Costs of reference to High Court

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R. 4. [S 620] The costs (if any) con sequent on a reference to the decision of the High Comt shall be costs in the case

[1877-S 620, 1861-S 34]

1 Costs of reference

The costs of reference to the High Court cannot be dealt with separately but must be dealt with when awarding the costs of the suit 1 The High Court of Calcutta is however, of opinion that the award of the costs of the reference is in the discretion of the Court 2 This does not seem to be correct on principle. The rule requires that the costs of reference shall be costs in the case and S 35 which gives the Court a discretion to award costs is expressly made subject to the conditions and limitations prescribed by the rules of the first schedule

Power to alter etc. decree of Court mak

ing reference

R. 5. [S 621] Where a case is deferred to the High Court under Rule 1, the High Court may return the caso for amendment, and may after, encel or set aside any decree of order which the Court

making the reference has passed or made in the case out of which the reference aroso, and make such order as it thinks fit

[1877—S 621]

1 Scope of the Rule Where the lower Court has not complied with the conditions lad down in R 1 of this order the High Court has poter under this rule to return the case for amendment in proper form 1 The rule is also wide enough to enable the High Court to quash the order of reference itself made by the lower Court 2

R. 6. [S 646 A] (1) Where at any time before judgment a Court in which a suit has been instituted Power to refer to doubts whether the suit is cognizable by a High Court questions as to jurisdiction in small causes Court of Small Cruses or is not so cognizable it may submit the record to the High Court

with a statement of its reasons for the doubt as to the nature of the suit

- (2) On receiving the record and statement, the High Court may older the Court either to proceed with the suit or to return the plaint for presentation to such other Court as it may in its order declare to be competent to take cognizance of the suit
  - 1 At any time before judgment No reference could be made under this rule after the pas ng of the

judgment in the case <sup>1</sup> The rule refers only to such questions as arise during the trial of the sut and not to questions arising on an application for sanction to no court which supports be considered on a trial of the surface.

R. 7. [S 646-B] (1) Where it appears to a District Court that Court wheel the considered as a trial of the suit?

Power to District Court to submit for revision proceedings had under mistake as to jurisdiction in small causes that a Court subordinate thereto has, by reason of erroneously holding a suit to be cognizable by a Court of Small Causes or not to be so cognizable tailed to exercise a jurisdiction vested in it by law or exercised a jurisdiction not so yested, the District Court may, and it party shall, submit the record to the High Court

not so vested, the District Court may, and it required by a party shall, submit the record to the High Court with a statement of its reasons for considering the opinion of the subordinate Court with respect to the nature of the suit to be erroneous

- (2) On receiving the record and statement the High Court may male such order in the case as it thinks fit
- (3) With respect to invite eedings subsequent to decree in any ense submitted to the High Court under this Rule, the High Court may make such order as in the encumstance appears to it to be just and proper.
- (4) A Court subordinate to a District Court shall comply with any requisition which the District Court may make for any record or information for the purposes of this Rule

Scope of the Rule
Court subordinate thereto
If required by a party shall
Instrict Court should state its reasons

Some of the Rule
Rule
(a) I steriforance with jue toon of fix

Other Tapics

Doubt as to juri di tio: Se Note I It (1) Provinced Smill Cruse Courts Act S S 16

1 Scope of the Rulo

S 16 of the Prov Small Cause Courts Vet, 1887 provides that a suit cognisable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the limits of the jurisdiction of the Court of Small Causes by which the suit is triable. Where an ordinary Court emertains a suit cognisable by a Court of Small Causes it exercises a jurisdiction not vested in it and if it refuses to entertain an original suit on the ground that it is cognisable by a Court of Small Causes, it refuses to exercise a jurisdiction vested in it. A reference under this rule is limited to those cases where the District Court is of the opinion that the Subordinate Court has held

7, that it has no jurisdiction over the suit, and that such order is erroneous?

The rule 1s only an enabling one and does not in any way cut down the jurisdiction of the appellate Court <sup>2</sup> But a District Judge has power under this Rule to make a reference whether the case is, or is not, pending in appeal before him <sup>3</sup> Where a District Munsif returned a plaint as being cognisable only by a Court of Small Causes and the latter Court, however, returned it back as being cognisable only by the Munsif's Court, it was held that the correct procedure was either to pioceed under R 6 of this order itself or send the case to the District Judge for making a reference under this rule <sup>4</sup>

2 Court subordinate thereto'

The Court of Small Causes is a Court subordinate to the District Judge and O 46, R 7 contemplates and allows a reference to be made by the District Judge in cases tried by the Court of Small Causes 1

3 If required by a party shall

Before a reference could be made under this rule it is a necessary condition that it must appear to the District Court that the subordinate Court has erroneously held upon the point of jur sdiction. Where it does so appear and a party requires the District Court to make a reference, it is bound to do so?

4 District Court should state its reasons

A District Court when making a reference under this rule should state its rea-ons for considering the opinion of the subordinate Court to be crioneous?

5 Powers of the High Court under this Rule

Where a sur which is cognisable only by a Court of Small Causes is tried as an original suit by a District Munsif and the decree is reversed by the Suberdinate Judge on appeal there are two remedies open to the aggreed parts

- (1) A revision under S 115 of the Code
- (2) A reference under this rule

Where a reusion is preferred to the High Court the latter is bound to set used the decree of appellite Court as being prised in an appeal which was moompletent and therefore without jurisdiction. It can also set used the decree of both the Courts and return the plaint for presentation to ille proper Court.

3 Nag LR 1

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1 .23

Note 2 1 (1916) 1916 Cal 422 (4°4)

1 (1~ ) 11 \11 301 (30<sub>1</sub>) (1n 0) 13 \1 d 311 (316)

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2811 Ly the High Courts of Calcutta3 and Patrix4 that the High Court is not bound

to set uside the proceedings in all cases but has full power to consider the tratter of jurisdiction or to deal with the case on the ments so as to do "" a rual justice without necessarily putting the parties to the expense of a fresh trial

See al. a the undergroup out case 5

#### 6 Interference with questions of fact

O1 1 reference under this rule the High Court will not as a rule interfere with and ags of fact arrived at hy the first Court on the evidence before it 1

#### Local Amendments

## ALLAHABAD

131 after R " to O 46 -

8 Rale Co of O 41 shall apply so far is may be to proceedings under this Order "

The fill wine shall be auded as R s in O 16 -Applicability of R 38

8 Lule 33 of O 41 shall apply so far as may le to proceedings under this Order

11 Lefollow ug a R S -

8 R le us of O 41 shall at pla s far a mix le ( proceedings under this Order

OUDH SIND

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.. t the following as B 5 in O 46 8 Rute CS of O 41 shall apply so far as Applicability of R 38 of Q 41 may be to proceedings under this Order

### ORDER XLVII

### RIMEW.

 $\mbox{\bf R. 1.} [8\ 623\,]$  (1) Any person considering himself aggree  $\mbox{ed}^5-$ Application for review of judgment

(a) by a decree of order from which an appeal is allowed. but from which no appeal has been meferred 6

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes.

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not with in his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or eiror apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree assed or order made against him, may apply for review of judgment to the Court which passed the decree or made the order

<sup>3 (1315) 1315</sup> Cal G13 (G2O) (18J1) 91 Cal 91J (252)

<sup>(1</sup>J33) 1J33 Pat 31 (31) II I at 690

which rejected it - Appeal to Dis-triet Judge against this order dis-ml ed - High Court can revise the original order returning the plaint

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review

[1877—S 623: 1859—S, 3761

#### Synopsis.

Legislative changes	No	Note	y
	, i	Cases where review was not allowed	
Scope of the Rule	2	an the ground that there was no	
(a) Rousew and appeal—Distinction	3	sufficient reason	16
(c) Review and amendment-Dis		Review on the ground of subsequent	
tinction	-4	events	3
Person considering himself to be		No review on ground of decision being	
aggrieved 1	5	erroneous on merits 1	7
Decree or order from which		(a) Reslow on particular ground	
no appeal has been preferred	6	bee Note 2 to Bule 8	,
no appear has been preferred			•
(a) Filing of appeal pending apple	_	No review of fact after decision in	
cation for review	7	second appeal	
Decree or order from which so appeal		Application of the Rule to miscella	.,
15 allowed—Clause (b)	8	medus proceedings under the code	20
Decision on reference from Court of		Review in proceedings under other	_
Small Causes—Clause (c)	9		2
Discovery of new and important matter			2
or evidence	10	Consent decree	2
(a) Discovery of important matter of		Ex parte decrees and orders of dis	
law	11	missal for default	2 (
(b) Exercise of due diligence	12	Judgment in Letters Patent Appeals	2:
			•
(c) Was not within his knowledge		Review of decision before signing,	26
and could not be produced by			27
him at the time	13		3
(a) Decree rendered ineffectual by			
reversal See Note 10 sugra	14		9
Mistake or error on the face of the		Appeal by one party-Review appli	
record	15	cation by another- Clause (2)	
Any other sufficient reason "	16	Perry Caused practice	4
Cases where review was allowed on		Annesi 3	ļ
	16a	Revision 3	3
Program or savictions leason			

### Other Tomes

9, Pt (20)

F h (1)

1 12 (1)

16 (b) Pt. (1 a)

by another to competent Sec R 2 No 8

Review in probate proceedings See Note 21

Wrong exposition of lan-Whether a ground for review Ses Note 15 Pt 7, No a

Review under the old Code See Note 1 Stages in review application See R. \000

Appeal preferred before review-Review application not miintamable. See Note 6, Pt (1) Court a duty-Strict proof must be called for before grant of roview See Note 13

Pt (7) Grant of 1011cw - Objections that can be raised in appeal See R 7, Note 4, Pt (9) New evidence-Whether should be con

clusive See Note 10 Pt (3) Order by one Judge of High Court-Review

1 Legislative changes Section 623 of the old Code provided that an application for review could be made

to the Court which I used the decree or made the order, or to the Court (if any) to which the bisiness of the former Court has been transferred These lates words have been amilted in the present section in aley of 5 1.0 of the Cole newly introluced

### 2 Scope of the Rule

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It has been seen in Note 2 to S 96 anie, that a right of appeal does not exist and cannot be assumed unless expressly given by statute or by rules having the force of statute. The same principle applies to a right of review also Such a right do s no therefore exist unless granted by statute 1 S 114 of the Code and this order expressly give such a right in certain cases the former being the substantae section continuing a brief sintement of the Court's general power of review and the latter providing the details of procedure 2 These plous ons constitute an exception to the general rule that when once a judgme it is signed and pronounced it cannot afterwards be altered or added to (see O 20 R 3), and as such a right of review is exercisable only in the circumstances where it is distinctly provided by the statute 3

This rule is in itself definitive of the limits within which a review is permited by the Code and it follows from what has been stated above that where a case falls within the class of cases contemplated by this rule, the Court cannot have an inherent power of review apart from the provisions of the rule 5 Where however a case falls outside the class of such cases the Courts have of course inherent power to review their orders for the ends of justice or to prevent an abuse of the process of the Court 6

The eastness of a right of review does not bar a suit for the same rchef 7 Nor does the fact that an appeal can be filed against the decree afford any ground for refu ing a review. The reason is that where there are two remedies open to a party, they should not as a rule be construed so as to operate in derogation of each other 8 But the availability of an appeal as an obvious remedy will be a ground for refusing in the exercise of the Court's discretion, an application for review 9

#### 3 Review and appeal-Distinction

A review is not the same thing as or a substitute for an appeal 1 The ty o proceedings differ in very many particulars

(1) The primary intention of a review is the reconsideration of the

[See al o (1984) 1984 All 175 (170) ]

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subject of the suit by the same Julge under certain conditions
                     while an appeal is a re hearing by another tribunal 2
         Order 47 Rule 1-Note 2
                                                                (1933) 1933 Lab 169 (171)
                                                                         (See also (1924) 1924 Cal 1054
1 (191°) 1917 31ad 726 (726)
                                                                         (10,4)]
2 (1931) 1931 1 at 409 (400)
                                                                         (See also (1934) 1935 Cal 336 (384) ]
      See also Note 1 to 5 114 a ite
                                                                (1934) 1934 All 250 (2J2)
3 (1.331) 1931 Pat 409 (409)
                                                             6 (1929) 1929 Nag 185 (189)
    (18:3) "O Suth W R 150 (181)
                                                                (19.0) 19°0 Pom 294 ( 9a) Order not fall
4 (1922) 1922 P C 112 (115)
                                                                        ing within R 1
                                     3 Lab 127 49
   (1922) 1922 F C 112 (115) 3 Lan 121 49
Ind App 144 (P C)
(1931) 1934 P C 213 (216) 56 M 631 (P C]
(1927) 1927 Mad 355 (3.6)
(1932) 1932 Lah 596 (597) 13 Lah 546
                                                                (19 6) 1926 Pat 218 (227)
                                                                                                 5 Pat 261 (F B)
                                                             (1924) 1994 I at 673 (6"7) 3 Pa
(1916) 1918 Cul 178 (175)
7 (1904) 2 Ind Cas 129 (143) (Cal)
8 (1909) 2 Ind Cas 129 (113) (Cal)
                                                                                                 3 Pat 930
(1926) 92 Ind Cas 1013 (411)
5 (1927) 1927 Bom 232 (233)
(1927) 1927 Cal 990 (921]
                                                                 1933) 1933 Lah 226 (226)
                                                             9 (1931) 1931 Mad 628 (630)
                                                             1 (1931) 1931 Ma 1 CO3 (CO5)
                                                                (1922) 1922 U P 16 (17) 4 Lpp Bur R 27
                                                             2 (1865) 3 Suth W R 45 (47 48)
                                                                (1868) 9 Suth W R 181 (185)
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- (2) A point which may be a good ground of an appeal may not be a good ground for an application for review 3 Thus an erroneous view of evidence or of law is no ground for a revie? though it may be a good ground for an appeal 4
  - (3) A review does not, of necessity, re-open questions already decide l between the parties. The matter in issue is only re-opened when the application for review is accepted, while in the case of an appeal the matter is ie opened as soon as an appeal is admitted 5

## 4 Review and amendment-Distinction

1,

A review and an amendment differ in the following particulats -

- (1) In the case of a review the correctness of the judgment and the decree is questioned, while in the case of an amendment of a decree the correctness of the judgment is assumed but the jurisdiction to amend arises from the fact that the decree is not in accordance with the judgment 1
- (2) Where an application for an amendment is allowed there is no need for a re hearing of a suit, while if an application for review is allowed, a re hearing of the suit becomes necessari "
- (3) Where an application for review is granted the result is a ne / decree superseding the original decree and not merch some amendment thereof 3

#### Person considering himself to be aggreed?

It is only a person aggreed by a decree or order that can apply for a review A person aggricaed means a person who has suffered a legal grievance a man against whom a decision has been pronounced which his wrongfully deprised him of something or wrongfully affected his title to some thing, it is not sufficient that he has lost something which he would have obtained if another order had been made 1 A decree or order against a person not a party thereto, is on general principles of law, not binding on him Such a person therefore cannot have a legal grievance against the decree or order and, consequently cannot apply, for a review of the decree or order under this rule 2 The Judicial Commissioner's Court of Nagpur has however, held that where an order has been made in a proceeding against a company which was

- 3 (1931) 1931 Mad 60s (60s) 2 (1917) 1917 Mad 290 (292) (1883) 5 All 14 (16) 3 (1919) 1919 Nag 78 (79) 15 \aq L L Go (1905) 28 411 240 (241) (18,3 1876) 1 Cal 184 (186) (1922) 1922 Pat 308 (309) (1926) 1926 Rang 89 (89) Note 5 (Sec also (1935) 1935 Lah 530 (330) 16 Lah 602 Grounds for petition for review are different from grounds for application for lease to appeal
- High Court ] 4 (1930) 1930 Cal 701 (703) 5 (1922) 1922 Oudh 148 (148] 21 Oudh Cas 280

against judgment of single Judge of

Note 4 1 (1917) 1917 Vad 290 (292) (1924) 1924 Mad 225 (226 227) (1881) 6 Cal 22 (25)

- 1 Halsbury's Laws of England 1el Il.
- - [See also [1872] 18 Suth WR .
    - [465] Application on the lart of two of several parties Court cannot modify the decrees in favour of others who have not applied !

not properly a terry to the proceeding, a director of the company can file an application for review of the order 3

A mmor, who is aggrixted by a decree or order pussed against him may apply for a review inder the same incremistances as an adult 4 Similarly, the legal representatives of a decreased party who are materially infected by the decree are also entitled to apply under this rule 4 Where sanction was granted to the Public Prosecutor to prosecute an attornes and an order was made granting leave to the artorney to appeal to the Proy Council it was held that the Public Prosecutor was a person aggreed by the order granting leave to appeal and was entitled to apply for a review thereof 6

### 6 Decree or order from which no appeal has been preferred

If before the making of an application for review, an appeal from the decree sought to be recieved his advacad by a fixed and is pending the Court has no jurisd can to entertian an application for review? Where, however, the a pileation for review is midd first and thereafter an appeal is fited against the decree the jurisdiction to deal with the application is not affected by the pendicue of the appeal. But where before the application is heard such appeal is disposed of on the mental of under O. 41. R. 114 the appealance for every supersides the decree or order upoaled from and the result of allowing the application would be to interfer, with the decree of the appellatio Court of insection the Court which passed the decree or order cannot proceed with the application for review. Compute Note 12 to 5. 98 ante and Notes 10 and 11 to O. 9. R. 13.

Where an appeal is withdrawn and thereafter, an application for review 120 1320 Nag 185 (1'0) see whether the applicant is made a

3 (1929) 1929 Nag 185 (1°0) 4 (1871) 16 Sarth W. H 231 (232) 5 (100) 9 Oudb Cas So (37) 6 (1914) 1914 CH 587 (593) 41 CH 731

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1 (1923) 1 123 C 11 113 (11 5) 11900) 4 C 11 L Jour 560 (567) (18.0 °0) 5 Mad H C R 464 (466) (193) 1925 C 11 504 (805) (1602 C 3) 1 Mad H C R 254 (253)

J31]

(1J32) 1/32 Cal 171 (170) R view at plact ton filed after disposal of it 1 e d (192 1) 127 Bom 992 (233) (1990) 1 Ind Cas 136 (187) (Cal) (Da) (1870) 14 Suth W R 438 (440) (Do) (1860) 11 Suth W R 511 (512) (Do)

under

(1868) 9 Suth W R 471 (472) (Do) (1918) 1918 Lah 45 (46) 1918 Pun Re No 40 (Do)

facty respondent and given oppor

tunity and the appoil is heard

See also (1934) 1934 All 250 (251)
Dismissible suit by trial Court—
Appeal to sub Court and second appeal to High Court dismissed—
Trial Court cannot remove the

Trial Court cannot review its order of dismissed — dismissed — dismissed — dismissed — dismissed — dismissed of dismissed — dismiss

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(1922) 1922 Bom 130 (131) 46 Bom 1 (1906) 30 Bom 625 (630) (1906) 4 Cul L Jour 566 (567)

(1900) 4 Cal L Jour 506 (567) (1917) 1917 Cal 417 (419) (See also (1871) 6 Beng L R 533 (338,

[See also (1904) 7 Oudh Cas 299 (202) The Court should postpone the hearing of the application and

339) Application for review filed in lower Court after dismissal of second appeal—Application does not lie 1 R 1. (2) A point which may be a good ground of an appeal may not a good ground for an application for review 3 Thus an erro ous view of evidence or of law is no ground for a re though it may be a good ground for an appeal 4

> (3) A review does not, of necessity, re-open questions already decibetween the parties. The matter in issue is only re-ope when the application for review is accepted, while in the c of an appeal, the matter is re opened as soon as an appeal admitted 5

## 4 Review and amendment-Distinction

A review and an amendment differ in the following particulars -

- (1) In the case of a review the correctness of the judgment . the decree is questioned, while in the case of an amendo of a decree the correctness of the judgment is assumed but jurisdiction to amend arises from the fact that the decree not in accordance with the judgment 1
- (2) Where an application for an amendment is allowed there is need for a re-hearing of a suit, while if an application ! review is allowed, a re hearing of the suit becomes necessar
- (3) Where an application for review is granted the result is a no decree superseding the original decree and not mercly 507 amendment thereof 3

# 5 Person considering himself to be aggrieved

It is only a person aggreed by a decree or order that can app for a review A person aggrieved means a person who has suffered a leg grievance a man against whom a decision has been pronounced which h wrongfully deprived him of something or wrongfully affected his title to some thing, it is not sufficient that he has lost something which he would have obtained if another order had been made 1 A decree or order against a perso not a party thereto, is on general principles of law, not binding on him Sic a person therefore cannot have a legal grievance against the decree or order and, consequently, cannot apply, for a review of the decree or order under the rule 2 The Judicial Commissioner's Court of Nagpur, has however held the where an order has been made in a proceeding against a company which was

2 (1917) 1917 Vind 290 (292) 3 (1919) 1919 Nag 78 (79) 15 Nag L R 60 (1905) 29 111 240 (241)

### Note 5

1 Halsbury's Laus of Fucland 1d H

page 201 (1917) 1917 All 160 (162) 39 All 152 (1879) 14 Ch D 458 Ex parts Sideboths" -Distinguished in (1915) 1315 Mi

1177 (1178) 39 Mad 479 2 (1904) 8 Cal W N 468 (469) (1921) 61 Ind Cas 534 (535) (Lah) (See also (1872) 18 Suth WR , 64

(405) Application on the part of two of several parties Court cannot modify the decrees in favour of others who have not applied ]

<sup>3 (1931) 1931</sup> Mad 605 (608) (1883) 5 411 14 (16) (15,3 1876) 1 Cal 184 (186) (1922) 1922 Pat 808 (809) (1926) 1926 Rang 89 (89) (See also (1935) 1935 Lah 320 (330) 16 Lah 602 Grounds for petition for review are different from grounds for application for leave to appeal against judgment of single Judge of High Court ] 4 (1930) 1930 Cal 701 (703)

<sup>21</sup> Oudh Cas 5 (1922) 1922 Oudh 148 (148) 280 Note 4

<sup>1 (1917) 1917</sup> Mad 290 (292) (1924) 1924 Mad 223 (226 227) (1891) 6 Cal 22 (25)

not properly a party to the proceeding, a director of the company can file an application for review of the order 3

I minor, who is aggreed by a decree or order passed against him may ap, he for a teview under the same circumstances as an adult 4 Similarly, the least representatives of a decised party who are materially affected by the deerce are also entitled to apply under this rule 5 Where sanction was a ranted to the Public Prosecutor to prosecute an attorney and an order was made granting heave to the stormer to appeal to the Privy Council at was held that the Public Prosecutor was a person aggressed by the order aranting have to apical and was entitled to apply for a review thereof 6

### 6 Decree or order

and 11 to O 9 R 13

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from which no appeal has been preferred Il before the making of an application for review, an appeal from the decree sought to be reviewed has already be it fill d and is pending the Cour; has no juried cion to enterious an application for review! Where havever, the ambeation for rest was made first and thereaft ran appeal is filed arrunst the de tee the jurisdiction to deal with the application is not a lected by the pendency of the appeal. But where before the application is heard such appeal is disposed of on the merits3 or under O 41 R 114 the appellate de see supersedes the decres er order appealed from and the result of allowing the application would be to interfer with the decree of the appellate Court consequently the Court which pas ed the decree or order cannot proceed

with the application for review. Compare Note 12 to S. 98 aute and Notes 10 Where an appeal is withdrawn and thereafter an application for review

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3 (19 1) 1 + 7 N cg 155 (130)
                                                                         see whether the applicant is made a
4 (15"1) 16 Suit W R 231 (...)
                                                                        larte respondent and given oppor
5 (1 Ou) 9 Oudh Ca. 9 (3")
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0 (1914) 1314 ( 1) 1 ( 1) 11 ( 1) 4
                                                              3 (1 D3) 1 | 3 Cal 118 (11 )
                      Note 6
                                                                (tJ0 ) 4 C .1 L Jen 500 (56 )
                                                                (15 ) 70) M d fl L R 11 4 (400)
(1 128) 19 8 C at 504 (505)
1 (1931) 1 + 1 1 a m 232 (2 )
(1923) 1323 I ( 1,8 (13 ) + ( 11 CiC
                                                                (1602 (3) 1 Mal H C R 254 (2) )
(113) 1 13) Cal (71 (170) Ressew phics
          1nd Apr 1+3 (P C)
           (See atter (1551) 13 Long 20 (231)
                                                                t o 1 file l after di posit of 11 (
                                                                (1.103) 1 Ind Cas 136 (137) (Cul) (Do)
(1970) 14 Suth W R 478 (440) (Do)
(1803) 11 Suth W R 511 (51°) (Do)
                                                                 (1865) 9 Suth W R 471 (472) (Do)
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a under

(1918) LHS Lah 45 (46) 1JIS I un Ro No (United See also (1931) 1931 Att 2.0 (251) Dismissil of suit by trul Court-Appeal to sub Court and second appeal to High Court dismissed-Irral Court cannot review its order of dramasal

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Can 239 postpone ion and

is filed, the application may be entertained and disposed of by the Court R 1. the reason being that an appeal once withdrawn must be treated as if it ha never been preferred at all within the meaning of this rule 5 According to the High Court of Allahabad the principle is not affected by the fact that th application for review is filed first and the appeal is withdrawn later 6 Bi according to the High Court of Bombay there is no jurisdiction to entertai the application so long as an appeal is pending, and the fact that the appeal is withdrawn subsequently will not cure the initial defect in making the application 7

## 7 Filing of appeal pending application for review

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As has been seen in Note 6, ante the subsequent filmer of an appeal against the decree sought to be reviewed does not affect the jurisdiction of the Court to deal with the application for review but such jurisdiction ought in such cases to be exercised with the greatest care and only in a very strong case 1 The fact that application for review of a judgment is pending will not however, preclude the appellate Court from granting in appeal the relief claimed in the application 2

## 8 Decree or order from which no appeal is allowed-Clause (b)

lny decree or order from which no appeal is allowed is open to

## 9 Decision on reference from Court of Small Causes-Clause (c)

Under the Code of 1859 no application lay for review of judgment by the High Court on a reference from a Court of Small Causes 1 Even under this rule, the High Court has no power to review a judgment passed by it on a reference from a Subordinate Judge with Small Cause Court powers The rule allows a review of judgment on a reference only from a Court of Small Causes 2

# 10 Discovery of new and important matter or evidence

Where a laugant has obtained a judgment in a Court of justice he is by law, entitled not to be deprived of that judgment without solid grounds. Where therefore a review of a judgment is asked for by a party, the greatest care ought to be exercised by the Court in granting a review especially where the ground of review is the discovery of fresh evidence. It is so easy to the party who has lost his case to see what the weak part of his case was, and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion upon that part of the case must be very strong 1 The rule that permits a new trial to be granted on account of he discovery of new evidence has, therefore, been fenced round with many limitaicw trial must show that there was no toor (193a) 1935 Nag 174 (176) 5

Note 7

1 (1909) 2 Ind Crs 803 (t04) 32 Mad 416. 2 (1929) 1929 Sin 1 52 (3u) Note 8

1 (1929) 1929 \11 123 (124) Order of diem : 1 for default

1 (1864) 3 Suth W R 8 (8) 2 (1986) 10 Bem 68 (69)

Note 10 1 (1918) 1913 Lal 618 (621) 15 Cal 60

remissness on his part in adducing all possible evidence at the trial 2 Further, the new evidence must be such as is presumably to be believed and such that, if adduced, it would practically be conclusive, i. e. evidence of such a class as to render it probable almost beyond doubt that the judgment would be different? Where it is very doubtful whether the evidence if produced, would have had any effect on the judgment, there is no ground for review 4 In Maliab r Prasad v Collector of Allahabad s where a suit was dismissed on two grounds namely, want of no ice as required by law and the plaintiff being illegitimate and a review was applied for on the ground of discovery of new evidence tending to establish the legitimacy of the plaintiff, it was held that a review should not be granted masmuch as the suit would still have to be dismissed on the ouestion of notice. But the case would be different where the effect of the evidence of adduced, would be to alter or cancel the decree. Thus the discovery of a document containing an admission of liability by the defendants or the discovery of fraud 7 would be a good ground for review Similarly where a decree for resutution of conjugal rights was passed and subsequently it was discovered that the parties were related as cousins such relationship rendering the marriane a nullity it was held that there was a good ground for resiew 4 Igain where the parties were not aware of a previous judgment passed in another case between them which if it had been placed before the Court would have resulted in different judgment there is a good ground for review 9

In the undermenuoned cases to the been held that it is not necessary for granting a review on the ground of the discovery of new and important mat er that such evidence if admitted would be conclusive to show that the decision is wrong. This view is against the general trend of decisions and cannot be accepted as correct.

There is a conflict of opinion on the question whether the decision in another case between the same parties after the da e of the judgment sought to be reviewed would be a sufficient ground for review in cases where such decision if it had been given before the date of the judgment sought to be reviewed would have resulted in a different judgment Before the date of the Privy Council decision in Kotaguri v Vellanki<sup>100</sup> the Bombay High Court answered the question in the affirmative while the Allahabad and Calcutta High Courts

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2 (131-8) 1.18 °C.1 (31-8 (37-6) 45 °C.1 CO (120-5) 31 (30 °App 115 (P.C) (120-5) 31 (30 °App 115 (P.C) (120-5) 31 (30 °App 115 °C.1 CO (120-5) 31 (30 °A) ```

Bourke OC 115

<sup>(1917) 1917</sup> Pat 201 (201) 5 (1914) 1914 All 41 (15) 36 All 277 6 (1911) 11 Ind Cas 15 (16) (Lah)

Int a subsequent advission is not a ground for review See 5 Ind Cas 182 (183 184) (Cal) See also ferther down in the conmentary
See Vote 22 infra

<sup>8 (1930) 1930</sup> Pat 63 (67) 9 (1930) 1930 Ali 621 (6°2)

<sup>(1919) 1919</sup> Cat 46 (46) (1897) 10 Mad 357 (360) Decision given

before but published after the deci

<sup>(1917) 1917</sup> Lat 340 (341) 4 (1992) 5 Oudh Cas u9 (64) C P C 303 & 354

1. is filed, the application may be entertained and disposed of by the Court the reason being that an appeal once withdrawn must be treated as if it had never been preferred at all within the meaning of this rule 8 According to the High Court of Allahabad the principle is not affected by the fact that the application for review is filed first and the appeal is withdrawn later 8 But according to the High Court of Bombay there is no jurisdiction to entertain the application so long as an appeal is pending, and the fact that the appeal is withdrawn subsequently will not cure the initial defect in making the application?

7 Filing of appeal pending application for review

As his been seen in Note 6 ante the subsequent filing of an appeal agains, the decree sought to be reviewed does not affect the jurisdiction of the Court to deal with the application for review but such jurisdiction ought in such cases to be exercised with the greatest care and only in a very strong case. The fact that application for review of a judgment is pending will not, however, preclude the application for granting in appeal the relief claimed in the application.

- 8 Decree or order from which no appeal is allowed-Clause (b)
- Any decree or order from which no appeal is allowed is open to review  $^{\rm 1}$
- 9 Decision on reference from Court of Small Causes-Clause (e)
- Under the Code of 1859 no application lay for review of judgment by the High Court on a reference from a Court of Small Causes <sup>1</sup> Even under this rule the High Court has no power to review a judgment passed by it on a reference from a Subordenate Judge with Small Cause Court powers. The rule allows a review of judgment on a reference only from a Court of Small Causes <sup>2</sup>

10 Discovery of new and important matter or evidence

Where a litigant has obtained a judgment in a Court of justice he is by law entitled not to be deprited of that judgment without sold grounds. Where therefore a review of a judgment is asked for by a party the greatest care ought to be exercised by the Court in granting a review especially where the ground of review is the discovery of fresh evidence. It is so easy to the party who has lost his case to see what the weak part of his case was and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion upon that part of the case must be very strong. The rule that permits a new trial to be granted on account of he discovery of new evidence has, therefore, been fenced round with many limits show that there was no

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Var 174 (176)

Var 176 (176)

Cas 802 (804) 32 Mad 416

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Note 8

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2 (8 (20)

Note 10

1 (1918) 1015 (24) 135 (25) 135 (26)

remissiness on his part in adducing all possible evidence at the trial 2 Further, the new evidence must be such as is presumably to be believed and such that, if adduced, it would practically be conclusive, i.e., evidence of such a class as to render it probable almost beyond doubt that the judgment would be different 3 Where it is very doubtful whether the evidence, if produced, would have had any effect on the judgment there is no ground for review 4 In Maliab r Prasad v Collector of Allahabad s where a suit was dismissed on two grounds tamely, want of no ice as required by law and the plaintiff being illegatimate and a review was applied for on the ground of discovery of new evidence tending to establish the legitimacy of the plaintiff, it was held that a review should not be granted masmuch as the suit would still have to be dismissed on the question of nouce. But the case would be different where the effect of the evidence of adduced would be to alter or cancel the decree. Thus the discovery of a document containing an admission of liability by the defendants or the discovery of fraud? would be a good ground for review. Similarly where a deerce for restitution of conjugal rights was passed and subsequently it was discovered that the parties were related as cousins such relationship rendering the marriage a nullity at was held that there was a good ground for review 8 Acain where the parties were not aware of a nectious judgment passed in another case between them which if it had been placed before the Court would have resulted in different judgment, there is a good ground for

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review 9

<sup>2 (1018) 1018</sup> Cal 619 (626) 45 Cal 60 (1917) 1917 Pat 201 (201) (1907) 31 Bom 381 (358) 31 Ind App 115 5 (1914) 1914 Alt 44 (45) 86 All 277 6 [1911] 21 Ind Cas 15 [16] (Lab) (1920) 1920 Cal 467 (4:0) 4" Cal 568 Jut a subsequent admission is not a 3 (1900) 81 L T 31 Young v Kershaw -Referred to in 45 Cal 60 1918 Cal ground for reuse: See 5 Ind Cas 182 (183 181) (Cal) See also firther don i in the 618 (622) cor me daru (1935) 1935 Rang 184 (18a) See Note 22 infra (1910) 1910 App Cas at p 374 Prown v
Dean Cited in 45 Cat 60 1918 Cal 8 (1930) 1930 Pat 63 (67) 9 (1930) 1930 All 621 (622) (1919) 1919 Cal 46 (46) (1918) 1918 P C 184 (188) (P C) (1887) 10 Mad 357 (360) Decision shen (1887) 10 Mad 73 (77) 13 Ind App 155 lefore but published after the deci (P C) (1929) 1929 111 545 (545) (18°5) 23 Suth W R 323 (324)

answered it in the negative <sup>12</sup> In *Rolagin's* case it was held by their Lordsh.ps of the Prity Council that the section of the old Code corresponding to this rule did not authorise the review of a decree which has right when it has made on the ground of the happening of some subsequent event. It has accordingly been held since then that a subsequent decision in another case of or the subsequent reversal of a decision on the basis of which a judgment was given is no ground for review under this rule <sup>123</sup>. There are however several decisions <sup>14</sup> which have purported to follow the Bombay view, but no reference was made in any of them to *Kotagin's* case. In the undermentioned case <sup>15</sup> the High Cour. of Rungoon has further held that the Bombay view cannot be said to have been overruled by the decision of the Prity Council in *Kotagin's* case and that it is still good law. The reasoning is, however, not very clear it is submitted that these decisions cannot be accepted as laying down the correct law. The word evidence in this rule is not confined to documentary evidence but includes oral evidence.

### 11 Discovery of important matter of law

The words new and impostant matter in this Rule refer to evidence or other matter in the nature of evidence, and not to a legal authority in evisience at the date of the judgment but not brought to the notice of the Court. Hence no review can be asked for on the ground of the discovery of new authorities which show that the decision is not correct? The contrary view expressed in the cases cited below? is, it is submitted not sound

But the discovery of a former decision between the same parties which operates as res juilicata is a discovery of new and important matter within

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(1887) 8 Cal Too (1708)
(1803) 9 Suth W R 102 (103)
(1887) 7 Suth W R 400 (400)
(But see (1871) 13 Suth W R 317
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important matter referred to in this Rule must be something which existed at the date of the decre-sought to be revised

(1922) 1922 Wad 227 (227) (1976) 1926 Nag 10 (10) Decree on whi h

12 (1884) 6 All 292 (294)

decision based subsequently amended
[See also (1934) 1934 Oudh 440 (446)

See also (1994) 358 Guida via vieto Vipral dismissed with observation that if decision of High Court in a similar case is rever-ed by the Prity Council appliant might apply for review — Such reversal by Prity Council—The new ground may be deemed to have been in contemplation at the date of decree.

14 (1°07) 31 Bom 128 (136) (1911) 10 Ind Cas 244 (245) 33 411 566 (1913) 19 Ind Cas 214 (214) (1907) 1 Sind L R 227 (227) (1918) 1918 Pat 647 (648) 15 (1977) 1927 Rang 180 (180) 5 Rang 261 16 (1928) 1973 Nag 279 (279) Note 11

1 (1899) 21 All 152 (153)

The above tree it is submitted as be to a a sound principle Because of their held that a party is entitled to appliff,

held that a yarty is entitled to apply recises on the ground of his discourted

to a reatter which being a matter of the a part; is always presunced to know of a Holland's Jurisprudence 3rd Elis Page 92

2 (1925) 1925 Sand 53 (54) 19 Sand L R 30 (1924) 1921 Pat 250 (2.3) 3 Pat 134

3 (1906) 1906 Pun Re No 124 page 467 [Sco also {1,026} 1926 Viad 704 (764)] this Rule.4

## 12 Exercise of due diligence

in Kesson Issur v G I P Railnay1 their Lordships of the Privy Courcil observed as follows - Now the Code of Civil Procedure permits such applications for review on the ground of such discovery, (i.e., discovery of new and emportant matter or evidence) 'but it enacts very strict conditions so as to prevent langants lying on their cars when they ought to be looking for their evidence-i enjoins the Judge to require the facts as to the absence of negligence to be streetly proved. Applications for review on the ground of discovery of fresh syndence ought, therefore, to be refused when such evidence could have been produced if reas mable care and diligence had been exercised 2 There mu t be strong evidence of diligence in getting all available evidence 3 When the trial had lasted three years the Privy Conneil refused to admit fresh cyclence as there was no reason shown as to why the new cyclence was not turcously submitted 4. The fact that evidence was found subsequently cannot uself be taken to show that due diligence could not have been exercised otherwise there could not be any case coming within this Rule 5 The grounds or granupg a review on account of the discovery of fresh evidence, may in cerain cases be grounds for exending the time under S 5 of the Lm. aun Act 6

13 Was not within his knowledge and could not be produced by him at the time? It must be shown that after the exercise of due diligence the evidence

was not within the applicant's knowledge or could not be produced by him at the time 1 The Court in fact, has no power to grant a review without calling for strict proof of such allegations 2 In the undermentioned case3 the High Court of Patna has expressed the view that the words 'or could not be pro-

4 See 1 vit 9 t 3 to 10 ante (1870) 14 Suth W R 26 (26) 3 (1933) 1333 Sand 110 (111 112) Note 12 1 (1007) 31 Bom 341 (359 380) 34 Ind App. (1911) 9 Ind Cas 260 (267) (All) 4 (1915) 1Jto P C 78 (78) (P C) 115 (P C) 2 [1887] 10 Mad 73 [77] 13 lpd App 155 (P C) (See also (1975) 29 Suth W R 829 (324) (1J°3) 1 J33 Oudb 328 (°28) (1) J 1J3 Rarg 151 (195) 5 (1930) 1J30 Pat G9 (G7) 6 (1921) 1921 Nag 174 (176) (1,1'3) 1 3 5md 110 (111) Exercise of due diligence depends upon facts of Nut 13 particular cale Eurden of proof to on fetitioner (1902) 6 Cal W N 503 (516) (P C) Document could have been discovered from the opposite parts (1917) 1917 Part 340 (341) Deliberate non-12 production (1018) 1019 U B 27 (23) 2 Upp Bur R

(1903) 2 Stud L R 35 (FB) Found in the house. (1916) 1916 All 286 (257) 38 All 280 Certs ficate of guardianship avuilable in conld

(186J) 12 Suth W R 536 (537) Where he knew previously where to find it (1609) 19 Suth W R 130 (130) (Do)

.. . 1 68 (See also (1911) 9 Ind Cas 320 (321) (Cal))

3 (1924) 1924 Pat 809 (810)

duced by him at the time must refer to the words was not within his knowledge and that the whole clause means that the new matters alleged were not within the applicant's knowledge and as such could not have been produced by him at the trial In other words, it seems to be of the opinion that the availability of a piece of evidence within the knowledge of the applicant, but which, even after the exercise of due diligence, could not be produced by him at the trial is not a ground for review. It is submitted that this view is against the language of this Rule and cannot be accepted as correct 4

- 14 Decree rendered meffectual by reversal -See Note 10 supra
- 15 Mistake or error on the face of the record

In order that an error may be a ground for review it must be one apparent on the jace of the record 1 te, an evident error2 which does not admit of extraneous matter to show its incorrectness 3 The word error is not limited to errors of fact but includes also errors of law 4 But the law must be definite and capable of ascertainment 5 An erroneous view of the law on 2 debatable point<sup>6</sup> or a wrong exposition of the law<sup>7</sup> or a wrong application of the laws cannot be considered a mistake or error on the face of the record

A review has been held permissible in the following cases -

(1) Where a judgment is passed without notice to the parties or in a form not legally correct 10

4 (1874) 22 Suth W R 446 (446) applicant had full knowledge of the evidence but could not even with due diligence produce it it was held it was a good ground for review

Note 15

1 (1929) 1929 Rang 70 (70) 6 Rang 794 [See (1934) 1934 Nag 111 (111) Where mistake is only clerical and does not affect decision of the case

(1929) 1923 Nag 58 (58)

(1928) 1928 Nag 277 (278) (1922) 1922 Pat 308 (309) Error with to gard to the basis of calculation of

(1932) 1932 Pat 275 (2"6) 11 Pat 519 [See also (1922) 1922 Pat 119 (120) 5 Pat L.J 314 Failure to 12 03

point of law] (1930) 1930 Bom 317 (319) But see (1929) 1929 Cal 17 (19) Error of law by reason of which Court declines to enter into mer is of case is error apparent on face of

292)]

d on mautherent-Review may be granted on the ground that the stamp was sufficient-This is other sufficient

5 (1892 96) 1892 96 Upp Bur R 287 (1902 03) 2 Upp Bur R Civ Pro Code

6 (1923) 1923 Mad 209 (210 212)

ties had not been directed to be

Present (1929) 1929 Rang 70 (71) 6 Rang 91 (1926) 1926 All 384 (386) 48 411 251 Amendment without not co (1932) 1932 Cal 265 (266) Order setting

aside sale without notice 10 (1914) 1914 Oudh 332 (333)

- (2) Where a suit is dismissed for default in the presence of the plaintiff's pleader11 or for non-joinder of parties 12 (3) Where a suit based on plaintiff's title is decreed simply on the
- ground that the defendant has not proved his title 13 (4) Where a woman is arrested in execution of a decree 14
- (5) Where the Court fails to notice the provisions of S 21 or of S 98 of the Code or fails to notice the bar of limitation
- applicable to the facts appearing on the record16 or fails to apply the apposite law.162 (6) Where an adjudication is annulled in the absence of a prayer
  - by either party 17
    - (7) Where the Court has omitted to try a material issue 18
    - (8) Where the want of jurisdiction is apparent on the face of record 10 But where the parties invite the jurisdiction of the Court deliberately, they cannot turn round and object to it when the judgment is unfavourable to them 20
    - (9) Where the appellate Court reverses the finding of the lower Court without coming to a conclusion as to the incorrectness
    - (10) Where the judgment was not clear as to whether the defendants were hable individually or not -2
    - (11) Where a suit was, by mistake, dismissed where it ought to have been decreed on the findings of the Court 23
    - (12) Where a calculation of an amount is wrongly made 24
    - (13) Where the judgment used certain expressions wrongly when it plainly meant something different 25
    - (14) Where the law was indisputable that a certain property was not exempt from hability for the suit claim and the defendants did not claim any such exemption but the judgment without any discussion on the point, exempted the property from hability 26 (Under the circumstances it was clear that the error

11 (1923) 1979 Sind 38 (39) (1929) 1323 All 811 (812) 12 (1900) 5 Cat W N 83 (80)

T.

(19t8) 1918 Cal 946 (946) 20 (1919) 1919 Cal 525 (526) (1916) 1916 Oudh 104 (105)

13 (1925) 1925 Oudh 323 (330)

14 (1858) 12 Bom 228 (230)

15 (1929) 1929 Nag 79 (74) 25 Nag T R 10t

one defendant on ground of want of purisdiction-On appeal by other

(1933) 1933 Mad 631 (635) 18 (1871) 16 Suth W R 134 (134) (1869) 12 Suth W R 223 (224) 13 [See also (1911) 11 Ind Cas 15 (16) (Lah) Suit

clearly cognisable by Small Cause Court-Small Cause Court dismiss ing suit on the ground that the suit was not Small Cause-Review hes ]

was not the result of any exposition of law) See also the following cases 27

Where the Court granted a claim for personal relief a prayer for which could not on a proper construction of a doubtfully worded clause in the plaint be made out, the error is not one apparent on the face of the record justifying a grant of review 28 So also is the failure to give a formal finding on an issue tried and decided or allowing the petitioner to prove fraud which was not pleaded 20 So also the consideration of the evidence by the Court in second appeal does not amount to an error apparent on the face of the record 0.

It was held in the undermentoned cases that the fact that the Court had overlooked a previous ruling of the High Court on a point of law, may be an error appricant on the face of the record A contrary view has been taken in the cases noted below 2 It is submitted that the latter view is correct As was observed by the Madras High Court in Babu Vaidy an v Muringe sam Pillai 33 It is difficult to see how an error can be said to exist on the face of the record where you have to travel outside the record to see if the judgment is correct or not

Where the view of the law on which a judgment is based is subsequently overruled or modified by a superior Court it cannot be a mistake or error on the face of the record.

## 16 Any other sufficient reason

There has been a great diversity of judicial opinion as to the exact meaning of this expression any other sufficient reason. In Chajia Ram v. Nehi! their Lordships of the Privy Council after reviewing the case lav

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27 (1870) 14 Suth W R 236 (236) Mistake
about document
(1033) 1083 Lah 476 (447) 14 Lah 453
(1032) 1032 Vad 275 (279)
(1020) 1920 Vad 1031 (1032) Wrong state
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ment about admission by party (1924) 1324 Mag 130 (191) Where decree

vis in consonance with the judg ment but there was the erroneon direction in the judgment that the pre emption price should be paid to defendant No 1 instead of defen dant No 3 (1909) I ind Cas 1141 (1141) (Vad)

(1900) 4 Ind Cas 1141 (1141) (Mad) (1932) 1932 Nag 177 (1°0) 28 Nag L R 221 Omission to consider important and 1925 Crl 304 doubted (1933) 1933 Lah 223 (228) (1924) 1924 Pat 250 (253)

(1935) 1935 Rang 32 (33 34) 13 Rang 1 0 (1928) 1923 Mad W N 595 (598) [See also (1933) 1933 Lah 223 (228)]

Note 16 1 (1922) 1922 I C 112 3 Luck 127 49 Ini

(Sco also (1887) 14 Cal 627 (6°0

(1860) 6 Lorn H C R (A C) 233 (240)
Remand order 12seed by High Court
—Ruling which will affect such
order not brought to notice of
Court — 1 roper course is to apply

32 (1J2 ) 1J\_7 Mad 998 (1000) 1924 Wad 93

ing that it would be open to use parties to apply in review if the area taken taken to a point of the thing Court was over ruled by the Priva Council and it so created that the point of one to take pred that the point of one of the pred that the point of one of the pred that the point of the pred that the point of the pred that with the discovery of new with the discovery of new parties with the discovery of new

(1929) 113 Ind Cas SS (501) ( 18)

declared that the expression should be interpreted as meaning a reason sume ent on grounds at least analogous to those specified immediately previoud) (See in this cornection Preymble Note 7 point 30) There is still a great diversity of opinion as to what is and what is not a reason analogous" to the reasons specified According to the High Court of Rangoon the word "aral yous is distinguishable from the expression emisdem generis" and the former word, as used by the Privy Council, is wider than the expression "cius lem generis 2 The want of uniformity in the decisions on this subject even after the Privy Council decision is apparently due to the fact that in most cases at as a matter for argument whether any reason is analogous to the reasons specifically mentioned in the Rule 3 The case-law bearing on the subject has been summarised in Notes 164 and 16b julra

#### 16a. Cases where review was allowed on ground of sufficient reason

It has been held that a review can be granted in the following cases:-

- (1) Where the decree or order has been passed under a misa prehension of the true state of etreums ances 1
- (2) Where a party has not had a fair opportunity of producing his cyadence 2
- (3) Where the Court has failed to consider important evidence 3

2

(19°2: 10°2 Lah 596 (597) 13 Lah 546

(1927) 1927 Nag "68 (56-) (1--2) 1-52 VII W N 102 (102)

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(145) No longer law offer the Print Council decision? (1920) 1925 All 301 (265) 47 All 961

good law The ucrls wed in the corresponding pressions of the C le of 18'9 a ere general and sence at tas feld that the Courts

di cretion in sa ann what the sufficient reason for resien was not limited in any um - See for instances, the following ca c1 — (15"") 2 Cal 131 (140 141)

(15"2) 17 Suth W R 479 (479)

n ents

2 (1925) 1929 Rang 31 (32) 5 Rang 675 5 See 33 e elserentiem of Mediergee J m (1924) 1924 Cal 8-2 (874) ulere he zail tlat the question whether a particular reason is analogous to either the one or the other of the rea ons specified in the Rule

s ay lead to very refined if mit subtle argu Note 16a

1 (1925) 1925 Rang 314 (317) 3 Rang 961 Where the Court thought that the Counsel agreed to consent order when as a matter of fact he did not -Held it was analogous

(1924) 1924 Cal 872 (874) Mistaken im pression that a party had wanted a certain objection

(1924) 1924 All 518 (520) Misunderstanding

or slip which has led to an erroneous statement of fact in a judgment (1926) 1926 Cul 941 (943) Mistakenly hold ing that a certain question is not in

disjute (16°6) 13 Cal 62 (66) Omission to notice

contents of document (1911) 11 Ind Cas 102 (109) (Cal) After appointment of Receiver decree granted to a just may be set aside

on review (1911) 9 Ind Cas 273 (2°4) (Mrd) Court s misimpression as to the stamp

-Court with a view to avoid the

ing suit - Witness subsequently

(1922)

(1925)

to rebut defendants evidence is sufficient ground (1872) 17 Suth W R 47 (47) Improper refusal to admit evidence

3 (1576 78) 1 Mad 396 (401)

- (4) Where the Court has failed to consider important facts on the (5) Where the Court has failed to consider an important plea or
- (6) Where the case is an exceptional one6 as where the point involved is one of general importance 7

  - (7) Where the Court has omitted to notice certain provisions of the Code 8

For other instances, see the undermentioned cases 9

16h Cases where review was not allowed on the ground that there was no sufficient

reason It has been held that review cannot be granted in the following cases -

(1) Where it is asked for to enable the applicant to raise points which he could and ought to have raised at the former hearing 1

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(1932) 1932 Nag 177 (179)
  (1869) 12 Suth W R 223 (224)
(1871) 16 Suth W R 134 (134)
   (1871) 16 Suth W R 150 (151)
   1911) 9 Ind Cas 545 (546) (Lah)
   (1926) 1926 Mad 764 (764)
   (1913) 19 Ind Cas 363 (364) 6 Sand L R 127
   (1891) 15 Bom 267 (274)
          [See also (1927) 1927 Rang 20 (23)
         4 Rang 2651
8 (1919) 1919 Cal 94 (94) Omission to notice
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issue 5

certain provisions of the Code-9 (1939) 1930 Rang 162 (164) Taking too strict view of title of suit and its prayer and overlooking need for doing sub

stantial justice (1939) 1939 All 517 (519) 56 All 975 Where the Court orders personal attend ance of a party where the pleader did not refuse or was not unable to answer questions under O 10 R 4 and dismissed suit for default of appearance of the plaintiff held a review lies

(1935) 1935 Nag 109 (110) Order summarily rejecting appeal filed ont of time-Delay caused by wrong information given by copying department in copy of judgment supplied-Held it was sufficient reason analogous to error on face of record so as to justify granting of review

(1932) 1932 Mad W N 153 (158) (F B) Ordering a thing not prayed for by either party (1933) 1933 Mad 5 (6) Discovery of a rea

sonable ground for adjournment is a sufficient ground for reviewing an order refusing to granting an ad journment

(1925) 1925 Oudh 643 (644) Appeal dis missed under O 41, R 11 without notice to appellant as required by that Rule-Review lies (1901) . Cal W N 83 (85) Suit dismissed for

non joinder of parties-Review lies ocumen 1 without

1 0148 of proof placed wrongly-Review lies

(1868) 10 Suth W. R 42 (43) Unfairuess of trial-Revisiv lies (1913) 19 Ind Cas 48 (50) (LB) Case de idel

on a point not raised by any party-Revisiv lies (1884) 12 Ind App 47 (51) 11 Cal 379 (P C)

Case disposed of on new point—

Party surprised—Review lies

(1921) 1921 Cal 393 (395) Compromise de ree-Facts mal ng compromise not binding on one of the parties-Review lies [See also (1894) 7 Mrd 307 (203) While the discovery of a fresh authority may not entitle a party to

ing to law] (1881) 1881 Pun Re No 128 page 317 (188,) 9 411 36 (10 42) (1896) 24 Cal 334 (336) Review grantel on ground of certain decisions not

having been considered Note 16b 1 (1886) 13 Cal 62 (65)

(1934) 1934 Cal 131 (132 133) (1933) 1933 Mad 290 (292) Discovery of new argument based on fact or law is no

ground for review (1922) 1922 Pat 119 (120) 5 Pat L J 311

(1996) 1996 Tah ( ,5 (6,6)

3

- (2) Where the review is asked for on the ground that if another opportunity were given to the applicant to establish his case he could prove the judgment of the Court to be wrong 2
- he could prove the judgment of the Court to be wrong <sup>2</sup>
  (3) Where the review is asked for on the ground that the case has been mismanaged by the party's counsel <sup>3</sup>
- (4) Where review of an ex parte decree or an order of dismissal for default 15 sought for on the ground that the case ought not to have been decaded ex parte or dismissed for default 4
- (5) Where the Court has proceeded on a wrong exposition of the law or has wrongly decided on a question of law 42 See also Note 15 ante.

(1925) 1925 411 552 (553) 47 411 551 (1926) 13 Oudh L J 507 (1917) 1917 Pat 201 (204) (1910) 5 Ind Cas 50 (55) (P C) (1864) 9 Suth W R 123 (124 (1570) 5 lang L R 321 (3°3) (1914) 1914 Lah 419 (419) (1-6-) 9 Suth W L 5-1 (5-9) (1J1 ) 19 Ind C is 6 - 1 (5 - 9) [AII] [See also (1975) 2 Mad 38 160) | i n t No resien [ t tal te abandoned that p int] (1900) 3 Oudh (as 2"9 (2-0) (Do) (1856) 1580 I om Print Judgt 240 (241) Oversight committed by the plain tiff in the conduct of his case and whereby he apprehends adverse te sult in sub equent suit to be brought hy him is no ground for amending the decree under this Rule (1925) 1928 P C 103 (103) 6 Hang 302 55 Ind App 101 (P C) Quarre whether a jarry is cutifled by a proceeding in review to take a point not taken by him at the original hearing [But ace (191") 1917 Lah 13 (14) Review cannot be rejected simply on the ground that the connsel of the applicant had neglected to press the

matter at the time of argument)
2 (1924) 1924 Cal 774 (770) 51 Cal O Avail

able evidence not produced by Government who was a party-Fresh

opportunity by means of a review

(1915) 1915 All 250 (251) 37 All 440

before judgment notwithstanding his gross (egligence) 3 (1918) 1918 Oudh 303 (300) Failing to produce evidence on account of wrong

advice of councel
(1934) 1934 Nag 143 (144) 31 Nag L R 21
Decree certified as fully stusfied
through negligence of agent or
pleader—Order cannot be reviewed

(1929) 1929 Nag 89 (90) Appellant's count el unprepared—Court refusing ad journment (1926) 1926 Mad 980 (983) 50 Mad 67 Ab

(1921) 1920 Wan 950 (1939) 50 Wan Of An sence of pleader is not sufficient ground (1921) 1921 Mag 3 (4) (Do) [But see (1931) 1931 Sind 3 (4) 25 Sind L R 242 Misconception of plea

4 (1912) 13 Ind Cas 318 (318) (Lah) Ex parts decice

(1934) 1931 Cal 116 (117) (1933) 1933 Vad 345 (345 346) (1935) 1935 Oudh 405 (406) (1923) 1923 Vil 5°6 (54) Distribul for de

out hearing the parties there is mistake apparent on the free of the record 1 4 (1922) 1922 I C 112 (113 114) 3 Lah 127

49 Ind Apr 144 (P C) (1933) 1933 Mad 662 (664) (1935) 1935 Pesh 22 (23)

(1929) 107 Ind Cus 90's (hag) (1929) 1923 hag 89 (90) Omis out to const detectain aspects or phases of ques tion of limitation is no ground for review

(1971) 1921 Oudh 260 (260) °4 Oudh Cas 154

154 (192.) 1925 Oudh 644 (645) Error of law 18

no ground for review (1930) 1930 Oudh 392 (394)

(1992) 1922 U B 16 (17 18) 4 Upp Bur R 27
Review applied for on the ground
that judge had overlooked certain
decisions—No review

For other instances, see the following cases 5

### 17 Review on the ground of subsequent events

As has been seen in Note 10, ante, the happening of a subsequent event is not a valid ground for review. Thus a subsequent legislation altering the liw 2 or a subsequent idmission of a party as to the matter lingated? is not a ground for review. Where a suit is decreed on condition of the plaintiff complying with certain requirements within a particular time and it is subsequently found that the period allowed by the decree is insufficient for the fulfillment of the conditions imposed, it has been held that the Court has juri-diction to review the judgment and enlarge the period.

### 17a No review on ground of decision being erroneous on merits

A review cannot be granted on the ground that the decision is erroneous on the ments, such a ground being appropriate for an appeal and not for an application for review <sup>1</sup>

### 18 Review on particular ground -See Note 2 to Rule 8

on certain provisions of the Law cannot be a ground for review (1925) 1935 Pat 368 (369) (33-2) 8 (34-3) Pat 368 (369)

against surety- Failure to give no

(1808) 9 Suth W R 161 (16t) (1875 76) 1 Cal 184 (185 186) (1808) 9 Suth W R 158 (160) (1931) 1931 Vad 828 (829 820) Execution

- ties to surety to show cause why de ree should not be executed against him is no ground for review ing order for execution [1932 1932 Pat 275 [275] Rulings disco
  - (1932 1932 Pat 275 (275) Rulings discovered by Court suo motu—No opportunity given to party to explain
    —No review
  - (1924) 1921 Pat 208 (209) 2 Pat 765 Omis sion to refer to certain evidence in the judgment is no ground for review
  - (1883) 5 All 14 (16) The fact that the High Court has in second appeal found a fact not determined by the lower Courts or wrongly imagined that an issue had not been tried by them
  - is not a ground for review
    (1917) 1917 Pat 659 (659) Pardsmahin
    lady—Case neglected by agent—No

Goş

purely technical matter, it is no ground for review 1 irks O C 131 Fronçous decision on immiterial point is not sufficient

ground
[1872] 17 Suth W R 182 (182) New point
allowed to be raised but no surprise
cused to the other party—Noreview
[1885] 1895 All W N 123 (123) Inconsistent

view by the same Judge is no ground for review (1878 S0) 2 Mad 10 (11 12) No review on

(18°8 S0) 2 Mad 10 (11 12) No review on ground of previous decision having done injustice Note 17

1 (See also (1993) 4 Vad L Tim 86 (37) (1859)
13 Bom 380 must be deemed to be
overruled by the de ision in 24 Vad
1 (P C)

(1918) 1918 Lah 10 (12) Sub-equent review order

2 (1928) 1929 Bom 309 (310) 52 Lom 434 (1924) 1924 Nag 70 (71)

3 (1910) 5 Ind Cvs 192 (193) (Crl) 4 (1925) 1925 All 364 (305) 47 All 361 (1926) 1926 Med 1059 (1060)

(1932) 1932 Mad 1939 (1960) (1932) 1932 Mad 223 (224) (1925) 1925 Pat 452 (253) Note 17a

1 (1868) 9 Suth WR 589 (589) Failure to re mand case—No review hes on such ground

(1930) 1930 Oudh 392 (394) Deliberts order limiting purview of enquiry— No review

(1869) 12 Suth W R 400 (410) Application on the ground of improper remand— Review not granted

19 No review of fact after decision in second appeal

The High Court in second appeal cannot enter into questions of fact (see 5 100) it follows from this that after the disposal of a second appeal no review thereof will lie on the ground of a discovery of a new and important evidence as to a question of fact.

20 Application of the Rule to miseellaneous proceedings under the Code

The rule applies to all decrees and orders under the Code under the circumstances mentioned in the rule 1

#### 21 Review in proceedings under other Acts

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As to a right of review of orders pas ed in proceedings under other Acts

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Note 19
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1 (19 119 3 3)) 541 (54 ) 45 311 45
   t on or application of both parties-
  (1 0) 4 1 d Ca -09 ( 10) 32 AH 1
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(12 ) 1 Jem ( 6)
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               l un Re to 140 page 432 (F1)
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   (18 0) a Heng L R Apr 20 (30)
(See also (1809) 11 Suth W R 22
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1 (191 1J1 C 1548 (J45) 44 Cal 9J0
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   (14J ) 16 bom 511 51°)
   [But ses 1508 (1808) I un Ro to 3]
   {1
        ) 10 Suth W R 345 (316)
  (1805) 20 11 410 (411 412)
   (15 /15 Suth W R 37 (29 ) Sub Judge
   (1933) 1933 Mad u (6)
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  (1J14) 1914 Cal ap (559) 41 Cal 34
   (1924 1 3 I at 954 3 a)
                                 Pat JOI
  (1912) 1 Ind Cas 21 (922) 39 Cal 103
                       t al targeat -
          c ret
          1 Suth W R 484 464)
  1550) 16 Cal 292 ( 93)
   (18
   (Jut ee (1506) 08 th W R (M s)
          10 Lens L R 1.6 (1.5)
15 Suth W R 4 5 (4 .)
  9 (95) After appeal to Irva Councl has been admitted to rever
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           e ej t g e ora lu ofazz al
   les aga 1st order of High Court
                 ta
   grating leave]
[Sealso (1865) 6 Suth WR (W)
              01"105 600)
    11 1 1310 Cal 22 22 at p at for defa lt -
   1 0 (120)]
      6J 1 Cal 3 0 301) 1 L)
  Dec ee based o a ard —
(1919) 1919 C 1 522 ( 23)
(1891) 1831 I un Re No 111
    1151
   Orl cut 1ro el gs —
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(1C) 44 I C) D 101 under Code of
   Ds ssal for a tof prosecution or for
   18.0 - 1r vy Council dd not treat
the re e of the order as a null ty
(186) 4 Bom H C R (VC) 6 (5)
  siltt gca cs of a to -
(18 2) 5 V W I H C B ± (76)
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t e-(1886) 9 VI d 4.0 (451) O ler llo g tl dra al of appeal --(1891) 12 Lom 3 0 (3 4)

(18 5) 7 \ W I H O R 126 (130) (1872) 18 9 I un Re No 30 Spl tt ng see the undermentioned cases 1 This rule does not apply to the following cases -A decis on which becomes final under S 5 of the Court-Fees

- Act. 1870.2 (2) A judgment dehvered in an income-tax case on a statement
  - made by the Commissioner of Income-tax. The reason is that it is neither a decree nor an order 3
    - (3) Orders under U P Act (XII of 1881) 4
    - (4) Orders under the U P Land Resenue Act 5

Note 21 Julyment of Court of Small Causes can be reticued -

1 (1884) 10 Cal 297 (298) (1935) 1935 All 435 (436) Decree of Small Cause Court - Revision to High Court dismissed-Lower Court is competent to entertain application for review of judgment as there is no merger of decree of Small Cause

Court in the High Court (1882) 8 Cal 287 (290)

(1881) 6 Cal 236 (237) (1880) 5 Cal 699 (700) (1879) 1879 Pun Ro No 29, page 83 (FB)

Order rejecting application under S 76 f the Registration Act -(18:6 77) 2 Cal 131 (189) 3 Ind App 221

Order in insolvency can be reviewed by the Insolvency Court -(1932) 1932 Mad 63 (65) (1927) 1937 Mad 175 (176) (1879 b0) 4 Bom 489 (494)

(1)08) 7 Cal L Jour 269 (269, 270) (1924) 1924 Cal 83 (83)

Recenue Court acting under Bengal Rent let can review its orders -(1872) 4 N W P H C R 171 (172) (1871) 16 Suth W R 159 (160) (1870) 14 Suth W R 414 (414) (1870) 14 Suth W R 27 (28)

(1869) 11 Suth W R 108 (108) (But see (1871) 3 N W P H G R 22 (23) Under Act \ of 1859 (Bengal) no

general power of review] Subordinate revenue Courts in Oudh can review their orders

(1918) 1918 Oudh 213 (213) 21 Oudh Cas

Pensem lies -(1868 69) 4 Mad H C R 251 (253)

Order of Imancial Commissioner of Punjab-Chief Court of can review -(1871) 1871 Pun Re No 16 Can review (1891) 1881 Pun Re No 5, page 11 Can-

not review Order under the Companies Act (1812) -

(1894) 16 111 53 (57) Order of demant under S 12 of the Court Fees Act -(1919) 1919 Pat 270 (276) 4 Pat L Jour 57.

Decision under S 16 of the Disorce ict -Review Lies -

(1881 82) 6 Dom 416 (435) Decree of Special Judge unler Dellan

Agriculturists Pelief Act -(1898) 22 Bom 520 (524) (1895) 10 Loni 116 (119) (1895) 19 Bom 113 (115) 1896) 20 Bom 281 (283

(1888) 15 Bom 650 (652) Orders of District Munsif under S 73 of the Madras Village Munsifs Courts 101-

(1917) 1917 Mad 157 (157) Land Acquisition proceedings -

(1920) 1920 Pat 743 (744) 5 Pat L Jour 253 Proceedings under the Bengal Tenas cy

Act 1885 -(1932) 1932 Cal 265 (266) (1921) 1921 Pvt 284 (296) (1918) 1918 Cal 26 (27)

(1893) 25 Cal 146 (154) Wiscellaneous

(1903) 30 Cal 619 (623) Case under Publ ? Demands Recovery Act. I of 1535 (Bengal)-Open to review (1895) 22 Cal 419 (424) Case under Publi

Demands Recovery Act, Bengal (1913) 18 Ind Cas 956 (956) 40 Cal 552

417

(418)]Order in appeal from decision of Col lector under Madras let, VIII of 1865-

Review fies 2 (1897) 20 Mad 395 (400) (See also (1800) 12 VI 129 (156 157) (F B)1 3 (1930) 1930 111 200 (211)

(18J7) 19 All 522 (523 ) 5 (1932) 1332 AH 293 (301) (F II)

- (5) Orders in proceedings under Ch 7 of the Presidency Small Cause Courts Act 6
- (6) Proceedings under the Guardians and Wards Act appointing or refusing to appoint guardians 7
- (7) Proceedings under S 8 of the Presidency Towns Insolvency  $\Lambda_{CL}\,^{8}$
- (8) Proceedings under the Bengal Estates Partition Act 9
- (9) Orders passed by the commissioner under the Workmen's Compensation Act of 1923 10

As to the applicability of this rule to proceedings under other Acts see the following --

- (1) S 17 Cl (2) of the Bengal \gra and Assam Civil Courts
  Act (\II of 1887) enacts that that seepon shall not be applicable to cases provided for by this rule
  - (2) S 15 Cl (3) of the Guarat Taluqdars Act (VI of 1888) males this order applicable to the decisions of the Taluqdari Settlement Officer.
  - (3) Under S 153 \( \) of the Bengal Tenancy Act (VIII of 1885) the applicant has to state in an application for review of a judgment or order under that Act the injury sustained by him and the Court cannot entertain the same unless the applicant depo its the amount if any due from him (See S 153 A of that Act)
  - (4) S 201 of the Agra Tenancy Act (III of 1928) empowers the Courts to review their decisions in accordance with the provisions of this rule
  - (5) S 265 sub S (3) of the Chota Nagpur Tenane, Act (VI of 1908) makes the provisions of this order applicable to proceedings under that Act in so far as they are not inconsistent with those contained in that Act
  - (6) Under S 388 sub S (3) of the Succession Act (YYVIX of 1925) the order of a District Judge subject to the provisions relaning to review of judgment in the Civil Procedure Code is final

### 22 Review petitions by minors

1 (1916) 1916 MI 324 (3°5) 38 AH 4.2

A minor can apply for a review of a judgment passed against him on the ground that his guardian has conducted the case with gross negligence or on the ground that no sanction had been obtained for a compromise entered into them? In all such applications he will be

(1992) 29 Cal 725 (197)
(1992) 180 110
(1992) 1999 Rang 299 (931 232) 7 Rang
(1992) 1999 Rang 299 (931 232) 7 Rang
(1992) 1999 Rang 299 (931 232) 7 Rang
(1993) 1999 Rang 299 (1994) 1999 Rang 2999 Rang

(1899) 13 Bom 137 (146).

bound by the provisions of this Rule 3 There is no provision in the Code empowering the Court when passing a decree against a minor, to reserve to the minor the right of questioning the decree after attaining majority, and the absence of such provision is not a ground for review of the judgment otherwise properly passed 4 (See also O 32, R 3, Note 5 and O 32, R 7, Note 5)

# 23 Consent decree

Where facts are brought to the notice of the Court showing that a compromise ought to be treated as a nullity an application for review is a proper mode of raising the question whether the compromise should be treated as a nullity or not 1 A compromise decree entered into by a valid or agent might be set aside on the ground that the valid or agent had no power 2 There is conflict of opinion as to whether the discovery of fraud or undue influence in obtaining the consent decree can be a valid ground of review, some cases holding that it is and some that it is not 4. The true view, however, seems to be that in such cases a suit is the proper remedy in the generality of cases though motions for a new trial may be convenient in some cases 4. An application for review may be made when the consent decree is sought to be impeached on the ground of a clerical error or when it does not represent what the Court intended to d'ende 6.

24 Ex parte decrees and orders of dismissal for default

See also Notes 8 and 9 to 0 9, R 13 The rule applies to all cases whether they are disposed of in the presence of the parties or exparted in the absence of the defendants 1 As to whether the fact that an application under 0 9 R 13 could have been preferred and that it was barred on the date of the review application is a bar to review s.e. Note 9 to 0 9 R 13 But an application to set aside an exparte decree cannot by itself be treaded as one for review 2 A dismissal for default other than the fullure to appear is also open to review 3 Where the dismissal is for default of appearance the

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3 (1871) 16 Suth W R 231 (229)
4 (1802) 10 Lom 571 (775 576)
Note 23
1 (1915) 1915 Cal 5622 (673)
(1911) 10 Ind Cas 593 (930) (Cal)
(1902) 2 Cit L Jour 503 (503)
See the (1871) 15 Suth W R 23
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(1,00) 8 Cal L Jour 119 (1:30)

(1891) 15 Dom 594 (J98)

(1971) 15 Suth W R 23 6 (1999) 2 Ind Cas 129 (1936) (Cal) (1991) 15 Bom 391 (20) (1991) 15

2 (1925) 1925 Rang 157 (158) 2 Rang 157 (158) (See however (1910) 6 Ind Cas 4-2 (193) (Lab)]
3 (See (1926) 1926 Pat 27 (27) 4 Pat 701)
3 (See (1926) Pat 27 (27) 4 Pat 701)

(1J20) 1920 Sind 34 (35) 14 Sind L R 237 Assumed (1697) 24 Cal 350 (751) (F B) (1911) 1 Ind Las 351 (352) (Mad)

(1%34) 05 Cal 649 (652) (1 10 ) 3 Cal E Jour 119 (1°0) (130)) 2 Ind Cas 129 (132) (Cal)

<sup>(1995) 1995 (11 50 (\$2 54) 48 41) 150</sup> (1991) 1992 41) 399 (400) 46 41) 915 (1806) 5 Sath W R 2\*6 (226) (230) 5 Sath W R 2\*6 (226) 233 4 Pat L Jour \*95 2 5 (1918) 1918 P C 154 (158) 6 (1993) 2 Ind Cas 179 (136) (Cal)

fulure to apply under O 9, R 9 or under O 41 R 19 will not, according to the High Courts of Madras Calcutta and Lahore, but an application for review, 4 though the reason for the fulure to appear will not of itself amount to surricent cause within the meaning of this rule and will not be a valid ground of review 5 The High Court of Mahabrids and Patnas5 have taken a contrary view. It has been held by the High Court of Lahore that where an application for restoration is male and dismissed an application for review thereafter will be barred 5

25 Judgement in Letters Patent Appeals - See Notes to Ct 15 of the Letters Patent and No e 1 to S 114 anic

#### 26 Review of decision before signing decree

Where in order to be consistent in the decree finally passed the Court has to pass orders under O 41, R 33 the same relief can be given in a petition put in by way of review.

### 27 Commissioner cannot review

A Commissioner app inted for taking accounts may, in his discretion and on proper grounds respect the inquire unts my one or more of the items before this report is made for until then he decides nothing that is final and conclusive.

### 28 Limitation

The period of limitation for applications of review of judgments of Provincial Small Cause Courts the High Courts in the exercise of their Original Cau. Jurisdiction and other Courts are respectively 15 20 and 90 days from the date of the decree or order sought to be reviewed (See Arts 161 162 and 173 of the Limitation Act 1908) In computing the period of linitation the applicant is entitled to deduct under S 12 of the Limitation let 1908 the time spent in obtaining a copy of the decree or order? though as will be seen in Note 29 m/rs such time cannot be evcluded for the purposes of the Court-fee payable on the application. But he cannot exclude the time occupied by a previous application for review. The Court may also under S of the Limitation Act 1908 admit the application after the expirit of the period of limitation on sufficient cause being shown for not making the application within the presented period. No definite set of rules can be laid down to govern the discretion of a Court under S 5 of the Limitation 4ct.

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(1913) 1919 Vad 814 (514)
                              Following 26
  tion under O 47, R 1 merely to
        Cal JJS
  escape limitation is not maintain
  (1599) 26 Cal 595 (601)
  able ]
  (1913) 19 Ind Cas 481 (485) 1913 Pun Re
   6 (1873) 1873 Pun Re No 52 page 77
        No 109
  (1925) 192a Lah 517 (518)
  (1910) G Ind Cas 482 (483) (Lah)
  [But see (1933) 1333 Nag 39 (40) 28
        (But see (1909) 1 Ind Cas 900 (901)
  Nag L R 295 ]
Note 26
        1909 Pun Re No 33 1
  (1836) 2 Cal W N 318 (319)
   1 (1923) 1923 Vad 392 (402)
5 (19.7) 1927 Mad 355 (856)
  Note 27
  (1928) 1928 Mad J64 (96a)
   1 (1924) 1924 Bom 231 (232) 47 Bom 593
5a (1923) 1923 All 57G (577)
  Note 28
5b(1917) 1J17 1 at 673 (673 674) 1 Pat L
        Jour 547
  (1J20) 1J20 Pat 491 (491 492)
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(See also (1933) 1933 Pat 557 (558) Where remidy under O 9 R 4 or

R 9 is barred by Israitation, applica

42 Bom 295 ] - - - - 28 (229)

1. It depends on the circumstances of each case <sup>2</sup> The fact that an appeal is pending<sup>3</sup> or that the applicant is a minor<sup>4</sup> or that applicant's legal advisers were ignorant of the contents of a document in their possession at the time of the original hearing<sup>5</sup> or that a new exposition of the law has been made since the decision<sup>6</sup> is not a sufficient cause for excusing the delay in filing the application within time

There is nothing in this order to suggest that the application for review must be within the same period which is allowed to a party for the alternative remedy by way of appeal or application for restoration of suit which has been dismissed for default of appearance?

### 29 Court fee

An application for a review of a judgment of the trial Court if presented on or after the 90th day from the date of the decree is chargeable with the same fee as is leviable on the plaint. An application for review of an appellate judgment if presented on or after the 90th day from the date of the decree is similarly chargeable with the same fee as is leviable on the memorandum of appeal 1 Such applications presented before the 90th day from the date of the original or appellate decree, as the case may be, are chargeable with one half of the fee leviable on the plaint or the memorandum of appeal 124 (See Articles 4 and 5 of Schedule I of the Court-Fees Act, 1870 ) Under S 14 of the said Act the Court may, even in a case where the application is presented on or after the 90th day, order the refund of so much of the fce paid on the application as exceeds the fee which would have been payable had at been presented before such day 1a As to refund of Court-fees an other cases see S 15 of the Court-fees Act and also the undermentioned case 16 The fact that an application, filed actually beyond the 90 days, may be within the time for the purposes of limitation by virtue of the application of Ss 5 and 12

2 (1885) 11 Cal 767 (776)

See also the following cases —
(1867) 5 Sixt W R 485 (186) 12 years
delay excused
(1921) 1921 (21 393) (394) Decision under
the Indian Solders Act IV of 1918—
Limitation for review is three

that the previous Vunsil had estarted the compromise by under pressure ]

6 (1868) 9 Suth W R 181 (185) (F B) (1850) 13 Suth W R 190 (120) (1854) 10 Suth W R 190 (120) (1855) 10 Suth W R 20 (126) (1859) 9 Suth W R 102 (103) (1657) 7 Suth W R 405 (405)

(1866) 6 Suth W R 167 (168) (1872) 17 Suth W R 163 (163)

32 Ind Ca<sub>3</sub> 1000 (1001) 3
3 (1932) 1932 Cal 171 (175)
(1831) 8 Dom 250 (125)
(1871) 8 Dom 250 (125)
(1871) 8 Cal 171 (173) (1932) (1932)
(1850 also (1932) 1933 Cal 171 (175, 175)
(1850 also (1932) 1939 Cal 171 (175, 175)
(1851 also (1932)

7 (1929) 1929 Sind 38 (39)
Note 29
1 (1809) II 111 I76 (179)
Iaa (See also (1924) 1/24 (cal 881 (881))
(1938) 1933 11 20 (21) 54 All 1 202
(1938) 1933 11 20 (21) 54 All 2 (21)
(1938) 1933 11 20 (21) 54 All 2 (21)
(1938) 1934 (1938) 1935 (1938)

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of the Limitation \ct, does not exempt the applicant from paying the full fee chargeal le on the plaint or memorandum of appeal the two Acts are not in nari materia 2 Is to the fee payable where a portion of the judgment is sought to

be reviewed see the undermentioned cases 3 The word judgment in Articles 4 and 5 above referred to does not

include an interlocutory order Consequently in application for review of an interlocutory order is chargeable only like any other ordinary application 4

The presentation of an insufficiently stamped application for review

is not a val d presentation \$

No Court fee need be paid on an application for review presented in a ut in forma pauperis See O 33 R 8 of the Code But the applicant must have been declared a pauper in the suit at the time of the application Otherwi e he would have to pay the full fee char\_eable on the application under tan 7

30 Appeal by one party review application by another-Clause (2)

The fact that an appeal has been preferred by one party does not preclude the other parties from applying for review! except where-

1) The grounds of such appeal are common to the applicant and the

appellant or 2) being a resp ndent he can present his case in the appellate

Court The expression where the ground of such appeal is common to the applicant and the appellant means that the grounds of appeal and the grounds of review are the same. Where a party who has not appealed applies for review on the ground of discovery of new and important matter after the appeal by another party is summarily dismissed the ground of review is different from the grounds of appeal and therefore the application is maintainable 2 Where the applicant has the opportunity to present his case before the appellate Court. the lower Court has no jurisdiction to proceed with the application 3 A respon dent in an appeal has the right to apply for review of appellate Court judg ment 4

31 Privy Council Practice

As to the powers of the Privy Conneil to re hear appeals see Note 9 to S 112

32 Appeal -See R 7 infra

33 Revision - See Note 27 to S 115 ante and Note 16 to R 7 anfra 4 (1909) 1 Ind Cas 999 (1000) 31 All 263

2 (18°6) 2 Mad 134 (138) (1894) 7 C P L R 111 (112)

3 (1909) 1 Ind Cas 209 (210) 31 All 294 Whole fee leviable on the plaint or

st.

5 (1890) 12 All 57 (GO) 6 (1898) 90 A11 410 (411)

(1892) 1892 Bom Pr nt Judt 383 [But see (1930) 1930 Rang 280 (281) 8 Rang 423 1

7 (1895) 1895 1 un Re No 91 page 435

able with fee Rs 2

Application to High Court charge

able if the review were granted and not necessarily on the whole value of the suit (18"9 80) 4 Lom 2G (28) (1927) 1927 Mad 360 (361) 50 Mad 488 (Do)

(1933) 1933 Rang 203 (203 204) (Do) C P C 355 & 356

To whom applica-

tions for review may

be made

R. 2. [S. 624.] An application for review of a decree or order of a Court, not being a High Court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in Rule 1 or the existence of a clerical or arithmetical

mistake or error apparent on the face of the decree, shall be made only to the Judge who passed the decree or made the order sought to be reviewed; but any such application may, if the Judge who passed the decree or made the order has ordered notice to issue under Rule 4, sub-rule (2), proviso (a), be disposed of by his successor.

[1877-S. 624]

### Sunonsis

Legislative changes.

Note No Review by successor in office

Note No

### Other Topics.

Applicability of the Rule to Small Cause Courts See Note 2, Pt (21)

1 Legislative changes

There was no section in the Code of 1859 corresponding to this section The cases decided under that Codel are now only of academic importance

2 Review by successor in office

This rule must be read as a proviso to R 11 The policy underlying the rule is that an application for review should be entertained and considered by the very Judge who made the decree or order.2 Reading Rr 1 and 2 as they ought to be, it follows that-

(1) every application for review on which notice has been ordered to issue by the Judge who passed the decree or made the order may be disposed of by his successor in office 3

(2) an application based on the ground of the discovery of new and important matter or evidence or the existence of a clerical or arithmetical mistake or error apparent on the face of the

Order 47, Rule 2-Note 1

1 197

Note 2

I (1885) 8 Mad 567 (569)

2 (1857 59) 3 Suth W R 45 (48) (PC) 3 (1892) 1892 VII W N 103 (103) (1892) 16 Pom 603 (605) (1851) 10 Cal 80 (81)

(1656) 13 Cal 231 (231) (1913) 20 Ind Cas 670 (672) (Cal) (1894) 1884 Pun Ro No 134, page 357 (1885) 1885 Pun Ro No 97, page 215 (Note) (1891) 1891 Pun Re No 7, page 10 (1925) 1925 Lah 377 (377) (1933) 1933 Lah 130 (131)

(1500) 13 Mad 178 (187, 185) (F B) (1914) 1914 111 57 (59) (1915) 1915 Mad 1063 (1069) (1900) 3 Oudh Cas 363 (365)

(1837) 1837 Pun Re No 6, 1382 10 (1837) 1837 Pun Re No 6, 1382 10 (1837) 1837 Pun Re No 6, 1382 10 (1837) 1837 Pun Re No 6, 1382 10 (1837) 10 Ind Cas 241 (245) 23 \(11 \) 273 (251) 1 (1911) 10 Ind Cas 241 (245) 23 \(11 \) 30 (1839) 13 Hom 330 (335)

(1913) 19 Ind Cas 214 (215) (Mad) (1918) 1918 Pit G47 (G48) 3 Pat L Jour

[See [1921] 1924 Pat 803 (810)]

record<sup>5</sup> can be entertained and disposed of by the successor in ofnce An application made both under O 9, R 13 and O 47, R 1 and registered as one under O 47, R 1, may, however, be changed by the successor as one made under O 9, R 13 of the Code and disposed of on that basis 6 A successor in office may also entertain applications for amendment of the decree under S 152 of the Code 7

- (3) an application based on any other ground than those referred to in the paragraph above can be entertained only by the Judge who made the order or passed the decree 74 Thus a successor in oince cannot grant a review of the decree or order passed by his predecessor in office on the ground that such decree or order 15 incorrect 8 or on the ground that notice of hearing was not grace, or on the ground that the guardian ad litem of a minor party had no saiction to refer the matter to arbitration10 or on the ground that the case was wrongly dismissed by his prede cessor for default11 or on the ground that the right to proceed against oher properties was not reserved by the original Judge 12 It will be illegal for a District Judge to transfer a review potition filed before a Subordinate Judge to his own file 13 or to transfer an application for review filed before him to a Subordinate Judge 14 A successor in office of a Judge who has been transferred15 or who has retired 16 or who is dead17 cannot entertain such application for review Similarly. where a Court has been aboushed and suits have been transferred to another Court the Judge of that Court eannot grant a review except on the two grounds mentioned in this rule 18 But where a Judge of an Additional Sub-Court was transferred as the Subordinate Judge of the principal Sub-Court it was held that the latter could review his own order passed while he was the Addit onal Subordinate Judge 19
  - (4) an application for review of a decree or order passed by a Judge of the High Court can be made to, or disposed of by, his

(1932) 1932 Lat 321 (322) Pov er of auc

cessor under S 153 is wider than

dec a so ted of a state of a sec (234) Decision by Sub Judge-Review application to District Judge-Latter should return it for presentation to proper Court] But see (1909) 13 Cal W N xer

(91n)) 8 (1680) 5 Cal 110 (112)

(1876) 1 Cal 197 (199) (1877) 2 Mad 10 (11 12) (1931) 1931 AR 60a (606) 9 (1690) 14 Bom 101 (102) (1908) 1906 Pun Re No 82 10 (1903) 8 Cat L Jour 204 (298) 11 (1909) 1 Ind Cas 900 (901) 1903 Pun Re No 33 12 (1910) 5 Ind Cas 725 (726) (Cal)

13 (1864) 1864 Suth W R (Gap) (Mrs) 99 (29)

14 (1919) 1919 Nag 143 (143)

15 (1882) 4 111 278 (280) [See also (1927) 1927 Oudh 131 (131)]

16 (1882) 1832 All W N 96 (96) 17 (1929) 120 Ind Cas 386 (366) (Oudh)

18 (1885) 8 Mad 507 (568)

19 [See (1927) 1927 Cal 312 (313) 54 Cal 374] [But see (1925) 1925 All 804 (806) 47 All 751]

successor in office 20 This rule has no application to the High

Court The rule has no application to Courts of Small Causes 21 See O 50 ınira

tions for review

3

The expression the Judge who passed the decree means the Judge who decided the case and not the Judge who merely signed the decree 22 R. 3. [S 625] The provisions as to the Form of applica

[1877—S 625]

form of preferring appeals shall apply, mutatis mutandis, to applications for review

Sunonsin

Note No Note No Applicability of the Rule Application by legal representative of Form contents and presentation of ap party plication Limitation

1 Applicability of the Rule

This Rule is not applicable to Small Cause Courts See O 50 As to the powers of review of Small Cause Courts see S 17 of the Provincial Small Cause Courts Act and the undermentioned cases 1

2 Form contents and presentation of application

Applications for review should be drawn up in the same manner as ap peals and should set forth concisely the grounds of objections to the decision of which a review is sought without argument or narrative and such grounds should be numbered consecutively 1 The Court should not travel beyond the grounds mentioned in the application 12 According to the High Court of Allaha bad it is not necessary that it should be accompanied by the copy of the decreorder or judgment sought to be reviewed 2 while according to the High Court of Bombay it is necessary to do so 3 The application should be presented to the Judge and not to the Munsarium . The informalities in presenting a review petition cannot be raised after the decree is passed in terms of review 5

The Rule only relates to the form of the application for review It does not extend the right of a party who goes for a review and give him a right of appeal against an order refusing to restore an application for review, by reason of the fact that an appellate order under such circumstances is appealable under O 43 R 1 (f) 6 An application for execution made after 90 days from

20 (191") 1917 Cal 184 (185) 44 Cal 28 As sumed

21 (190a) 1905 Pun Re No 63 22 (1917) 1917 Cal 6(3 (673)

Order 47 Rule 3-Note 1

1 (1894) 1894 Pun Re No 108 page 410 At the time of presenting the application are directory and not mandatory (190a) 32 Cal 333 (341 342) (Do)

(1800) 14 Suth W R 42 (43) (1869) 11 Suth W R 245 (245 246) (1894) 1894 Pun Re No 5 page 7 (1890) 13 Mad 178 (182) (F B) (1891) 18 Cal 83 (8J)

(1907) 9 Bom L R 833 (835) Case under ici VI of 1865 now repealed (1881) 1881 Pun Ro No 60 page 140 (Do)

Note 2 1 (1862 65) 1 Bom H C R 185 (186) 13 (1900) 5 Cal W N 485 (480)

(1933) 1933 Rang 151 (153) (1911) 1911 Pun Re No 73 11 Ind Cas 42 (423)

2 (1895) 17 111 213 (216) 3 (18 9 50) 4 Bom 414 (415) 4 (1690) 12 All 57 (59) 

(1928) 1928 Cal "3 ("3)

(1914) 1914 Bom 1 (7) 33 Bom 416 6 (1924) 1975 VII 5 (58) 17 VII 1

ī.

the date of the decree and which does not mention any circumstances to show why it could not be made within 90 days, cannot be treated as an application for review 7

3 Application by Legal representative of party

The legal representative of a deceased party to a suit can apply for a review in the circumstances in which the party himself could have applied 1

4 Limitation

When filing an applicat on for review of a judgment although it is not rice sary to tile a copy of the judgment, the applicant is entitled to the benefit of S 12 sub S 2 of the Lamitauon Act if he does obtain a copy of the judgment 1 A pauper may apply for review of judgment with the same indulgence under S 5 of the Limitation Act as to delay in making the application as a person who is not a pauper - The time occupied in prosecuting a prior appl ca ion for review cannot be deducted in calculating the period of limitation? or the time taken in prosecuting an appeal 4

4 [5 626] (1) Where it appears to Application h cr the Court that there is not sufficient ground for rejected a leview it shall reject the application

(2) Where the Court is of opinion, that the Application 1 ere application for roview should be granted, it shall granted giant the same 2

Provided that-

(a) no such application shall be granted without previous notice to the opposito puty, to enable him to appear and be heard in support of the decree or order, a review of which is

applied for and

(b) no such application shall be granted on the ground of discovery of new matter or evidence, which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof6 of such allegation

[1877—\$5 626, 629 , 1859—\$ 378 ]

### Sinopsis

Note No Legislative changes Where the Court is of opinion sŁ shall grant the same 2 Review without notice to the opposite 3 party Form of notice-See Appendix G Form

No 14

Discovery of new matter or evi dence 6 Strict proof Second application for review - See O 47 R 7 belo v 7 Death of party pending review Appeal See O 47 R 7 8 Revision-See S 115 Note 27 10

Note No

7 (1931) 1931 All 218 (219)

Note 3 1 (1906) 9 Oudh Cas 35 (36)

Note 4 1 (1934) 1934 All 307 (368) 56 All 591 [But see (1899) 2 Oudh Cas 302]

2 (1878 80) 2 Mad 230 (231)

3 (1902) 26 Bom 485 (190)

4 (1881) S Bom 260 (263)

1 Legislative changes

(a) The words and the Judge shall record with his own hand his reasons for such opinion which occurred in the concluding part of para 2 of the old section have been omitted

(b) Cl (c) of the old section has been transferred to R 2 of this Order

The other alterations do not involve any alteration in the law

By reasons of the change mentioned in (a) above the decisions mentioned below have been rendered obsolete 1

Where the Court is of opinion st shall grant the same

Where an application for review is made on any of the grounds specified in R 1 and the Court is of opinion that the review should be granted it should be granted 1 It is improper to admit a review petition and hear the case afresh and thereafter dismiss the petition, where, at the re-hearing, the Court comes to the conclusion that there is no reason to interfere, the proper course is not to pass an order dismissing the review application but to pass an order to the same effect as the one under review 2

3 Review without potice to the opposite party

Before granting an application for review it is necessary that notice of the application should be given to the opposite party. Otherwise the order granting review will be a nullity 1 A notice of an application by the plaintiff for review of an order passed in a suit must be served on all the defendants and not merely on the opposing defendants who had appeared when the decree or order sought to be reviewed was passed 2 The reason is that the expression opposite party in proviso (a) of the Rule is not restricted to cases in which such party has actually appeared. It includes all parties interested in supporting the order or decree sought to be set aside 3 There is a difference of opinion as to whether where an appeal is dismissed under O 41 R 11 or a suit is dis missed before summons to the defendant or an application for execution is summarily dismissed before notice to the judgment-debtor, the respondent deferdant or judgment-debtor as the case may be is an opposite part) wathin the meaning of this Rule The High Courts of Madras and Patnas have held that he is, while the High Courts of Calcuttae and Lahore have held that

he is not 3 (1922) 1922 Pat 281 (283) 6 Pat L Jour Order 47 Rule 4-Note 1 1 (1900) 27 Cal 333 (335) 27 Ind App 79 625 4 (1926) 1926 Mad 930 (931 982) 50 Mad 6 (P C)

(1900) 23 Mad 496 (498) (1888) 3 All 316 (320) (1895) 22 Cal 734 (737) (1870) 13 Suth W R 439 (440)

Note 2 1 (1917) 1917 Lah 379 (3e0) 1916 Pun Ra

No 115

2 (1923) 1923 Oudh 93 (91 95) 26 Oudh Cas

# Note 3

1 (1915) 1915 Cal 666 (667) 42 Cal 493 (1938) 1933 Pat 643 (644) (1923) 1923 Rang 49 (50) 1 L B R 394 (1904) 14 Mad L Jour 7 (7 8) (1887) 11 Bom 591 (594 595) (1913) 19 Ind Cas 864 (864) (Lah) (186") 8 Suth W 12 301 (304) (1926) 1926 Mad 138 (134)

(1913) 19 Ind Cas 275 (277) (Cal)

5 (1922) 1922 Pat 281 (263) 6 Pat L Jour

6 (1922) 1922 Cal 234 (235) Sunt dismissed

for non payment of deficiency in Court fees before summons to defen

Sems ary dismissal of appeal u der

11ques

Lah 3.0 (351) 7 (1924) 1921 application-Dismissal for default [See however (1928) 1923 Lah 303 [304]]

- 4 Form of Notice -See Appendix G, Form No 11
- S Discovery of new matter or evidence

T

The expression means the same thing as the expression new and important matter of evidence in R 1 above i See also Notes to R 1, supra 6 Street proof i

No application for review should be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge or could not be produced by him when the decree or order was passed or made, without street proof of such allegation 1 Where a Court grants a review without calling for strict proof of the allegation that the new matter was not within the knowledge of the pentioner, the order is in contravention of this Rule and is without jurisdiction 2 Strict proof means anything which may serve directly or indirectly to convince a Court, and has been brought before the Court in legal form and in compliance with the law of evidence. It is the formality of the proof which is presembed and not the sufficiency in the result. Hence, the fact that the evidence adduced is not sufficient to prove the allegation does not make the order granting an application for review one in contravention of the provisions of this Rule within the meaning of R 7 unira 3 It is within the jurisdiction of the appellate Court to say whether the strict proof is according to law or not though the question of the sufficiency or importance of evidence is for the Court admitting the

7 Second application for review - Sec O 47 B 7 below 8 Death of party pending review

The order granung review only holds the judgment in suspense. The death of party does not, therefore, cause the suit or appeal to abate 1

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9 Appeal.—See O 47 R 7
10 Revision -See Note 27 to S 115 ante
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1 (19.0) 19'0 Cal of 5 (160 111 472) a* Cal (1917) Lah 870 (390) 1916 Fun Rs L63 (E L)

Note 6
1 (100*) 31 Bom 33 (1839 200) 34 Ind App 120 (1801 180 U D 2. (28) (1916) 2 Upp Bur R 180 (1801 180 U D 2. (28) (1916) 2 Upp Bur R 180 (1801 1800 U D 2. (28) (1916) 2 Upp Bur R 180 (1801 1800 U D 2. (28) (1916) 2 Upp Bur R 180 (1801 1800 U D 2. (28) (1916) 2 Upp Bur R 180 (1801 1800 U D 2. (28) (1916) 2 Upp Bur R 180 (1801 1800 U D 2. (28) (1916) 2 Upp Bur R 180 (1801 1800 U D 2. (28) (1916) 2 Upp Bur R 180 (1801 1800 U D 2. (28) (1916) 2 Upp Bur R 180 (1801 1800 U D 2. (28) (1916) 2 Upp Bur R 180 (1801 U D 2. (28) (180
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(1.75) 1933 Mad 217 (218) (1037 1917 Mil 107 (103) (1017 1917 Mil 107 (103)

| 1130 | 131 | 132 | 1237 | 133 | 11 ° 80 | | 1130 | 131 | 132 | 1237 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 | 1327 |

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(1574) 2° Suth W R 40 (440)
(1573) 20 Suth W R 420 (426)
(1573) 19 Suth W R 420 (426)
(1573) 19 Suth W R 430 (456)
(1573) 19 Suth W R 440 (456)
(1570) 12 Suth W R 440 (456)
(1570) 12 Suth W R 440 (456)
(1570) 12 Suth W R 440 (457)
(1579) 12 Suth W R 450 (257)
(1572) 14 Suth W R 450 (257)
(1572) 15 Suth W R 432 (432)
(1565) 15 Suth W R 422 (432)
(1567) 10 Suth W R 422 (432)
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(18 0) 14 Suth W R 236 (237)

(1873) 90 Suth W R 84 (85) (F B) (1865) 2 Suth W R 174 (175 176) (1918) 1918 Cal 618 (624 625) 45 Cal 60 (1930) 1930 Cal 424 (425) [See also (1911) 9 Ind Cas 532 (533) (Call)

Note 8 1 (1924) 1924 Bom 310 (310) 48 Bom 210

Application for re view in Court con-

more Judges

R. 5. [S 627.] Where the Judge or Judges, or any one of the Judges, who passed the decree or made the order a review of which is applied for, continues sisting of two or or continue attached to the Court at the time when the application for a review is presented,

and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, such Judge or Judges or any of them shall hear the application, and no other Judge or Judges of the Court shall hear the same.

# Local Amendment.

BOMBAY

In R 5, for the word six" the word 'two shall be substituted

Sunovers

Note No. Note No Application for review in Court con "Attached to the Court" sisting of two or more Judges

# Other Topics

Review by two Judgos, one of whom is new See Note I, Pt (1)

1 Application for review in Court consisting of two or more Judges

This Rule will apply only in the case of a Court consisting of more than one Judge 12 This Rule applies to High Court also It is not applicable to Small Cause Courts See O 50 A review heard and granted by two Judges of a Court one of whom only was the Judge who passed the decree, is illegal Similarly where one Judge of a Bench of two Judges who disposed of an appeal leaves the Court on a month's leave, the other Judge has no jurisdiction to hear an application for review since the former Judge cannot be said to have ceased to be a member of the Court or to be precluded by absence or other cause for a period of six months next after the application for review 2 But where a Bench of two Judges of a Court has passed a decree or made an order and one of the Judges is absent on leave thus precluding him from considering the decree or order for a period of six months from the date of the application for review, the other Judge is competent to hear the application for review 3 If a review 15 allowed by such single Judge, the matter should be reheard by a Bench of two Judges 4 A District Judge cannot transfer an application for review to the Additional Judge 5

Order 47, Rule 5-Note 1 1a (1933) 1933 Lah 130 (131) Under Punjab Courts Act, Court of Additional Judge is distinct from the Court of the District Judge

1 (1922) 1922 P C 112 (114) 3 Lah 127 49 Ind App 144 (P C) 2 (1919) 1919 Cal 1033 (1034)

8 (1928) 1928 Cal 654 (656) Absence for more than six months must be assumed to have existed in this case (1933) 1933 Pat 433 (433)

(1927) 1927 Rang 20 (23) 4 Rang 265

4 (1889) 16 Cal 788 (793) (1911) 9 Ind Cas 532 (533) (Cal) (1909) 2 Ind Cas 201 (205) (Mad)

5 (1930) 1930 \11 785 (786)

Attached to the Court

Т

A Judge who is absent on leave and for whom ano her is officiating is not attached to the Court and the review application may be disposed of by the remaining Judge who heard the appeal originally 1

- R. 6. [5 628] (1) Where the application to a review is O he ud hy more than one Judge and the Court Application where is equily divided the application shall be rejected rejected
- (2) Where there is a majority, the decision shall be accord ing to the opinion of the majority

Order of rejection ot arreala le Objec tions to order gra t sigail cate

R. 7. [S 629] (1) An order of the Court rejecting the application shall not be appealable but an order granting an applica tion may be objected to on the ground that the application was—

- (a) in contravention of the provisions of Rule 2
- (b) in contravention of the provisions of Rule 1,7 or

(c) after the expiration of the period of limitations pies cubed therefor and without sufficient cause

Such objection may be talen at once by an appeal from the order granting the application of in any appeal from the final decico or order passed or made in the suit

(2) Where the application has been rejected in consequence of the failure of the applicant to appear he may apply for an order to have the rejected application restored to the file, and uhere it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from appearing when such application was called on for hearing, the Court shall order it to be restored to the file upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for hoaring the same

(3) No order shall be made under sub rule (2) unless notice of the application has been served on the opposite party

[1877—S 629]

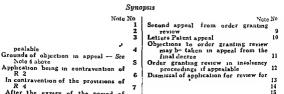
# Local Amendment

MADRAS

In sub rule (1) substitute the word order for the word application occurring after the words on the ground that the

16





Otl er Tonics

Appl cability to Small Cause Court See Note 2 Pt (2)

# 1 Legislative changes

1 In sub rule (1) the word first which occurred in the old section has been subst tuted by the words shall not be appealable

limitation

3 The

Under S 378 of the Code of 1859 the order of the Court granting or rofus ug the rever was final

# 2 Scope and applicability of the Rule

After the expiry of the period of

Under this Rule an order rejecting an application for review to not appealable An order granting an application for review is appealable only on three grounds of objections namely that the application was -

- (a) in contravention of the provisions of R 2
- (b) in contravention of the provisions of R 4
- presented after the expiration of the period of limitation pre (c) scribed therefor and without sufficient cause

Such objection may be taken-

- at once by an appeal from the order granting the application 10 43 R 1 (w) 1 or
- (b) in an appeal from the final decree or order passed or made in the suit (S 105)1

Where an application is dismissed for default of appearance it may be restored on sufficient cause being shown for such non appearance upon such terms as to costs or otherwise as the Court thinks fit and shall appoint a day for hearing the same But no order of restoration should be made without notice to the opposite party

This Rule being inconsistent with S 176 of the Agra Tenanci let 15 not applicable to an order passed by an Assastant Collector Second Class relating to the trial of any suit or application 12 This Rule does not upply 10 the Provincial Small Cause Courts 2 Where the Court actually granted a review though it purported to act under S 112 it was held in the undermenuored case3 that it must be treated as an order under this order and that an appeal lay against the order.

#### 3 Order rejecting review not appealable

I.

An order rejecting an application for review is not appealable 1 As to whether and when the revision will be in such a case, see Note 27 toS 115 and the undermentioned cases.2 As to whether an order rejecting an application for review of judgment is an order made "on appeal" from which an appeal lies to the Privy Council, see Note 5 to \$ 109 and the cases cited below 3 As to the powers of revision under S 25 of the Small Cause Courts Act, see the case cated below 4

#### 4 Order granting review, if and when appealable

Under the Code of 1859 there was no appeal even against an order granting a review 1 O 43, R 1 (w) gives a right of appeal against such an order,12 This Rule enacts that in such an appeal only the three grounds of objections specified in this Rule can be raised. Both the Rules must be read together2 and so reading them it follows that there is no appeal even from an order granting a review in cases other than those specified in this Rule 3 Thus

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(1870) 13 Suth W R 82 (83)
3 (1921) 1921 Lah 2,0 (251)
  la (1934) 1934 Oudh 445 (445) Order of single
                     Note 3
1 (1904) 23 411 572 (573)
  judge of Chief Court grinting re
   (10° ) 10° Pat 177 (178) Order refusing
  view-ippeal lies to Bench of two
judges under S 12(1) of the Oudb
          review in insolvency proceedings
  (1899) 4 Cal W N 30 (40)
  Courts 1ct
  (18cs) 1.0 Cal 432 (435)
(18cs) 1.0 Cal 432 (435)
(1873) 20 Suth W R 54 (85)
(1870) 13 Suth W R 167 (163)
(1869) 11 Suth W R 264 (265)
  (See also (1921) 1921 (Lah) 250
  (250)]
   2 (1930) 1930 All 126 (127)
(1920) 1920 All 112 (114) 42 All 626
(1934) 1934 Lah 617 (619) Right of appeal
   (1500) 11 Suth W R 181 (180)
   (1866) 5 Suth W B 80 (90)
(1864) 1 Suth W B (Mis) 7 (7)
(1864) 1864 Suth W R (Mis) 20 (21)
  under O 43, R 1 1s controlled by
  this Rule
  (1932) 1932 Oudh 69 (65) 7 Luck 350
   (1562 C4) 1562 G4 Suth W R Sp 11 (12)
   (1921) 1921 Cal 66 (66)
   (1506) 5 Snth W R 93 (96) (F B)
   (1918) 1918 Cal 618 (625) 45 Cal 60
   (1916) 1916 Cal 521 (524) 19 Cal W N 504
   (1856) 9 Mad 253 (251, 256)
   (1906) 30 Bom 56 (61)
  42 Cal 530
(1906) 25 Mad 500 (602)
2 (1910) 6 Ind Cas 707 (707) (All) No revi-
           sion lies against an order refusing
   (1917) 1917 Mad 965 (966) Right of appeal
           to grant review
           [See also (1911) 10 Ind Cas 725 (725) (Lab) No revision)
  under O 43, R 1 is controlled by
    (1929) 1929 Sind 38 (39) Orders disallow-
  O 47. R 7
  3 Sea the cases cited in foot note (2) above
    (1900) 4 Ind Cas 23 (24) 31 All 610
   and also
           Refusal to entertain an application
   (1933) 1933 All 778 (778, 779)
            -Revision lies
   (1933) 1933 Born 183 (185) Insufficiency
    (1911) 12 Ind Cas 172 (173) (Mad) No revi-
  of Court fee stamps on review ap-
           +10n lics
  plication is no ground of appeal
    (1675 78) 1 All 206 (297) Case nuder the
  against review
   (1933) 1933 Cal 727 (727)
           old Code
 3 [See (1869) 11 Suth W R 145 (145)]
   (1934) 1934 Lah 575 (575) Order granting
    (1864) 1 Suth W R (Mis) 13 (14)
(1865) 5 Suth W R (Mis) 17 (17)
 4 (1929) 1929 Mad 56 (56)
                      Note 4
 1 (1868) 9 Suth W R 125 (125)
           [See (1866) 6 Suth W R 18 (19)
The order is final]
    (1874) 22 Suth W R 289 (290).
   (1917) 1917 AB 76 (77)
```

where a Court grants a review for sufficient reason the order is not open to appeal. In Bombay O 43, R 1 (w) has been deleted by a rule made by the High Court under S 122 of the Code In Bombay therefore an order granting a review is in any view appealable, only if it falls under this Rule 4a.

Where a decree passed on review cannot be attacked on a ground recognised under this Rule the case cannot be certified as a fit case under S 109, Cl (c) of the Code 5 nor will the mere fact that an appeal is permitted under this Rule make it a fit case for appeal to His Majesity in Council 6

It is open to the appellant to prefer an appeal against an order granting a review, without taking any steps regarding the decree itself 7

As to an appeal from an order granting a review in suits of a Small Cause nature, see Note 19 to S 102 and the undermentioned cases 6

(1922) 1922 111 866 (867) Imbility to (1909) 2 Ind Cas 834 (884) 12 Oudh Cas 151 (1806) 18 All 44 (45) (1888) 12 Bom 171 (173) (1888) 12 Born 171 (173) (1930) 1930 Cal 424 (425) (1930) 1930 Cal 424 (425) (1930) 1930 Cal 439 (360) (1910) 1910 Cal 1072 (1073) (1914) 1914 Cal 633 (629) (1910) 5 Ind Ca. 728 (726) (Cal) (1890) 3 Cal W N CART (EXEV) (Note) (1891) 1 Cal V N 328 (339) (1899) 21 All 152 (154) Subsequent Full Bench ruling not brought to its (1930) 1930 All 126 (127) Review allowed on ground that judgment was unfue to one of the parties (1923) 1923 Cal 450 (451) Dismissal for default restored on sufficient cau e (1919) 1919 Cal 94 (94) (1910) 5 Ind Cas 182 (183) (Cal) Review granted on basis of sub equent ad 1219810n (1897) 24 Cal 878 (880) (1928) 1928 Cal 73 (73) (1929) 1923 Lah 26 (27) Contratention of provisions of R 1—No al peul lies. (1928) 1928 Lah 755 (757) (1917) 1317 Lah 379 (350) 1916 Pun Re \a (1916) 1916 Lah 420 (420) (1912) 16 Ind Cas 993 (995) 1913 Pan Re

> (1903) 16 O P L R 151 (153) (1903) 7 Oudh Cas 347 (346) (1925) 1925 Oudh 266 (267) 25 Oalb

Nag L R 104] (1976) 1926 Bom 121 (121)

<sup>(120) 1226</sup> C4 217 (218)
4 (1025) 1025 411 864 (305) 47 411 861
Where the Court on being satusfied
that the planning was presented
from complying cracity with the
terms of a decree originally passed
owing to causes beyond his control
strate(d a review

<sup>(1910) 7</sup> Ind Cas 1015 (1016) 13 Oudh Cas

An appeal will be also from an order granting a review of an order passed in execution proceedings 9

#### 5 Grounds of objection in appeal-See Note 4 above

#### 6 Application being in contravention of R 2

An appeal will 1e from an order granting a review on the ground that there is a contravenuon of R 2 1 A, a Distinct Judge passed an order dismissing, an appeal While A was absent, an application for review of the order was presented to the Sub-Judge who ordered notice to issue Subsequently A died and his successor granted a review of the order of dismissal. It was held that the Sub-Judge had no jurisdiction to order notice to issue on the application for review and that an order by the successor of A, granting a review of A is order was under such circumstances in contravention of the provisions of R 2 and an appeal therefore lay under this Rule 2.

#### 7 In contravention of the provisions of R 4

It has been seen in Note 6 to R 4 ante that where a Court grants a review without note e to the opposite party or in cases coming under Cl (b) of sub R 2) of that Rule without calling for strict proof of the allegations referred to therein it acts in contravention of that Rule An appeal will therefore he from such order under the provisions of this Rule As to the meaning of the words strict proof and to the powers of the appellate Court to go in to the question of the sufficiency of the evidence see No e 6 to R 4 ante

#### 8 After the expiry of the period of limitation

An appellate Court cannot entertun an appeal from an order granting review simply on the ground that the application was time-barred. There must also be want of sul/iccent cause for the delay! When an application made beyond the prescribed period is admitted without the Court satisfying itself that there is sufficient cause for delay then the Court acts without jurisdiction? The appellate Court can look into the sufficiency of the cause for the delay allered?

### 9 Second appeal from order granting review

> second appeal hes from the order of an appellate Court whether it confirms or reverses the order of the Court of the first instance granting an

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9 (1910) 5 Ind Cas 483 (484) (Cal)
   (1870) 13 Suth W R 33 (33)
   (1870) 11 Suth W R 22 (22)
(1869) 12 Suth W R 94 (95)
(1868) 10 Suth W R 42 (43)
                              Note 6
1 (1910) 5 Ind Cas 725 (726) (Cal)
2 (1919) 16 Ind Cas 203 (204) (Cal)
   (1867) 8 Suth W R 181 (188)
                             Note 7
   (1876) 1876 Pun Re No 101 page 215
(1871) 1871 Run Re No 51
1 (1920) 1920 Cal 467 (470) 47 Cal 568
    (1933) 1933 Mad 217 (218)
   (See however (1913) 18 Ind Cas 309
(311) (Lah) There was no objection
    (1924) 1924 I at 250 (2.3)
         See also generally the cases exted in
  (341) There was in by opposite party]
3 (1874 75) 2 Ind App 58 (69) (P C) (18.6) 25 Suth W R 343 (344) (1875) 24 Suth W R 294 (295) (1872) 18 Suth W R 286 (286) (1872) 17 Suth W R 230 (231)
    Note 6 to Rule 4 ante
                             Note 8
   (1864) 1864 Suth W R Gap 287 (287)
   (1871) 1871 Pun Re No 51
(1901) 5 Cal W N 485 (486)
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(1932) 1932 Cal 552 (555)

7. application for review 1 See S. 104, sub-S (2).

#### 10 Letters Patent appeal

An order refusing an application for review is not a 'judgment' within the meaning of S 15 of the Letters Patent and is not appealable as such 1 An order granting an application for review may amount to a "judgment' within that clause but an appeal will be on the grounds specified in this Rule 2

Where a single Judge disposed of an application for review, when the other Judge was on a month's leave it was held that the order was without jurisdiction and that an appeal lay under Cl 15 of the Letters Patent 3

11 Objection to order granting review may be taken in appeal from the final decree The propriety of an order granting review can also be questioned in the appeal against the final decree but only on the grounds specified in this Rule 1

12 Order granting review in insolvency proceedings, if appealable

A Court exercising powers under the insolvency jurisdiction has the same powers as any other Court under the Code 12 If a review is granted, the order can be objected to in appeal only on the grounds mentioned in this Rule 1

13 Dismissal of application for review for default-No appeal

An order under O 47, R. 7 refusing to re-admit an application for review, dismissed for default is not an appealable order. However, the High Court could in such a case interfere in revision.1

14 Appeal from decree passed on review

An appeal hes against the decree passed on review 1 (See also Note 3 to R 8)

Note 9

(1985) 11 Cal 206 (208)

1880) 5 Cal 711 (712, 713) (1889) 12 Mad 125 (126) (1918) 1918 Mad 1011 (1012) Question left

(1882) 1882 Pun Re No 133 page 396

Under the Punjab Courts Act, a second appeal hes

1 (1923) 1923 A11 356 (357) 45 A11 535 (1886) 9 Mad 253 (256

(1917) 1917 C d 88 (89) (1905) 9 Cal W N 502 (503) (1869) 12 Suth W R 459 (460)

2 (1929) 1929 Mad 261 (263) (1889) 16 Cal 788 (793)

(1870) 13 Suth W R 439 (440) 3 (1919) 1919 Cal 1033 (1034)

Note 11 1 (1913) 20 Ind Cas 670 (670) (Cal)

(See also the following cases -(1931) 1931 \11 323 (330) (1926) 1926 Cal 213 (245) (1913) 1919 Cal 237 (290, 291) (1835) 22 Cal 984 (989) (1895) 22 Cal 734 (737 738) (1908) S Cal L Jour 204 (297)

(1878) 2 Cal L Rep 257 (258) (1873) 20 Suth W R 426 (426) (1873) 20 Suth W R 84 (85 86) (F D) (1913) 19 Ind Cas 481 (485) 1913 Pun Re No 100

(1695) Pun Re No 62 page 317 (1929) 1929 Mad 261 (261)

(1634) 6 111 202 (294) (1876 90) 2 All 267 (289) (1875 78) 1 All 363 (361)

(1876) 25 Suth W R 324 (325) (1876) 25 Suth W R 63 (64) (1875) 24 Suth W R 186 (188) (1874) 22 Suth W R 399 (399) (1874) 22 Suth W R 183 (183) ]

Noto 12 1a (1935) 1935 Pat 177 (178) Order rejulios application for review is not afficalable

1 (1922) 1922 111 205 (207) 44 111 605 

In such appeal the Court has full power to go into the merits of the case and see whether the decree was properly passed 2 It could be urged in such an appeal that the Gourt which admitted the application for review had no unsdiction to do so 3

#### 15 Second application for review

T.

There is nothing in the Code of Civil Procedure preventing a second application for review where a previous application for review was made and rejected, provided such second application is based on grounds different from those taken in the first application 1

#### 16 Review without jurisdiction-Revision

The High Court will not interfere with the order of an appellate Court dismissing an appeal against the grant of review unless there is a want of jurisdiction or there is an illegality or material irregularity in passing such an order! nor will it interfere with an interlocutory order granting review for a sufficient reason? But where the first appellate Court allows an appeal against an order granung review on the grounds other than those mentioned in this Rule it acts without jurisdiction and the order is liable to be set aside in revision 3 Where a Court subordinate to the High Court rejects an application for review of judgment refusing to consider the grounds of the same and thus fails to perform its duty it is competent to the High Court under its general powers of superintendence to direct such Court to proceed according to law \$2 (See also No e 27 to S 115 ante and the undermentioned cases) 4

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2 (1915) 1018 Cal 616 (624) 45 Cal 60
(1924) 1924 Mad 603 (604)
(1023) 1320 Mad 261 (264)
3 (1904) 27 Mad 602 (607)
(1911) 11 Ind Cas 313 (343) 14 Oudh Cas
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[See also (1869) 6 Bom II C R \ C 205 (210) ]

Note 15

(180a) 10 Suth W R 415 (415) (1866) 5 Suth W R 93 (95) (1864) 1864 Suth W R 91 (92) (Gap) (1865) 2 Suth W R 61 (62) (1864) 1 Suth W R 287 (287) (1892) 1892 Pun Re No 57 page 207 (1883) 1893 Pun Re No 107 (See also (1J0G) 4 Cal L Jour 46 [See however (1588) 16 Cal 749 (752) 1

Nate 16

1 (1925) 1925 Oudh 223 (224) [Ses (1939) 11 All 383 (385) No m terference in revision as there is a remedy by way of appeal from the final decree at the rehearing ] 2 (1912) 16 Ind Cas 995 (995) 1913 I un Re

No 11 (18:0) 13 Suth W R 439 (440)

3 (1929) 1929 Rang 105 7 Rang 167 (1925) 1925 All 895 (896)

(1916) 1916 Mad 544 (544) (See also (1880) 1880 4H W N 179

(181) ] 31 (1875 78) 1 (11 206 (207) (1934) 1934 All 971 (071)

4 (1903) 2 Ind Cas 488 (488) (Mad) Small Causes Court

(1924) 1924 All 759 (760) (Do ) (1890) 13 Mad 178 (181) (Do )

(1934) 1334 111 250 (251) Order allowing review by trial Court-High Court cin revise such order even if on appeal to lower appellate Court order has been modified

(1919) 1919 Mad 111 (112) Although O 47
R 7 of the C P Code is not applicable to Small Cause Courts its provisions will guide the discretion which the High Court possesses under S 25 of the Provincial Small Cause Courts Act

(1901) 1J01 Pun L R No 3S page 126 An ap plication for a review wrongly granted by the Small Cause Court is subject

to revision by the High Court (1929) 1999 All 375 (376) Order of the lower

cise jurisdiction—Revision lies (1927) 1927 Rang 204 (205) 5 Rang 121 (1923) 1928 All 392 (394) 50 All 801 Review granted on a ground not

good in law-No revision lies (1932) 1932 Nag 177 (179) 28 Nag L R 221 application for review 1 See S 104, sub-S (2)

#### 10 Letters Patent appeal

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14 Appeal from decree passed on review

An appeal lies against the decree passed on review 1 (See also Note 3 to R 8 )

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Note 9
  (1878) 2 Cal L Rep 257 (258)
1 (1889) 11 All 333 (885)
(1918) 1918 111 229 (229) 40 All 69
(1889) 18 Bom 496 (499)
(1907) 6 Cal L. Jour 225 (225)
(1801) 21 Cal 319 (319)
(1885) 11 Cal 296 (298)
  (1873) 20 Suth W R 426 (426)
  (1873) 20 Suth W R 84 (85 86) (F B)
(1913) 19 Ind Cas 181 (485) 1913 Pun Re
  No 100
  (1895) Pun Re No 62 page 317
  (1929) 1929 Mad 261 (264)
(1903) 31 Mad 49 (50)
    (1850) 5 Cal 711 (712 713)
    (1889) 12 Mad 125 (126)
  (1900) 23 Mad 496 (497)
  (1858) 7 Moo Ind App 293 (307) (P C)
(1875) 2 Cul 131 (141) 3 Ind App 221 (P C).
    (1918) 1918 Mad 1011 (1012) Question left
    (1852) 1832 Pun Re \o 133 page 396
  (1854) 6 111 292 (291)
              Under the Punjab Courts Act a
  (1816 80) 2 A11 287 (289)
              second appeal hes
Note 10
  (1875 78) 1 411 363 (364)
   (1876) 25 Suth W R 324 (325)
(1876) 25 Suth W R 324 (325)
(1876) 25 Suth W R 136 (64)
(1875) 21 Suth W R 156 (188)
(1874) 22 Suth W R 159 (39.)
(1874) 22 Suth W R 153 (163) 1
 1 (1923) 1923 All 356 (357) 45 All 535
    (1886) 9 Mad 253 (256
    (1917) 1917 Cal 88 (89)
(1905) 9 Cal W N 502 (503)
(1869) 12 Suth W R 459 (460)
  Note 12
  la (193.) 1935 Pat 177 (178) Order re . 120
 2 (1029) 1929 Mad 261 (263)
   application for review is not appeal
    (1889) 16 Cal 759 (793)
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1 (1922) 1922 \11 206 (207) 41 \11 605

17

Note 14

1 (1913) 20 Ind Cas 670 (670) (Cal) [See also the following cases — (1331) 1931 111 323 (330) (1326) 1926 Cal 243 (245) (1913) 1919 Cal 287 (290 291) (1835) 22 Cal 984 (959) (1805) 22 Cal 734 (737 738) (1904) 8 Cal L Jour 204 (207)

(1870) 13 Suth W R 439 (440)

Note 11

3 (1919) 1919 Cal 1033 (1031)

In such appeal the Court has full power to go into the ments of the case and see whether the decree was properly passed 2 It could be urged in such an appeal that the Court which admitted the application for review had no juri-diction to do so 3

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There is nothing in the Code of Civil Procedure preventing a second anpucation for review where a previous application for review was made and rejected, provided such second application is based on grounds different from those taken in the first application 1

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The High Court will not interfere with the order of an appellate Court dismissing an appeal against the grant of review unless there is a want of jurisdiction or there is an illegality or material irregularity in passing such an order1 nor will it interfere with an interlocutory order granting review for a sufficient reason. But where the first appellate Court allows an appeal against an order granung review on the grounds other than those mentioned in this Rule it acts without jurisdiction and the order is hable to be set aside in revision 3 Where a Court subordinate to the High Court rejects an application for review of judgment refusing to consider the grounds of the same and thus fails to perform its duty, it is competent to the High Court under its general powers of superintendence to direct such Court to proceed according to law 3a (See also Note 27 to S 115 ante and the undermentioned cases) 4

2 (1915) 1918 Cal G18 (G24) 45 Cal G0

(1924) 1924 Mad 602 (602) (1979) 13-9 Mad 261 (264) 3 (1904) 27 \Ind GO2 (CO7)

(1911) 11 Ind Cas 343 (343) 14 Oudh Cas

[See also (1609) 6 Lom H C R 1 C

2,5 (940) 1

Note 15

(1916) 1910 Mad 514 (514) (Sec also (1889) 1889 All W N 170

(181) ] 3a (1975 78) 1 All 206 (207) (1934) 1934 All 271 (271)

4 (1909) 2 Ind Cas 488 (489) (Mad) Small Causes Court

(1924) 1924 All 759 (700) (Do )

(18.0) 13 Mad 178 (181) (Do ) (1934) 1934 All 250 (201) Order allowing roview by trial Court-High Court

can revise such order even if on appeal to lower appellate Court order has been modified (1919) 1913 Mad 111 (112) Although O 47

R 7 of the C P Code is not applicable to Small Cause Courts its provisions will guide the discretion which the High Court possesses under S 25 of the Provincial Small

(See also (1906) 4 Cal L Jone 46 [See however (1889) 16 Cal 749 (752)]

Note 16 1 (1925) 1925 Oudh 223 (224)

[See (1899) 11 All 283 (385) No in terference in ravision as there is a remedy by way of appeal from the final decree at the rehearing ] 2 (1912) 16 Ind Cas 995 (995) 1913 Pan Re

No 11 (t8:0) 13 Suth W R 439 (440) 3 (1929) 1929 Rang 105 7 Rang 187 (1925) 1925 All 395 (396)

to revision by the High Court (1929) 1929 Ali 375 (3"6) Order of the lower appellate Court jostponing consi

xer

(1928) 1928 All 392 (394) 50 All 801 Review granted on a ground not good in law-No revision lies (1932) 1932 Nag 177 (179) 28 Nag L R 221

R. S. [S 630] When an application for review is gran

Registry of appli cation granted and order for re bearing

ted, a note thereof shall be made in the register and the Court may at once re-hear the case or make such order in legald to the rehearing as it thinks fit

[1877 —S 630; 1859—S 380]

Sunovsis

Effect of review on the original decree 3 What question may be gone into after the grant of review

1 Procedure on review

from the Rule itself

1

The Rule applies to High Courts and Small Cause Courts There are three stages in the proceedings for review1 -

- (1) An ex parte application and notice thereon
- (2) The hearing of the application after such notice

(3) Re hearing of the case after granting the application for revie This Rule refers to the procedure to be followed when an order granting a review is passed. The Court ought to make a record of the fact that the review has been granted 2 The Court can thereafter proceed to hear the case at once3 or may make such order as to re-hearing as it thinks fit 4 This is clear

2 What question may be gone into after the grant of review

A Court, in granting a review, can make a qualified order as to the extent to which the review should be carried out 1 It is not bound to hear the whole case 2 Nor on the other hand is it restricted to the particular ground on which the application was granted 3 It depends upon the circumstances of each ease whether the whole ease should be re-opened or whether it should be re tried in part only 4 When, on a review application an order dismissing an appeal under O 41 R 11 is set aside the whole appeal may be heard 4 But grounds not mentioned in the memo of appeal cannot be held A party alo

Appeal from order graning review -Appellate Court confusing bet ween reasons for review and order on review acts illegally-Revision lies

> (1913) 20 Ind Cas 6 0 (672) (Cal) (1887) 12 Cul L Rop 64 (79) [But see (1815) 24 Suth W R 12

(1871) 14 Suth W R 105 (106) (1910) 7 Ind Cas 1015 (1015 1016) 13 Oudh

Oudh Cas

. 1 (3).

not only had an opportunity of raising a question but who did ruse it in appeal and in the argument abandoned it cannot be allowed to agitate the question again on review 6 The Court has a discretion to receive at the hearing after review, documents which had not been tendered at the original hearing 7 But where a party obtained a review on the ground that upon the record he was eninled to full rebef he sought, the other side cannot be allowed to adduce evidence 4 Whether certain documents which have been admitted as evidence were so admissible or not, is not a point which can be argued on review 9

### 3 Ecifect of review on the original decree

1

Where an application for review is rejected, the original decree stands 1 Where an application for review is granted, the decree previously made is vacated - \ appeal will be then fore reainst such decree after the review is granted if an appeal has been preferred at cannot after the review is granted be proceed further? Where their hearing on testew 3 decree is passed modifying or c nirming the original decree it is a fresh decree and can be appealed agains within the rear I prescribed for an appeal An order granting revew is n t a final order of the C urt Se no leave to appeal to Privy Councl a le ainel n respect of su h un order 5

> R. S. [5 629 Last Para] No application to review an order made on an application for a review or a ar decree or order passed or made on a review shall be entertained

[1877—S. 629 ]

Inc

7 101 1

Other Topics

Second texten-Parted See Note 1 I t (1)

l Bar of certain applications

review les from-

(1) an order granting or rejecting an application for review or

the decree or order passed or made at the hearing on review A second review of the decree or order originally passed is barred

(310) 48 Lom 210 The judgment (F Bil

(15 , "1 1 1 om 543 (546) 0. (18" + 50 2 Mad 58 60)

7 (112s) 1979 Cal 416 (416) (1860) 12 Suth W R 223 (224)

8 (16"3) 90 Suth W R 225 (225) 9 (1875) 94 Suth W R 186 (187)

Note 3

1 (1913) 90 Ind Cas 647 (648) (11) (1906) 20 Lom 56 (60) (1872) 18 Suth W R 494 (495)

(1914) 1914 Mad 270 (271) (1866) 6 Suth W R (Mis) 102 (t03) (P B)

(1922) 1972 Oudh 148 (148) 24 Oudh Cas

eriod of limitation for execution runs from date of revised decree even against persons who were not larties to the

review application (1913) 20 Ind Cas 647 (648) (411) [See however (1924) 1924 Born 310 C P C 357 t 358

(1930) t920 Lah 18 (19) 1919 Pun Re

No 166 (1970) 1920 Lab 333 (333) 1919 Iun Re

4 (1928) 1928 Cal 418 (419) (1890) G Cal 22 (25)

5 (1928) 1928 Cal 418 (419) (1932) 1932 All 318 (318) 54 \11 401 28a0REVILW ScH

under this Rule as it is practically for the review of the order passed on review.1

# Local Amendments

Add the following as R 10 -10 Rule 38 of O 41 shall apply, so far as may be to pro cedings under this Order' BOMBAY

The following shall be added as R. 10 -Applicability of R 38 10 Rule 38 of O 41 shall apply so far as may of O 41 be to proceedings under this order

OUDH Add the follo ving as R 10 -10 Rule 33 of O 41 shall apply so far as may be to proceedings under this

10 Rule 38 of O 41 shall apply, so far as may

be to proceedings under this Order

SINO Ad I the following as R 10 -

# ORDER XLVIII.

# MISCELLANDOUS

R. 1. [S 93] (1) Every process assued under this Code shall be served at the expense Process of the party on whose behalf it is issued, unless served at expense of party issuing

the Court otherwise directs (2) The Court-fee char geable for such service shall be paid within a time to be fixed before Costs of service the process is issued

[1877-S 93, 1861-S 2]

# Local Amendments

Applicability of R 38

of O 41

ALLAHABAD

1

ALLAHABAD Before the words Every pro ess assued | trofix the words | Lucopt as | ror led 12 O 4 R 1 (2)

CALCUTTA Substitute for sub rule (2) the following -(2) The Court fee chargeable for such service shall be paid when the pro cos s sp

lied for or within such time if any as the Court may when ordering its is us fix for the purpose NAGPUR

To sub R (2) of R 1 of O 48 profix the vords | Lucept as provided in O 4 R 1 of and substitute the word the for The

оион In R 1 before the words I very proces issued | prefix the words | Except as provided in O 4 R. 1 (2)

(1663 0) & Mad 11 6 It 3 3 (3 1 3 a) Order 47, Rule 9-Note 1

(16.J3 1900) 1593 1900 L B R 5-0 [But see (1866) 5 Suth W R 93 ( ) I (1833) 16 Cal 749 (752) 16 Ind hpp 101 (1 C) (1911) 10 Ind Cas 6 9 (631) (Lah) (156 ) 7 Suth W R 461 (463) (1 II) C. e ut der Code of 15.9] (153 ) 1532 1 un Re \o 57 page 0" (15 4) 18 8 I un Re No 6 1age 54 under Lode of 1832

#### Other Torres

Remi sion of Court fee See \ 1 1t (9) Sca N 1 1 1 (2) Unless the Court otherwa e directs

I Process to be served at the expense of the party applying

7

Ordinarily a party applying for a process on his behalf should pay for the expenses thereof. But the Court has power, under special circumstances, o direct that any other party shall bear the expenses 1 But the words unless the Court otherwise directs should not be construed as giving the Court any power to remit the fees leviable under the Court Fees Act 2 The Court should under Cl 2 of the rule fix a time for the payment of process fee and it is only in default of payment within such time that it can dismiss suit for default. Where no such time is fixed in the order, a dismissal for non payment of process fees is not proper 3 The time that a Court fixes for payment must be such as to give reasonable facilities to a litigant to obey such order and thus enable him to get the aid of the Court in the matter of summoning his witnesses an order to pay process at once is against the spirit of the Rule 4

This Rule which applies to payment of process fees does not apply to filing of the process forms in the manner provided by the High Court Rules, and no time need be given for the same 5 See also S 143 ante

R. 2. [S 94 Cf S 122] All orders, notices and other documents required by this Code to be given to Orders and notices or served on any person shall be served in the how served manner provided to: the service of summons

In the manner provided for the service of summons -See O 5 ante This Rule is not applicable to suits for recovery of rent under the Bengal Tenancy Act (Act VIII of 1885 as amended by Act IV of 1928), vide S 14S, sub S (a) thereof

R. 3. [S 644] The torms guen in the appendices, with such variation as the cheumstances of each Use of forms in appendices case may require, shall be used for the purposes therein mentioned

[1877-S 644]

# Local Amendments

RANGOON The following shall be added to O 48 R 3 -

> The words or such forms as may be prescribed by the High Court of Judicature at Rangoon shall be inserted after the word. Append ces

1 Use of forms in appendices -See the case noted below 1

#### Local Amendments OUDH

The following is added as R 4 -

4 Except as otherwise provided in every interlocutory proceeding and in every

- Order 48 Rule 1-Note 1
- 1 (1899) 26 Cal 124 (126 174) 2 (1899) 26 Cal 124 (126 174) 2 (1899) 26 Cal 124 (126) (1927) 1927 Pat 318 (318) 3 (1924) 1924 Nag 298 (299)

- (1869) 11 Suth W R 290 (290) 4 (1924) 1924 Nag 271 (275) 20 Nag L R 145
- 5 (1921) 1921 Pat 428 (429)
- Order 48 Rule 3-Note 1 1 (1897) 94 Cal 766 (772)

proceeding after decree in the tril Court the Court may either on the application of any party or of its own motion dispense with service upon any defendant who has not appeared or upon any defendant who has not filed a written statement.

# ORDER XLIX

# CHARTERED HIGH COURTS R. 1. [S 636] Notice to produce documents, summonses

Who may serve to witnesses, and every other judicial processing form of the exercise of the original civil judicial momal testamentary and intestate jurisdictions, except sum monses to defendints, writs of evecution and notices to responsemployed by them, or by such other persons as the High Court

[See Ss 116 to 120 and Ss 121 to 131]

Order by persons employed by them

by any rule or order, directs

Persons employed by attorney means persons in their regular service and not persons engaged for a special purpose. Thus a village headman specially employed for serving a notice is not a person employed by the attorney within the meaning of this Rule.

Orders 49 to 51 are not applicable to the Rangoon Small Cause Courts vide S 111 Cl (d) of Act VII of 1920 (The Rangoon Small Cause Courts Act)

R. 2. [New.] Nothing in this Schedule shall be deemed to limit or otherwise affect any Rules in force at the of Chartered High Courts, a Chartered High Court the recording of judgments and orders by a Chartered High Court

[Sec S 157]

[060 0 101

1 Scope of the Rule S 633 of the old Code provided that the High Court shall take endence and record judgments and orders in such manner as it by rule from time to time directs. Where Rules had been framed under that section and were in force at the time of the passing of this Code the Rules of the 1st Schedule is to the mode of taking evidence and of recording judgments would rot affect those Rules. ī.

R. 3. [Ct S 638] The following Rules shall not apply to any Chartered High Court in the exercise of its Application of ordinary or extraordinary original civil juris-Rules diction, namely --

(1) Rule 10 and Rule 11, Clauses (b) and (c) of Order VII;

(2) Rule 3 of Order X: (3) Rule 2 of Order X VI;

(4) Rules 5, 6, 8, 9, 10, 11, 13, 14, 15 and 16 (so tar as relates to the manner of taking evidence) of Order X VIII,

(5) Rules 1 to 8 of Order XX . and

(Sec >> 116 to 120 and Ss 121 to 131 ]

(6) Rule 7 of Order XXXIII (so far as relates to the making of a memorandum);

and Rule 35 of Order XLI shall not apply to any such High Court in the exercise of its appellate jurisdiction

# Local Amendment

## BOMBAY

In R 3 the word and namediatel preced ng Paragraph (6) hall be omitted and the following I aragraph shall be inserted bet saan Paragraphs (5) and (6) namely -(a a) R 72 4 of Order 21 and

For the word and figures R 35 occurring below item (6) of R 3 the voids and figures

Rr 31 and 35 shall be substituted

The following clause shall be inserted as clause (1) namely -

(1) R. 21 A of O u

For the existing clause (1) the following shall be substituted namely -

(1 a) Rr 10 and 11 clauses (b) and (c) and Rr 19 to 26 of O 7 Below clanso (1 a) the following shall be insarted namely -

(1 b) Rr 11 and 12 of O 8 1 elo v clause (6) the following shall be inserted namely -

(7) Rule 38 of O 41, and

The following shall be added as R 4 -

4 Under S 123 Paragraph 2 Clause (1) of the Civil 1 recedure Cele of 1903 the following power is delagated to the Registrar of the High Court Appellate Side

Where on a memorandum of appeal presented within the time prescribed for the same the whole or any part of the fee prascrabed by the law for the time being in force relating to Court fees has not been paid the Registrar may in his discretion allow the appellant to pay the whole or part as the case may be of such Court ices and may admit the appeal to the register even though the subsequent payment of Court tee may have been made after the time prescribed for presen tation of the appeal

1 Application of O 41 R 10 to Chartered High Courts - See Note 3 to S 117 ante

## ORDER L

# PROVINCIAL SUALL CAUSE COURTS

[New ] The provisions hereinafter specified shall not extend to Courts constituted under the Provincial Smull Cause Courts Act, 1887, or to Courts exer-Provincial Small Cause Courts cising the jurisdiction of a Court of Small Causes under that Act, that is to say(a) so much of this Schedule as relates to-

(1) suits excepted from the cognizance of a Court of Small Causes or the execution of decrees in such suits ;

(ii) the execution of deerees against immovable property or the interest of a partner in partnership property;

(iii) the settlement of issues: and

(b) the following Rules and Orders,-Order II, Rule 1 (frame of suit):

Order X, Rule 3 (record of examination of parties); Order XV, except so much of Rule 4 as provides for the

pronouncement at once of judgment: Order XVIII, Rules 5 to 12 (evidence);

Orders XLI to XLV (appeals);

Order XLVII, Rules 2, 3, 5, 6, 7 (review);

Order LI. [See S. 7 and O. 20, R. 4.]

1 Provincial Small Cause Courts - See Notes to S 7 and Note 8 to 0 20 R 4, ande

# ORDER LI.

# PRESIDENCY SMALL CAUSE COURTS.

R. 1. [New.] Save as provided in Rules 22 and 23 of Order V, Rules 4 and 7 of Order XXI, and Rule 4 of Presidency Small Order XXVI, and by the Presidency Small Cause Cause Courts Courts Act, 1882, this Schedule shall not extend to any suit or proceeding in any Court of Smull Causes established in

the towns of Calcutta, Madras and Bombay. Local Amendments

ALLAHABAD

Add the following as O 52, R 1 -"I Rule 38 of O 41 shall apply, so far as may so to proceedings under S 115 of the Code "

BOMBAY

The following shall be added as O 52 -

Applicability of R 38 "I Rule 39 of O 41 shall apply, a ar as may le, of O 41 to proceedings to proceedings under S 115 of the C c under S 115

OUDH

After O 51 add the following as O. 52 -"Rule 33 of O 41 shall apply, so far as may be, to proceedings under S 115 of the Code "

RANGOON

Order 52 - Bules of procedure to be followed in the Appellate Side of the High Court of Rangoon [Omitted ] Order 53 -Rules for the conduct of suits in the Small Cause Court at Rangon's

(Omitted ) Order 54 -Rules for the classification and arrangement of Civil Records [Omlited]

SIND Add the following as O 52 -Applicability of R 38

Rule 33 of O 41 shall apply, so far as may be of O 41 to proceedings to procesdings under S 115 of the Code " under S 115

Defendant

# APPENDIX A

#### PLEADINGS

| (I) TITLES OF SUITS |
|---------------------|

| IN | THE COURT OF                      |         |
|----|-----------------------------------|---------|
| 4  | B (ald description and residence) | Plainty |
|    | artinst                           |         |

(2) DESCRIPTION OF PARTIES IN PARTICULAR CASES The Secretary of State for India in Council

The Advo ata Ceneral of

C D fell leserant on and replement

The Collector of

The State of

- he t B Company Limited having its registered office as
- A B a public officer of the C D Company
- A B (add description and residence) on behalf of himself and all other creditors of C D , late of (ald description and residence)
- A D (add description and residence) on behalf of hunself and all other holders of debentures resued by the Company Limited

The Official Receiver

- A B a minor (add description and residence), by C D for by the Court of Wards], his next friend
- A B (add description and residence), a person of unsound mind [or of weak mind], by C D, his next friend
  - A B, a firm carrying on business in partnership at
- A B (add description and rendence), by his constituted attorney C D (add description and residence)
  - A B (add description and residence), Shebalt of Thakur
  - A B (add description and residence), executor of C D , deceased.
  - A. B (add description and residence), heir of C D , deceased

rupces

(3) PLAINTS No 1.

MONEY LENT

(Tatle )

A B, the above named plaintiff states as follows -On the

day of 19 , he lent the defendant repayable on the day of

2 The defendant has not paid the same except runces paid on the day of

[If the plaintiff claims exemption from any law of limitation, say --]

till the 3. The pluntiff was a muor [or meane] from the day of

[l'acts showing when the cause of action arose and that the Court has jurns liction ]

The value of the subject matter of the sunt for the purpose of jurisdiction is rulees and for the purpose of Court fees is

rupees 1er cent from The plaintiff claims rupces with interest at the

19 No 2

MONEY OVERPAID.

(Tatle)

day of

if B, the above named plaintiff, states as follows day of On the

19 , the plaintiff a reed to buy annas fer and the defendant agreed to soll burs of silver at tola of fine silver 2 The plaintiff procured the said birs to be assayed by EF, who was 1 and by the

defendant for such wasy and F f, declared each of the bars to contain 1 000 teles of fine silver and the plaintiff accordingly paid the defendant

Each of the said hars contained only 1 200 tolas of fine silver, of which fact the plaintiff was ignorant when he made the payment

4 The defendant has not repaid the sum so overpaid

[As in paras & and 5 of Form No 1, and relief claimed ]

No 3

# GOODS SOLD AT A LINED PRICE AND DELIVERED

(Trile)

A B, the above named plaintiff states as follows -

L F , sold and delivered to the 1 On the day of 19 defendant [one hundred ba rels of flour, or the goods mentioned in the schedule hereto annexed, or sundry goods ].

rupees for the said goods on delivery 2 The defendant promised to pay , some day before the plaint was filed] for on the day of

3 He has not puld the same 4 L F died on the

19 . By his lat will be la j of appointed his brother, the plaintiff, his executor [As in paras 4 and 5 of Form No 1]

The plaintiff as executor of F F claims [lelief claimed]

No 4

#### GOODS SOLD AT A REASONABLE PRICE AND DELIVERED (Tatle )

i B, the above named plaintiff, states as follows 19 , plaintiff sold and delnerel day of to the defendant [sunley articles of house furniture], but no express agreement was made as 10 the price

2 The goods were reasonably worth rupces 3 The defendant has not paid the money (is in parcs, i and 5 of Form No 1, and Relief claimel) PLEADINGS

#### I.

# No 5. GOODS VIADE AT DEFENDANT'S REQUEST, AND NOT ACCEPTED

# (Table)

A B the above named | luntiff, states as follows -

1 On the day of 19 E F agreed with the plaintiff that the plaintiff should make for him [six tables and fifty chairs] and that E F should pay for the goods on delivery rupces

2 The plaintiff made the goods and on the 19 . ofcred to deliver them to L I and has ever since been ready and willing so to do

3 L F has not accepted the goods or paid for them

[As in paris 4 and 5 of Form No 1 and relief claim, 1]

#### No 6

### DEFICIENCY LION ARE SALL [GOODS SOLD AT AUCTION] (Tatle )

A B the above named plaintiff states as follows -

1 On the day of day of 19 the plantiff put up at auction candry (goods) subject to the condition that all goods not paid for and removed by the purchaser within [ten days] after the oile should be resold by auction on his account of

which condition the defendant had notice 2 The defendant purchased [one crate | cracker f] at the auction at the pice of

rupecs

3 The plaintiff was ready and willing to deliver the goods to the defendant on the date of the sale and for [ten days] after

4 The defendant did not take away the goods purchased by him nor pay for them within [ten Ja is] after the sale nor afterwards the plaintiff re sold the

o On the

rubees

day of [crate of cro kery] on account of the defendant by public auction for rupees 6 The expenses attendant upon such resale amounted to rupees

The defendant has not paid the deficiency thus arising amounting to

( is in varas 4 and 5 of I over No 1 and Relief clas ed ]

No 7

SERVICES AT A REASONABLE RATE

(Tyle)

A L the above named plaintill states as follows -

day of 19 and the 1 Letween the day of plaintiff Lexecutel sintry drawings designs ard diagrams) for the defendant at his request but no express agreement was made as to the

sum to be paid for such services 2 The servi es vere reasonably worth runees

I The defendant has not pa d the money

[ is in garas 4 and 5 of For a No 1 a l Relief classel ]

No 8

## SERVICES AND MATERIALS AT A REASONABLE COST

### (Title)

A B the above named plaintiff states as follows -

1 On the day of at the plaintiff built a house [known as No and furnished the materials therefor for the defendant at his request but no express agreement was made as to the amount to be paid for such work and materials

2 The work done and materials supplied were reasonably worth

rnpees. 3 The defendant has not paid the money

[As in paras 4 and 5 of Fore Na 1 and Relief claused ]

# No 9

USE AND OCCUPATION.

|                                 | (Title )          |           |    |             |           |
|---------------------------------|-------------------|-----------|----|-------------|-----------|
| A B, the above named plaintif   | f executor of the | will of Y | Y, | , deceased. | states 23 |
| 1 That the defendant occupied t | he [house No      | ,         |    | Street      | , by per  |

mission of the said X Y , from the day of 19 . until the day of 19 and no agreement was made as to pay. ment for the use of the said premises

2 That the use of the said premises for the said period was reasonably worth

3 The defendant has not paid the money

x

[As an paras 4 and 5 of Form No 1]

6 The plaintiff as executor of X Y claims [Relief claime !]

No 10 ON IN IWIRD

(Title) A B, the above named plaintiff, states as follows -

1 On the day of

19 , the planutiff and defendant, having a difference between them concerning [a demand of the plaintiff for the price of ten harrols of oil which the defendant refused to pay ] agreed in writing to submit the differen a to the arbitration of E F and G H, and the original document is annexed hereto

19 , the arbitrators awarded that the day of defendant should [pay the plaintiff rupees]

3 The defendant has not paid the money

[4s sn paras 4 and 5 of Form No 1 and relief claime 1]

No 11

ON A FOREION JUDGMENT

(Title) A B. the above named plaintiff, states as follows -

in the State for 1 On the day of 19 . at Charle

2 The detendant has not paid the money,

[As in paras 4 and 5 of Form No 1 and relief claime 1]

No. 12

GAINST SURETY FOR PAYMENT OF RENT. (Tulle )

A B, the above named plaintiff, states as follows -

19 , E F , hired from the plat. if day of 1 On the years, the [house No for the term of

rupees, payable [monthly] at the annual rent of 2 The detendant agreed, in consideration of the letting of the premises to F F, to

guarantee the punctual payment of the rent rupesta 13 . amounting to 3 The rent for the month of

has not been paid [If, by the terms of the agreement, notice as required to be given to the surety, add --] 19 , the plaintiff gave notice to the day of

detendant of the non-payment of the rout, and demanded payment thereof 5 The detendent has not paid the same

(is in paras 4 and 5 of Form No 1 and relief claime!)

#### No. 13. ERFACH OF AGREEMENT TO PURCHASE LAND

(Tatle )

4 E the above named plaintiff states as follows -1 On the day of the plantiff and defendant en red into an agreement and the original document is hereto auusred

[ r on the day of

19 the plaintiff and defendant m tually agreed that the plaintiff should sell to the defendant and that the defendant should purchs e from the plaintiff forty highes of land in the village of

rapces 1 2 On the day of 19 the ilintiff being then the accolute owner of the property [and the came being free from all incumbrances as was made to appear to the defendant! tendered to the defendant a sufficient instrument of transfer of the same (or was read, and willing and is still read, and willing and offered to transfer the same to the defendant by a sufacient instrument] on the proment by the defendant of

t... sum agreed upon 3 The defendant has n t pul the money.

. Irin prog 4 and sof I rm No 1 and relief claimed ]

Local Amendment

Bengal

I.

Can of the w d and subtitut ther fr the wrl

No 14

#### N T DELIVERING GOODS SOLD

(Title )

A D the above named planning states as follows -

1 On the day of 13 the plaintif and defendant mutually agreed that the defendant should detrice (one hundred barrels of flour) to the day of plaintiff on the 19 and that the plaintiff should pay therefor

rupers on delivery 2 On the [eard] day the plaintiff was roady and willing and offered to pay the defendant

the said cum upon delivery of the goods 3 The defendant has not delivered the goods and the plaintiff has been deprived of the profits which would have accrued to him from such delivery

[As in paras 1 and 5 of Forn No 1 all relief claimed ]

No. 15

# WRONGFUL DISMISSAL

(Table)

4 --- 4-4 ---

A B, the above named plaintiff, states as follows -

lefandant r in the plaintiff

rupees [monthly]

2 On the day of 19 , the plaintiff entered upon the service of the defendant and has ever since been and still is, ready and willing to continue in such service during the remainder of the said year whereof the defendant always has had notice

3 On the day of 13 . the defendant wrongfully dis charged the plaintiff, and refused to permit him to serve as aforesaid, or to pay him for his services

[As in paras 4 and 5 of Form No 1, and relief claimed ]

No 16

# BREACH OF CONTRACT TO SERVE

(Title) A B, the above named plaintiff, etates as follows - lix 1 On the day of 19 , the plaintiff and defendant mutuall agreed that the plaintiff should employ the defendant at an [annual] salary of

rupees and that the defendant should serve the plaintiff as [an artist] for the term of [one year]

2 The plaintiff has always been ready and willing to perform his part of the agreemen 19 , offered so to do] day of

3 The defendant [entered upon] the service of the plaintiff on the above mentioned day but afterwards on the day of 19 , he refused to serve the plaintiff a aforesaid

[ is in paras 4 and 5 of Form No 1, and Relief claimed ]

### No 17

### AGAINST A BUILDER FOR DEFECTIVE WORKMANSHIP (Tulle)

! B the above named plaintiff states as follows --

1 On the 19 , the plaintiff and defendant enterel day of into au agreement and the original document is hereto annexed [Or state the tener of to

contract ] [2 The plaintiff duly performed all the conditions of the agreement on his part ] 3 The defendant [built the house referred to in the agreement in a bad and unworkmin

like manuer]

[4s in paras 4 and 5 of Form No 1, and Relief claimed ]

No 18.

# ON A BOND FOR THE PIDELITY OF A CLERK

(Tatle )

A B the above named plaintiff, states as follows -19 , the plaintiff took E I into his 1 On the day of employment as a clerk

2 In consideration thereof on the agreed with the plaintiff that if E I' should not plaintiff, or should fail to account to the plaintiff for jerty received by him for the use of the plaint

whatever loss he might snstsin by reason thereof not exceeding rupees

[Or 2. In consideration thereof, the defendant by self to pay the plaintiff the penal sum of

L. F should furthfully perform his duties as clerk and can account to the plaintiff for all moneys, evidences of debt or other property which should be a any time held by him in trust for the plaintiff the bond should be void ] [Or, 2 In consideration thereof on the same date the defendant executed a soul is

favour of the plaintiff, and the original document is hereto ounexed) 3 Between the day of , and the

F F received money and other property, amountit, to the rupees, for the use of the ptuntiff, for which sum he has a value of recounted to him, and the same still remains due and napaid

[ ts in paras 4 and 5 of Form No 1, and Relief claimed ]

#### No 19

#### BY TENANT AGAINST LANDLORD, WITH SPECIAL DAMACE (Tatle).

! B the above named | laintiff, states es follows -13 , the defendant, brar , beerd

1 On the day of matrument let to the plaintiff [the house No Street] fer the ters of years, contracting with the plantiff, that he the plantiff, unl his legal representatives should quietly copy possession thereof for the said term 2 Alt conditions were futfilled and all things happened necessary to entitle the plaintif

to maintain this suit 19 , during the said term / /, who

was the lawful owner of the said house, lawfully evicted the plaintif thereform, and suit withholls the possession thereof from him

4 The plaintiff was thereby [prevented from continuing the business of a tailor at the said place, was compelled to expend rulees in moving and lost the custom c' II , and I J by such removall.

[4s in paras 4 and 5 of Form No 1 and Pelief claimed]

No 20

ON AN AGREEMENT OF INDIBINITY.

(Title)

f B the above named plaintiff states as lollows -

I.

1 On the day of 19 the plaintiff and defendant leing partners in trade under the style of 4 B and C D dissolved the partnership and mutually agreed that the defendant should take and keep all the partnership property pay all dell . cf the firm and indemnify the plainting against all claims that might be made upon h m on account of any indebtedness of the firm

2 The plaintiff duly performed all the conditions of the agreement on his part

19 (a judgment was recovered 2 On the day of arainst the Haintiff and defendant by E F in the High Court of Judicature at upon a debt due from the firm to F F and on the

day of

19 ] the plaintiff paid ruped The defendant has not paid the same to the plaintiff rupees (in satisfaction of the same]

'As in rorar 4 and 5 of Fore No 1 and Relief clay icll

No 91

## PROCURING TROPERTY BY TRAUD

(Totle)

4 P the above named plaintiff states as follows -

the defendant for the purpose 1 Ortho day of 19 of inducing the plaintiff to sell him certain goods represented to the plaintiff that [he the defendant was solvent and worth supees over all his liabilities]

2 The plaintiff was thereby induced to sell [and deliver] to the defendant [dry goods] of the value of rupees

3 The said repre entations were false [or state the particular falsehoods] and were then known by the defendant to be so

4 The defendant has not paid for the goods (Or of the goods were not delivere !) claintiff in preparing and shipping the goods and procuring their restoration expended

[ is in raras 4 and 5 of Ports No 1 and relief claimed]

No 22

FRAUDULENTEA PROCURING CREDIT TO BE GIVEN TO ANOTHER PERSON. (Title)

4 B the above named plaintiff states as follows -

1 On the day of 19 the defendant represented to the plaintiff that E F was solvent and in good credit and worth rupees over this liabilities for that E F then held a responsible situation and was in good treumstance rupees over all

and might safely be trusted with goods on credit] 2 The plaintiff was thereby induced to sell to E F [rice] of the value of

months credit]

ruj ees

fon 3 The said representations were false and were then known by the defendants to be so and were made by him with intent to deceive and defraud the plaintiff [or to deceive and

injure the plaintiff] 4 E F [did not pay for the said goods at the expiration of the credit aforesaid or] has not paid for the said rice and the plaintiff has wholly lost the same

[As in paras 4 and 5 of Form No 1 and relief claimed]

No 23

POLLUTING THE WATER UNDER THE PLAINTIFF'S LAND (Title)

4 B , the above named plaintiff, <tates as follows -

- 1 The plaintiff is, and at all the times hereinafter mentioned was possessed of certain and situate in and of a well therein, and of water in the well, and was entitled to the use and beneat of the well and of the water therein, and to have certain springs and streams of water which flowed and ran into the well to supply the same to flower run without being fouled or polluted
- 19 , the defendant wrongfully fouled and polluted the 2 On the day of well and the water therein and the springs and streams of water which flowed into the well
- 3 In consequence the water in the well became impure and unfit for domestic and other necessary purposes and the plaintiff and his family are deprived of the use and benefit of the well and water

[4s in paras 4 and 5 of I orm No 1, and Relief claimed]

#### No 21 CARRYING ON A NOXIOUS MANUFACTURE

(Title).

- A B, the above named plaintiff, states as follows -
- 1 The plaintiff is and at all the times hereinafter mentioned was possessed of certa a hands called . situate in
- the defendant has wrongfully caused to 2 Ever since the day ef issue from certain smelting works carried on by the defendant large quantities of offensive and unwheleseme smoke and other vapours and normus matter, which spread themselves ever and upon the said lands and corrupted the air, and settled on the surface of the lands
- 3 Thereby the trees, hedges, herbage and crops of the plaintiff growing on the hads were damaged and deteriorated in value, and the cattle and live steck of the plaintiff on the lands became t

4 The plain

might have dene has been prevented

he otherwise would have had

[As on paras 4 and 5 of Form No 1, and Relief claimed]

No 25

#### OBSTRUCTING A RIGHT OF WAY (Talle)

A B, the above named plaintiff, states as follows -

I The plaintiff is, and at the time bereinafter mentioned was, possessed of [4 house in the village of

2 He was entitled to a right of way from the (house) over a certain field to a pull) highway and back again from the highway over the field to the house, for himself and his versants (with vehicles, or on foot) at all times of the year

3 On the day of 19 defendant wrongfully obstructed the said way, to that the pisintificould not pass (with vehicles or on foot or in any manner) along the way (and has ever since wrongfully obstructed the same)

4 (State special damage if any)

[ is in paras 4 and 5 of Form No 1, and Rehef claimed]

No 26

OBSTRUCTING A HIGHWAY

(Tttle).

1 The defendant wrongfully dug a trench and heaped up earth and stones in the Public h chian leading from so as to obstruct it to

nas lit cuica etom assenante es mis puestocas e-e a e-o e attendance

[ is in pares, 4 and 5 of Form No 1, and Relief claimed]

No 27 DIVELTING A WATER COURSE.

(Tatle)

A B, the atore named p'a at fl, states as follows :-

I The plaintiff is and at the time hereinafter mentioned was possessed of a mill s tasted on a [stream] known as the in the viflage of district of

2 by reason of such passe such the plaintiff was entitled to the flow of the stream for working the mill 3 On the day of 19 the defendant by cutting the tank of the stream wrongfully diverted the water thereof so that less water ran into the

p'aint fi s mill

By reason thereof the plaintiff has been unable to grind more than sacks per day whereas before the said livers on of water he was able to grand sacks per dir

[As in 1 iras 4 and 5 of Loris Vo 1 and relief claimed ]

#### \n 98

#### OFSTRUCTING A RIGHT TO USE WATER FOR IRRIGATION (Title)

A B the above named plaintiff states as follows 1 Plaintiff is and was at the time hereinafter mentioned possessed of certain lands situate & c and entitled to take and uso a portion of the water of a certain stream for irrigating

the said lands

T

day of 19 the defendant prevented the I'aintiff from taking and using the said portion of the said water as aforesaid by wronginlly c' tructing and diverting the said stream

[As in paras, 4 and s of lorm No 1 and relief classed]

No 20

# INJURIES CAUSED BY NEGLIGENCE ON A RAILROAD

(Tatle ) A B the above named plaintiff states as follows -

1 On the day of 19 the defendants were common

carriers of passengers by railway between On that day the plaintiff was a passenger in one of the carriages of the defendants on

the said railway 3 While he was such passenger at

for near the station of

or between the stations of and ] a collision occurred on the said railway caused by the negligence and unshifulness of the defendants servants whereby the plaintiff was much injured (having hieleg broken hall end out ato and state the special damage of any as and incurred expense for medical attendance and is permanently disabled from carrying on his former business as [a salesman]

[As in paras 4 and 5 of Form No 1 and relief claimed ]

(Or thus -2 On that day the defendants by their carraints so ne highently and numbrilly drow and managed an engine and a train of carraiges attached thereto upon and along the defendants railway which the plantiff was then lawfully crossing that the said engine and train were driven and struck against the plantiff whereby etc as in part 3]

No. 30

#### INJURIES CAUSED BY NEGLIGENT DRIVING (I'tle)

i B the above named plaintiff states as follows -

1 The plaintiff is a shoemaker carrying on business at The de'endant is a merchant of

2 On the

day of

19 the plaintiff was walking

and control of the defendant a servants was negligently suddenly and without any warning turned at a rapid and dangerons pace ont of Middleton Street into Chowringhee The pole of the carriage struck the plaintiff and knocked him down and he was much trampled by the horses

By the blow and fall and trampling the plaintiff a left arm was broken and he was truised and injured on the side and tack as well as internally, and in consequence thereof the plaintiff was for four months all and in suffering, and unable to attend to his business, and incurred heavy medical and other expenses, and sustained great loss of business and profits

[ is in paras 4 and 5 of Form No 1, and relief claimed ]

No 31

# FOR MALICIOUS PROSECUTION

(Tatle.)

B, the above named plaintiff, states as follows -1 On the

19 , the defendant obtain a warrant of arrest from

[a Magistrate of the said city, or as the case may be] on a charge of , and the plaintiff was arrested thereon, and imprisoned he [days or bonrs and gave bul in the sum of

rupees to obtain his release ?

2 In so doing the defendant acted maliciously and without reasonable or probable cia : 3 On the 19 , the Magistrate dismissed th day of complaint of the defendant and acquitted the plaintiff

# Mar of the said a plaintiff suffe was injured ment and in

c

[49 in paras 4 and 5 of Form No 1, and relief claimed ]

No 32

# MOVEABLES WRONGFULLY DETAINED.

(Title)

i B the above named plaintiff states as follows -1 On the day of 10 plaintiff owned for silet fit should be plaintiff owned for silet fit should be possession; the goods mentioned in the schedule hereto annu I for deterbed it goods; the estimated value of which is

2 From that day until the commencement of this suit the defendant has detained the

same from the plaintiff 3 Before the commencement of the suit, to wit on the

19 , the plaintiff demanded the same from the defendant, but he related to deliver them

[4s in paras 4 and 5 of Form No 1] 6 The plaintiff claims rupees in case delis if (1) delivery of the said goods, or

cannot be had . (2) rnpes compensation for the detention thereof

The Schedule

No 33 AGAINST A FRAUDULENT PURCHASER AND HIS TRANSFIRET WITH NOTICE (Title )

A B, the above named plaintiff states as follows -

1 on the day of 19, the defendant C B, for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that rupees over all his technical.

2 The plaintiff was hereby induced to self and deliver to C D [one handed boxes of teal, the estimated value of which is

The sald representations were take, and were then known by C D to to for at the time of making the raid representations, C D was insolvent and tree himself to be so ]

4 C D afterwards transferred the said goods to the defendant F without conf deration (or who had notice of the falsity of the representation)

#### [ is an preas 4 and 5 of Ferm No 1 ]

7 The plaintiff claims-

1.

to

31

(1) delivery of the said goods or

ruples in case delivery

caunot be had 12)

rupees compensation for the detention thereof

No 31

# RESCISSION OF A CONTRACT ON THE GROUND OF MISTANI

(Tatle ) A B the above named plaintiff at ites as follows -

1 On the day ef 19 , the defendant represented the plaintiff that a certain piece of ground belonging to the defendant, situated

contained [ten bighas] 2 The plaintiff was thereby induced to purchase the same at the price of

rupces in the belief that the said representation was true, and signed of which the original is hereto annexed. But the land has not been an agreement transferred to him

3 On the dur of 19 . the plaintiff paid the defeudant rupees is part of the purchase meney

4 That the sail piece of ground contained in fact only [five bighas]

As in paras 4 and 5 of Form No 11

7 The plaintiff claims-(1)

rupees with interest from the day of

(2) that the ward agreement be delivered up and cancelled

No. 35

#### IN INJUNCTION RESTRIAINING WASTL (Totle )

A B. the above named plaintiff, states as follows -

1 The plaintiff is the absolute ewner of [describe the property]

2 The defendant is in possession of the same under a lease from the plaintiff 3 The defendant has fout down a number of valuable trees and threatens to out down

many more for the purpose of sale) without the consent of the plaintiff [As in paras 4 and 5 of Form No 1]

6 The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further waste on the said premises

[Pecuniary compensation may also be claimed ]

No 26

### INJUNCTION RESTRAINING NUISANCE

(Talle) A B, the above camed plaintiff, atates as fellows -

1 Plaintiff is, and at all the times hereinafter mentioned was, the absolute owner of [the house No Street Calcuttal.

2 The defendant is, and at all the said times was the absolute owner of [a plot of ground in the same street

3 On the day e1 19 the defendant erected upon his said plot a slaughter house, and still maintains the same, and from that day until the present time has continually caused cattle to be brought and killed there [and has caused the

blood and offal to be thrown into the street epposite the said house of the plaintiff) [4 In consequence the plaintiff has been compelled to abundon the said house and has been unable to rent the same ]

[As in paras 4 and 5 of Form No 1]

7 The plaintiff claims that the delendant be restrained by injunction from committing or permitting any further nuisance

# No 37 PUBLIC NUISANCE

(Tuile)

A B , the above named plaintiff, states as follows -

1 The defendant has wrongly heaped up earth and stones on a public road known as so as to obstruct the passage of the public along the same and threatens and intends unless restrained from so doing, to continue and repeat the said wrongful act

2 The plaintiff has obtained the consent in writing of the Advocate General [or of the Collector or other officer appointed in this behalf to the institution of this suit

[As in paras 4 and 5 of Form No 1]

5 The plaintiff claims-

(1) a declaration that the defendant is not entitled to obstruct the passage of the public along the said public road,

(2) an injunction restraining the defendant from obstructing the passage of the public along the said public road and directing the defendant to remove the earth and stones wrongfully heaped up as aforesaid

No 33

INJUNCTION AGAINST THE DIVERSION OF A WATER COURSE (Table )

4 B the above named plaintiff, states as follows -

[As an Form No 27 ]

The plaintiff claims that the defendant be restrained by injunction from diverting the water as aforesaid

No. 39

RESTORATION OF MOVEABLE PROPERTY THREATENED WITH DESTRUCTION, AND FOR AN INJUNCTION

(Title )

A B the above named plaintiff state, as follows -

1 Plaintiff is and at all times bereinafter mentioned was, the owner of [a portrait of his grand father which was executed by an eminent painter], and of which no duplicate exists for state any facts showing that the property is of a kind that cannot be repacted by 1 toney]

day of 2 On the safe keeping with the defendant

19 , he deposited the same for

19 , he demanded 3 On the day of

the same from the defendant and offered to my all reasonable charges for the storage of the same 4 The defendant refuses to deliver the came to the plaintiff and threatens to conceal

dispose of, cut or injure the same if required to deliver it up 5 No pecuniary compensation would be an adequate compensation to the plaintift for the loss of the [painting]

[As in paras 4 and 5 of Form No 1]

8 The plaintiff claims-

(1) that the defendant be restrained by injunction from disposing of, injuring of concerling the said [painting],

(2) that he te compelled to deliver the same to the plaintiff

# No 40

# INTER PLEADUR

1 B the above named plaintiff states as follows -

 Before the date of the claims herein iter mentioned G H deposited with the plaintiff [accessed the property] for [safe keeping]

2 The defendant C D, claims the same [under an alleged assignment thereof to him from G H]

3 The defendant E I also claims the same [under an order of G H transferring the same to him]

of the defendants

for charges and costs, and is ready

G The suit is not brought by collusion with either of the defendants

[4s m paras 1 and 5 of Fores No 1]

9 The plaintiff claims-

I.

(1) that the defendants be restrained by injunction from taking any proceedings against the plaintiff in relation thereto

(2) that they be required to interplead together concerning their claims to the said property

[(1) that some person be authorised to receive the and property pending such litigation ?

(4) that upon delivering the same to such [person] the plaintiff be discharged from all intellit to either of the defendant, in relation thereto

### No 41

# ADMINISTRATION BY CREDITOR ON BEHALF OF HIMSELF AND ALL OTHER CREDITORS

(Tatle )

f B the above named plaintiff states as follows—
1 E F late of was at the time of his death and his estate still is indebted to the plaintiff in the sum of Reve enset nature of lebt and security.

fany]

2 L L died on or about the day of . By bis last will dated the day of he appointed C D his executor for

derised his estate in trust ere or died intestate as the case may be]

3 The will was proved by C D [or letters of administration were granted etc.]
4 The defendant has possessed himself of the moveable (and immoveable of the proceeds of the immoveable property of F F and has not paid the plaintiff his debt.

[ to to paras 4 and 5 of Form Vo 1 ]

7 The plaintift claims that in account may be taken of the moveable (and immureable) property of F F decea ed and that the same may be administered under the decree at the Court.

# No 42

### ADMINISTRATION BY SPECIFIC LEGATEE

(Tatle)

[ Alter Form No 41 thus]-

[Omit taragraph 1 and commence paragroph 2] E. F., late of died on or about the day of Ly, he, last will, dated the day of be repointed C. D. his, executor, and

Lequeathed to the plaintiff [here state the specific legacy]

for paragraph 4 substitute-

The defendant is in possession of the moverble property of E F and amongst other things of the said [here name the subject of the specific bequest]

For the commencement of paragraph ? substitute-The plaintiff clums that the defendant may be ordered to deliver to him the said [here

name the subject of the specific bequest] or that ele

#### No 43

# ADMINISTRATION BY PECUNIARY LEGATER

(Title ) (Alter I ores No 41 thus)-

By his last

[O t it paragraph 1 and substitute for jaragraph 2] E F , lite of

, died on or about the day of will dated the day of he appointed C D his executor

and bequeathed to the plaintiff a legacy of rupees.

In paragraph 4 substitute legacy for dobt' inother fores

(Taile)

I I' the above named plaintiff states as follows -1 1 B of K in the died on the

day of he appointed the detendant By his last will dated the de safe and V N [who died in the testator's lifetime] his executors and bequeathed his property whether moveable or immoveable to his executors in trust to pay the rents and income there of to the plaintiff for his life , and after his decease and in default of his having a son who should attain twenty one or a daughter who should attain that age or marry upon trust as to his immoveable property for the person who would be the testators heir at law and as to his moverble property for the persons who would be the testator a next of kin if ha had died

intestate at the time of the death of the plaintiff and such failure of his issue as aforesaid 2 The will was proved by the defendant on the day of

The plaintiff has not been married

3 The testator was at his death entitled to moveable and immioreable preperty the defendant entered into the receipt of the rents of the immoveable property and got in the moveable property he has sold some part of the immoveable property

### (As in paras 4 and 5 of loris No 1)

6 The plaintiff claims-

(1) to have the moveable and immoveable property of A B administered in this Court and for that purpose to have all proper directions given and accounts

(2) such further or other relief as the nature of the case may require

No 44

## 1 VECUTION OF TRUSTS

(Tatle) B the above named plaintiff states as follows -

1 He is one of the trustees under an instrument of settlement bearing date on of made upon the marriage of L F and GH the father and mother of the defendant [or an instrument of transfer of the estate day of and effects of F F for the benefit of C D the defendant and the other creditors of

2 A B has taken upon himself the burden of the said trust and is in possession of (or of the proceeds of) the movesble and immovesble properts transferred by the said

3 C D claims to be entitled to a beneficial interest under the instrument

#### [As in paras 4 and 5 of Forit No 1]

6 The Plaintiff is decrous to account for iff the rents and profits of the said immoveable property [and the proceeds of the sale of the said or of part of the said immovemble property or moveable or the proceeds of the salo of or of part of the said moveable property or the profits accruing to the plaintiff as such trustee in the execution of the said trustle, and he prays that the Court will take the accounts of the and trust and also that the whole of the said trust estate may be administered in the Court for the lenefit of C D the defendant and all other persons who may be interested in such administration in the presence of C. D. and such other persons so interested as the Court may direct or that C D may show good cause to the contrary

[ B - B lere the suit is by a beneficiary the plaint ring bornolelled mutatis mutandiscu il e plaint le a le raice

#### No. 4a

#### FORECLOSURE OR SALE

Title )

- i Il the above named plantiff tate as follows -
- 1 The plaintiff is mortgages of lands belonging to the defendant
- 2 The following are the parts place of the mortgage -
  - (a) (date)

I.

- (b) (names of mortgagor und to rtate)
- (c) (sum secured)
- (d) (rate of interest)
- (c) () roperty subject to mortgage)
- (f) (amount now due)
- (g) lef the rlaintiff's title as derivative state shortly the transfers or devolution under which he ciaims)
  - (If the plaintiff is mortgagee in possession add)
- 3 The plaintiff took possession of the mortgaged property on the

day of and is ready to account as mortgages in possession from that time [As in paras 4 and 5 cf Lorm No 11

6 The Hamtiff claims-

- (1) payment or in default [sale r] foreclosure [an l possession]
- [Where Order 34 Rule 6 applies]
- (2) in case the proceeds of the sale are found to be insufficient to juy the amount due to the plaintiff then that liberity be reserved to the plaintiff to apply for a decree for the balance

#### No 46

# REDEMPTION

# (Tatte)

- A B, the above named plaintiff states as follows -
- 1 The plaintiff is mortgager of lands of which the defendant is mortgaged
- 2 The following are the particulars of the mortgage --
  - - (b) (names of mortgagor and mortgagee).
    - (c) (sum secured) (d) (rate of interest)

    - (e) (property subject to mortgage),
  - (f) (if the plaintiff's title is derivative state shortly the transfers or devolution under which he clauis)
    - (If the defendant is martgatee in possession, ad 1)
- 3 The defendant has taken possession [or has received the rents] of the mortgaged property.

# [As in paras 4 and 5 of Form No 1]

6 The plaintiff claims to redeem the said property and to have the same reconvered to him [and to have possession thereof]

# Local Amendment

# Allahahad

ix

In Forms Nos 45 and 46 of Appendex A, renumber Clause 6 as Clause 7 and insert the following as clause 6 -

"6 The persons, who, to the knowledge of the plaintiff, are interested in ' the mortgage' security or in the right of redemption are as follows, namely -

No. 47

## SPECIFIC PERFORMANCE (No. 1).

(Title )

A B the above named plaintiff, states as follows -

1 By an agreement dated the signed by the defendant, he contracted to buy of [or sell to] the plaintiff certain immoveable

property therein described and referred to for the sum of 2 The plaintiff has applied to the defendant specifically to perform the agreement on

his part, but the defendant has not done so 3. The plaintiff has been and still is ready and willing specifically to perform the agree ment on his part of which the defendant has had notice

[As an paras 4 and 5 of Form No 1]

6 The plaintiff claims that the Court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in full possassion of the said property for to accept a transfer and possession of the said property and to pay the costs of the aust

No 18

# SPECIFIC PERFORMANCE (No 2)

(Trile)

A B, the above named plaintiff states as follows -

(2)

19 , the plaintiff and defendant 1 On the day of entered into an agreement in writing and the original document is hereto annexed

The defendant was absolutely entitled to the immoveable property described in the agreement

19 , the plaintiff tendered 2 On the day of rupees to the defendant, and demanded a transfer of the suid property by a

sufficient instrument the plaintiff again demanded 3 On the day of

such transfer [Or the defendant refused to transfer the same to the plaintiff ] 4 The defendant has not executed any matrument of transfer

5 The plaintiff is still ready, and willing in pay the purchase money of the said projectly to the delendant .[As in paras 4 and 5 of Form No 1]

8 The plaintiff claims-(1) that the defendant transfers the said property to the plaintiff by a sufficent instrument [following the terms of the agreen ent] .

rupees compensation for withholding the same

# No. 49 PARTNERSHIP

(Tatle ) 4 B, the above named plaintiff, states as follows —

1 He and C D, the defendant have been for years [or months ast carrying on business together under articles of partnership in writing [or under a deed, or under a verbal agreement]

2 Several disputes and differences have arisen between the plaintiff and defendant as ench partners whereby it has become impossible in carry nu the business in partnership with advantage to the partners [Or the defendant has ensumitted the following breaches of the partnership articles -

(1) (2) (3)

Ť.

1

[As in paras 4 and 5 of Form No 1]

5 The plaintiff claims-(1) dissolution of the partnership

(2) that accounts be taken

(3) that a receiver be appointed

(NB-In suits for the winding up I any partnership on it the claim for dis solution, and instead insert a paragraph state if the facts of the partnership having been destolsed )

#### (4) WRITTEN STATEMENTS

General defences

Denial The defendant denies that (set out facts)

The defendant does not admit that (set out facts) The defendant admits that but says that

The defendant denses that he is a partner in the defendant Protest firm of

The defendant denies that he made the contract alleged or any contract with the plaintiff

The defendant denies that he contracted with the plaintiff vs alleged or at all

The defendant admits assets but not the plaintiff a claim

The defendant denies that the plaintiff sold to him the good, mentioned in the plaint or any of them

The suit is barred by article or article Limitation of the second schedule to the Undian Limitation Act 1877 The Court has no inrisdiction to hear the suit on the ground Jurusdiction

that (set forth the grn inds) a diamond ring was delivered by the On the day of defendant to and accepted by the plaintiff in discharge of the alleged cause of action

The defendant has been adjudged an insolvent

The plaintiff before the institution of this suit was adjudged an insolvent and the right to sue vestel in the receiver

The defendant was a minnr at the time of making the alleged Minority contract

The defendant as to the whole claim (or as to Rs part of the mnney claimed or as the case may be) has paid Payment into Court into Court Rs and says that this sum is enough

in satisfy the claimiff a claim (or the fart aforesaid) The performance of the promise alleged was remitted on Performance remitted

(date) the The contract was resunded by agreement between the plant Rescussion tiff and defendant

Res judicata

The plaintiff's claim is barred by the decree in suit (gite the re terences

Estoppel

tion of soil

The plaintiff is estopped from denying the truth of (i isert

Ground of defence subsequent to institu

statements as to which estoppel is claimed) because (here state the facts relied on as creating the estoppel ) Since the institution of the suit that is to say on the

No 3

# DEFENCE IN SUITS FOR GOODS SOLD AND DELIVERED

day of

1 The defendant did not order the goods

The goods were not delivered to the defendant

3 The price was not Rs

5 Except us to Rs

for!

same as \ \begin{pmatrix} 1 \\ 2 \\ 3 \end{pmatrix}

(set out facts)

7 The defendant [or A B the defendant a agent] satisfied the claim by payment before suit to the plaintiff [or to C D the plaintiff e agent] on the

day of 8 The defendant satisfied the claim by payment after suit to the plaintiff on the day of 19

No 9

#### DEFENCE IN SUITS ON BONDS

1 The bond is not the defendant a bond

2 The defendant made payment to the plaintiff on the day according to the condition of the bond

8 The defendant made payment to the plaintiff after the day named and before suit of the principal and interest mentioned in the bond

%a 3

### DEFENCE IN SUITS ON GUARANTEES

1 The principal satisfied the claim by Javment before suit

2 The defendant was released by the plaintiff giving time to the principal deblor in pursuance of a binding agreement

No 4

# DEFENCE IN ANY SUIT FOR DLBT

1 As to Re 200 of the money claimed the defendant is entitled to set off for goods old and delivered by the defendant to the plaintiff

Particulars are as follows -

1907 January 25 February 1st

2 As in the whole for as to Rs the defendant made tender before suit of Rs

Total part of the money claumed]

and has paid the same into

150

50

200

Court

2873

# No 5

#### DEFENCE IN SUITS FOR INJURIES CAUSED BY NEGLIGENT DRIVING.

1 The defendant deutes that the curriage mentioned in the plaint was the defen dunt's carriage and that it was under the charge or control of the defendant's servants The carriage belonged to Street Calcutts livery

stable keepers employed by the defendant to supply him with carriages and horses and the rerson under who e charge and control the said carriage was was the servant of the said

2 The defendant does not admit that the said carriage was turned ont of Middleton Street either negligently on idenly or without warning or at a rapid or dangerous pace

3 The defendant says the plaintiff might and could by the exercise of reasonable care and diligence have seen the said carriage approaching him and avoided any collision with it 4 The defendant does not admit the statements contained in the third paragraph of the

#### \0 t

#### DLFLNCE IN ALL SUITS FOR WRONGS

1 Denial of the several acts for matters] complained of

#### \n •

## DEFENCE IN SUITS FOR DETENTION OF GOODS

1 The goods were not the property of the plaintiff

2 The goods were detained for a hen to which the defendant was entitled I articulars are as follows -

1907 May 3rd To carriage of the goods claimed from Delhi to Calcutta -45 m junds at Re 2 per maund Rs 90

# No 8

#### DFFENCE IN SUITS FOR INFRINGENI NT OF COPYRIGHT

The llaintiff is not the author [assignee etc.]
 The book was not registered

I.

tlaint

3 The defendant did not infringe

#### No 9

#### DEFENCE IN SUITS FOR INFRINGEMENT OF TRADE MARK

i The trade mark is not the plaintiff s

2 The alleged trade mark is not a trade mark

3 The defendant did not infrince

#### No 10

#### DEFENCES IN SUITS RELATING TO MUISANCES

1 The plaintiff s lights are not ancient [or dony his other alleged pre-criptive rights] 2 The rlaintiff s lights will not be materially interfered with by the defendant s build

ings 3 The defendant denies that he or his servants pollute the water [or do what is com plained of]

[If the defendant claims the right by prescription or otherwise to do what is complained of. le nust say so and must state tie grounds of the claim se, whether by prescription grant or what]

4 The plaintiff has been guilty of laches of which the following are particulars --

1870 Plaintiff's mill began to work. 1871 Plaintiff came into possession

1883 First complaint

5 As to the plaintiff a claim for damages the defendant will rely on the above grounds of defence, and says that the acts complained of have not produced any damage to the plaintiff (If other grounds are relied on, they must be stated, e g, limitation as to past damagel

#### No. 11

#### DEFENCE TO SUIT FOR FORECLOSURE

1 The defendant did not execute the mortgage

2 The mortgage was not transferred to the plaintiff is more than one transfer is alleged, say which is denied) of the second schedula to the 'Indian

3 The suit is barred by article Limitation Act 1877

4 The following payments have been made, 127 -

(Insert date)-----

(Insert date)----, 5 The plaintiff took possession on the

has received the rents ever since

6 That plaintiff released the deht on the

7 The defendant transferred all his interest to A B by a document, dated

#### No 12

of

of the second

#### DEFENCE TO SUIT FOR REDEMPTION

1 The plaintiff's right to redeem is barred by article

schedule to the Indian Limitation Act, 1877 2 The plaintiff transferred all interest in the property to A B

3 The defendant by a document dated the day of transferred all his interest in the mortgage debt and property comprised in the mortgage is

A B 4 The defendant never took possession of the mortgaged property, or received the rents thereof

(If the defendant admits possession for a time only, he should state the time and army possession beyond what he admits)

#### No 13

#### DEFENCE TO SUIT FOR SPECIFIC PLRFORM ANCI

1 The defendant did not enter into the agreement

- 2 I B was not the agent of the defendant (if alleged by plaintiff)
- 3 The plaintiff has not performed the following conditions-(Conditions)
- 4 The defendant did not-(alleged acts of part performance)
- 5 The plaintiff s title to the property agreed to be sold is not such as the delegable is bound to accept by reason of the following matter-(state why)
  - 6 The agreement is uncertain in the following respects-(State them)
  - 7 (or) The plaintiff has been guilty of delay
  - 8 (or) The plaintiff has been guilty of fraud (or misrspresentation)
  - 9 (or) The agreement is unfair
  - 10 (or) The agreement was entered rute by mistake
  - 11 The following are particulars of (7), (8), (9), (10) (or as the east may be)

12 The agreement was rescinded under Conditions of Sale, No 11 (or by mutual egreement).

(In cases where damages are claimed and the defendant disputes his hability to darrages le must deny the agreement or the alleged breaches, or show whatever ofter ground of defence le entends to rely cu e r. tle Indian Limitation Act accord and satisfaction release fraud elc.)

#### No 14.

# DEFENCE IN ADMINISTRATION SUIT BY PECUNIARY LEGATER

- 1 4 B's will contained a charge of debts, he died insolvent, he was entitled at his death to some immoveable property which the defendant sold and which produced the net sum of R. and the testator had some moveable property which the defendant got in, and which reeduced the net sum of Rs
- 2 The defendant applied the whole of the said sums and the sum of Ra which the defendant received from rents of the immoveable property in the payment of the
- funeral and testameutary expenses and some of the debts of the testator 3 The defendant made up his accounts and sent a copy thereof to the plaintift on the
- day of 19 and offered the plaintiff free access to the vouchers to verify uch recount but he declined to wail himself of the defendant a offer
  - 1 The defendant ubmits that the planutifiought to pay the costs of the suit

# No L

# PROBATE OF WILL IN SOLEMN FORM

- 1 The said will and codicit of the deceased were not duly executed according to the provisions of the Indian Succession Act, IS65 [or of the Hindu Wills Act 18"0]
- 2. The deceased at the time the said will and codicil respectively purport to have been
- sxecuted, was not of sound mind memory and understanding 3 The execution of the said will and codicil was obtained by the unique influence of the plaintiff [and others acting with him whose names are at pre ent unknown to the
- defendant] 4. The execution of the said will and codicil was obtained by the fraud of the plaintiff such fraud so far as is within the defendant's present knowledge being [state the nature of the frau I]
- 5 The decased at the time of the execution of the said will and codical did not know and approve of the contents thereof for of the contents of the residuary clause in the said will as the case riay le]
  - C The decessed made his true last will dated the 1st January 1973 and thereby appointed the defendant sole executor thereof
    - The defendant claims-
      - (1) that the Court will pronounce against the said will aud codicil propounded by the
        - (2) that the Court will decree probate of the will of the deceased, dated the lat January 1873, in solemn form of law

No 16

# PARTICULARS (O G R 5)

(Tatle of sust )

The following are the particulars of there state the riotters in respect of thick parts Particulars culars have been ordered) delivered pursuant to the order of the

(Here et out the particulars ordered in paragraphs if necessary)

ıx

# APPENDIX B.

# PROCESS.

No 1

SUMMONS FOR DISPOSAL OF SUIT (0 5, Rr 1, 5) (Tatle )

To

[Name description and place of residence.]

Whereas has instituted a suit against you for you are hereby summoned to

appear in this Court in person or by a pleader duly instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some person able to answer all such questions on the day of o clock in the

and as the day fixed for your appearance is appeara you must be prepared to produce on that day all the

the documents upon which you intend to rely in support of your defence,

Take notice that, in default of your appearance on the day before mentioned, the suit will be heard and determined in your absonce day of

Given under my hand and the scal of the Court, this

Indae

19 .

NOTICE -1 Should you apprehend your witnesses will not attend of their own accord you can have a summons from this Court to compel the attendance of any witness and the production of any document that you have a right to call upon the witness to produce on applying to the Court and on depositing the nocessary expenses

2 If you admit the claim, you should pay the money into Court together with the costs of the sust to avoid execution of the decree, which may be against your person or property, or both

### Local Amendments,

Bengal

Insert the following form and number it as 1 4 -

" No 1 A.

SUMMONS TO DEFENDANT FOR ASCERTAINMENT WHITHER THE SUIT

WILL BE CONTESTED (O 5, Rr. 1 and 5)

(Title )

ro [Name description and place of rendence ] Whe

instructed, . ωť day you m or in part a

or in part, : he filed a ... your defence are to be produced and also the document or documents upon which you inco-

Take notice that in default of your appearance on the day before mentioned, the sult will be heard and determined in your absence and tale further notice that in the event of your admitting the claim either in whole or in part the Court will forthwith pass judgment in acc rd inco with such admissions 19 +

GIVEN under my hand and the seal of the Court, this Seal

day of Judat

NOTICE -if you admit the cia m either in whole or an part you should come prepared to pay into Court the money due hy virtue of such admission together with the costs of the snit to avoid execution of any decree which may be passed against your person or property or

both '

Bombay The following notes shall be in cet 7 in red ink in Forms Nos 1 2 3 5 and 6

Also take notice that in default of your filing an address for service on or before the date mentioned you are liable to have your defence struck out

Madras

In crt the jola city note -Note - Al o take notice that in default of your filing au addre a for service before the

day before mentioned you are liable to have your defence struck out After Form 1 11 ert the following is Form to 1 1 -

No 1 4

SUMMONS FOR ASCERTAINING WHITTILR A SUIT IS CONCESSED OR

NOT AND IT NOT CONTESTED FOR ITS IMMEDIATE DISPOSAL (O 5 Rr 1 )

(T He )

lane d rit t rla re det e ]

WHEREAS

т

has jost uted a suit against you for hereby summoned to appear in this Court in person or by a pleader duly instructed and able to answer all material questions relating to the at (or who shall be accompanied by some person able to answer all su b quostions) on the day of

o clock in the noon and to state whother you coutest or do not contest the claim and if you contest to rece ve directions of Court as to the date on which you have to file the written statement the date of tr al and other matter

Take notice that in the event of the claim not being contested the suit shall be decided

at once Take further notice that in default of your ppe trance on the day and hour before meu

tioned the enit will be heard and determined in your absence

d of Judie 19

GIVE's under my hand and the seaf of the Court this

scal NOTICE -If you admit the claim you should juy the money ato Court together with the costs of the suit to avoid execution of the decree which may be against your person or property or both

Sind Insert the following note in red ink in Forms Nos 1 2 3 and 6 -

Also take notice that in default of your filing an address for service on or before the date mentioned you are liable to have you defence struck o t

No 2

SUMMON'S FOR SETTLEMENT OF ISSULS (O 5 Rr 1 5)

(Tatle )

To

[Nane description a d 11 ce of res dence]

WHEREAS has instituted a suit against you for you are hereby summoned to appear in this Court in person or by a pleader duly instructed and able to answer and material questions relating to the suit or who shall be accompanied by some person and to answer all such questions on the day of 19 ---

o clock in the noon to answer the answer. and you are directed to produce on that day all the documents upon which you inten an mer in support of your defence

2878 PROCESS SCH

Take notice that in default of your appearance on the day before mentioned the suit will be heard and determined in your absence

GIVEN under my hand and the seal of the Court this

day of Judge

Scal NOTICE -1 Should you apprehend your witnesses will not attend of their own accord you can have a summons from this Court to compel the attendance of any vitness and the production of any document that you have a right to call on the witness to produce on applying to the Court and on depositing the

necessary expenses 9 If you admit the claim you should pay the money into Court together with the costs of the suit to avoid execution of the decree which miv be against your person or property or both

# Local Amendments

Bombay

See the Local Amendment of Bombay for Form No 1 App B

Sind See the Local Amendment of Sand for Form No 1 App B

No 3

# SUMMONS TO APPEAR IN PERSON (O & R 8)

To

(Title) [Varie lescriptios and place of resilence]

WHEREAS

has instituted a suit against you for summoned to appear in this Court in per ou ou the

3 ou are hereby day of

o clock in the 19 at noon to answer the claim and you are dire ted to produce on that day all the documents upon which you intend to rely in support of your

defence Take notice that in default of your appearance on the day before mentioned the suf

will be heard and determined in your absence GIVEN under my hand and the seal of the Court this

day of

Judge

Bomhay

Local Amendments

See the Lo al Amendment of Bombay for Form No 1 App B

See the Local Amendment of Sand for Form No 1 App B

No. 4

SUMMONS IN SUMMARY SUIT ON REGOTIABLE INSTRUMENT

(O 37 R 2)

(Tatle )

To

[Varie description and place of residence ]

balance of principal and WHEREAS of whi hacopy of the Code of Civil Procedure 1908 for Rs

is hereto annexed you are hereby summoned to obtain leave from the Court within ten days from the ervice hereof to appear and defend the suit and within such time to case an Ι. Procks 2879

appearance to be entered for you. In default whereof the plaintiff will be entitled at any time after the expiration of such ten days to obtain a decree for any sum not exceeding the sum of and the sam of Rs

costs 1[together with such interest if any, from the date of the institution of the suit as the Court may order] Leave to appear may be obtained on an application to the Court supported by affidavit or

de laration showing that there is a defence to the suit on the merits or that it is reasonable that you should be allowed to appear in the suit Given under my hand and the seal of the Court, this

day of

NOTICE TO PERSON WHO THE COURT CONSIDERS SHOULD

BE ADDED AS COPLAINTIFF (O 1 R 10)

(Tatle)

То

Name description and place of residence ]

Whereas has instituted the above suit against and whereas it appears necessary that you hould be added a a printiff in the said suit in order to enable the Court effectually

and completely to adjudicate upon and settle all the questions involved Take notice that you should on or before the signify to this Court whether you consent to be so added

Given under my hand and the scal of the Court this 19

day of Judge

Judae

Local Amendments.

Bembay Sind

See the Local Amendment of Bombay for Form No 1, App B See the Local Amendment of Sind for Form No 1 App B

No 6 SUMMONS TO LEGAL REIRFSENTATIVE OF A DECEASED DIFFENDANT

(O 22 R 4)

(Tatle )

To Whereas the plaint if

instituted a suit in this Court on the

19 against the defendant

who has since deceased and whereas the said plaintiff has made an application to the Court alleging that you are the legal representative of the said deceased and desiring that you be made the defendant in

his stead You are hereby summoned to attend in this Court on the

day of

19 am to defend the said built and in default of your appearance on the day specified the said suit will be heard and determined in your absence

Given under my hand and the seal of the Court this 19

day of

Judge

1 The e words were inserted by S 4 of the Negotiable Instruments (Interest) Act 1926 XXX of 1926

2880 PROOFSS Sca

# Local Amendments

Bombay

Sind

lix

See the Local Amendment of Sand for Form No 1, Apr. B

See the Local amendment of Bombay for Form No 1, App B

No 7

ORDER FOR TRANSMISSION OF STIMMONS FOR SERVIOR IN THE JURISDICTION

OF INOTHER COURT (O 5 R 21 )

(Title )

Whereas it is stated that

lu the above suit is at present residing in that a summons returnable on the

Court of

with a duplicate of this proceeding The court fce of

realized in this Court in stamps Dated

day of

19 , be forwarded defendant

for service on the saidwitness chargeable in respect to the summons has been

Judge

defendant

witness It is ordered

19

Local Amendment

Allahahad

to the

Form No 7 - in older for transmission of summons for service in the jurisdiction of another Court (O 5, R 21) is hereby cancelled

No 8 ORDER FOR TRANSMISSION OF SUMMONS TO BILSERVED ON A PRISONFR

(O 5, R. 21)

(Tatle )

То The Superintendent of the Jail at

Under the provisions of O 5, R 21, of the Code of Civil Procedure, 1905 a summons in duplicate is herewith forwarded for service on the defendant a priosner in Jail You are requested to who is

cause a copy of the said summons to be seried upon the said defendant and to return the original to this Court signed by the said defendant, with a statement of service endorsed thereon by you Judae

No 9

ORDER FOR TRANSMISSION OF SUMMONS TO BE SERVED ON A PUBLIC SERVANT OR SOLDICE (O 5, Rr 27, 28)

{Title }

To Under the provisions of O 5, R 27 for 28 as the case may be), of the Code of Civil Procedure 1908 a summons in duplicate is herewith forwarded for service on the defendant who is stated to be serving under you You are requested

to cause a copy of the said summons to be served upon the said defendant and to return the criginal to this Court signed by the said defendant with a statement of service endorsed thereon

by you Tudae

No 10

TO ACCOMPANY RETURNS OF SUMMONS OF ANOTHER COURT (O 5 In 28)

(Lulle) Read | r ceeding from the forwarding for SCILL P OR m Smit No

cf 19 of that Court

Read Serving Officer a endorsement stating that the and proof of the above having been duly taken In me on the outh of and

it is ordered that the be returned to the with a cops of this proceeding

Judge NOTE. -This form will be applicable to process other than summons the service of which may have to be effected in the same manner

Local Amendments Allahabad torm > 10 -4 form to a company return of summons of another Court (O 5 R 93) la concelle !

Bengal freert the word (or proof of the above having been duly made by the declaration of after the words proof of the above having been duly taken by me

on the oath of Bombay Form to 10 shall be amended to read as follows -

No 10

TO ACLOMPANA RETURNS OF SUMMONS OF ANOTHER COURT (0 5 R 28) (Table )

Read proceeding from the forwarding m out No

for envice on of 19 of that Court

Read berving Officer's endorsement straing that the and proof of the above having been duly taken by me on the oath of and

it is ordered that the with this proceeding to the

be returned

I herei declare that the said summons on has been duly served

Tudje

NOTL -This form will be applicable to proce 5 other than summons the service of which may have to be effected to the same manner

No 11 AFFIDAVIT OF PROCESS SERVER TO ACCOMPANY RETURN OF A SUNNOAS OR

NOTICE, (0 5 R 18) , son of

(Table)

make oath affirm

C P C 361 & 362

The affidavit of

day of

19 . I received a

ix

and say as follows -

summons

(2) On the

----- issued by the Court of

(1) I am a process server of this Court

in suit No , in the said Court, of 19 dated the day of 13 for service on (3) The said was at the him summons time personally known to me, and I served the said on -- on the notice her day of at 19 ahout o'clock in the noon at by tendering a copy thereof to - and her his summons requiring -- signature to the original -\_\_\_ notice (a) ĺδĺ (a) Here state whether the 'person served, signed or refused to sign the process, and in Whose presence (b) Signature of process server (8) The said not being personally known to ms accompanied ms to and pointed out to me a person whom he stated to be the said , and I seried the said summons hım - on -- on the day of notice her by 19 , at about n clock in the noon at summons his tendering a copy thereof to - and requiring - eignature to the original her motice her (a) (a) Here state whether the person served, signed or refused to sign the process and in whose presence (b) Signature of process server. or and the house in which he ordinarily resides being (3) The said and there personally known to me I went to the said house, in 19 , at about day of on the o clock in the noon, I did not find the said (a) (a) Enter fully and exactly the manner in which the process was served, with special reference to O 5, Rr 15 and 17 (b) Signature of process server Or and there accompanied me to (3) One pointed out to me which he said was the house in which

(a) Enter fully and exactly the manner in which the process was serred, with spelish

ordinarily resides I did not find the said

(a) (¿)

reference to O 5, Rr 15 and 17.

PROCLSS 2883

(b) Signature of process cerver.

Or.

If substituted service has been ordered, state fully and exactly the manner in which the summons was serial with special reference to the terms of the torder for substituted service.

Sworn - by the said

before me this

4ffirmeJ

19 . day of

> Empowered under section 139 of the Code of Caul Procedure, 1908, to administer the oath to deponents

#### Local Amendments.

Bengal

I.

Substitute the following for the existing form No. 11 -

No 11

DECLARATION OF PROCESS SERVER TO ACCOMPANY RETURN OF A SUMMONS OR NOTICE (0 5, R. 18)

(Tatle )

I, , a process server of this Court, declare -(1) On the day of 19 . I received a summons

in Suit No -issued by the Court of of 19 , in the notice said Court, dated 19 , for service on (2) The said was at the time personally known to me and I served the said

summons him on---on the day of 19 . at about o'clock her notice

hım by tendering a copy thereof to--in the noon at her

spmmons and requiring her notice

(b) (a) Here state whether the persons served, signed or refused to sign the process and in whose presence

(b) Signature of process server Or pointed out to me a person whom he stated to be the said

(2) The said not being personally known to me

, and I served the

summons him on --- on the day of 19 at about eard -

notice her , by tendering a copy o'clock in the noon at

his summons thereof to - and requiring - signature to the original -

het notice her (a) (b)

x

(a) Here state whether the person served, signed or refused to sign the process and in

whose presence (b) Signature of process server 01. (2) The said and the house in which he ordinarily resides being per sonally known to me, I went to the said house, in and there on the day of 19 at about o clock in the noon. I did not find the said (a) (6) (a) Luter fully and exactly the manuer in which the process was served, with special reference to O 5, Rr 15 and 17 (b) Signature of process server Or (2) One at pointed out to me ordinarily resides I did not which he said was the house in which there find the said (a) (6) (a) Enter fully and exactly the manner in which the process was served with special reference to O 5, Rr 15 and 17 (b) Signature of process server Ot. (3) If substituted service has been ordered, state fully and exactly the manner in which the summons was serred with special reference to the terms of the order for substituted service " Lahore AFFIDAVIT OF PROCESS SERVER TO ACCOMPANY RETURN OF A SUMMONS OR NOTICE (0 5 R 18) (Title) The affidas it of I son of make oath and say as follows -(1) I am a process server of this Court I teceived a 19 (2) On the day of summons in suit No --- issued by the Court of notice day of of 19 in the said Court, dated the 19 for service on was at the time personally known to me, and I served the (3) The said summons him at about said ---- on the day of notice her by tendering a o clock on the noon at him lifs summons copy thereof to -- and requiring -- signature to the original --her ber notice (0) (a) Here state whether the persons served, signed or refused to sign the process, and in

Or,

accompanied to

not being personally known to me

whose presence.
(b) Signature of process server

(3) The said

by tendering a copy thereof to -- and requiring -- signature to the original ---

(a) Here state whether the per on erved signed or refused to sign the process and in

Or

a clock in the

hini

her

and pointed out to me a person whom he stated to be the said

summona him

notice her

who e presence (b) Signature of process server

I served the said - on -

(a)

19 . at about

summons

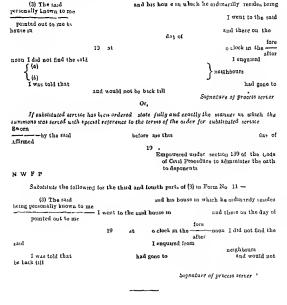
notice

noon at

on the

Ыъ

her



#### No 12

# NOTICE TO DEFENDANT (0 9, R 6)

Τo

(Trile)

[Name, description and place of residence ]

Whereas this day was fixed for the hearing of the above suit and a summons was assued to you and the plaintiff has appeared in this Court and you did not so appear, but from the return of the Nazir it has been proved to the satisfaction of the Court that the said summons was served on you but not in sufficient time to enable you to appear sod answer on the day fixed in the said summons.

Notice is hereby given to you that the hearing of the suit is adjourned this day and is now fixed for the hearing of day of 19 the same, in default of your appearance on the day last mentioned the suit will be heard and determined in your absence

Given under my hand and the seal of the Court, this 19 .

day of

Judge.

Madras

Insert the following as Form No 12 4 .-

"No 19 1

Local Amendment.

DEFENDANT ---- (O 32, Rr 3 and 4) NOTION TO THE PROPOSED GUARDIAN OF A MINOR-RESPONDENT

(Table)

Tο

[Name, description and place of residence of proposed guardian]

plaintiff has presented a petition to the Court praying Take notice that X -

appellant defendant (s) , and that

that you be appointed guardian ad litem to the minor respondent (s) 19 . the same will be heard on the day of

2 The affidavit of X has been filed in support of this application.

defendant (s) -you are required to 3 If you are willing to act as guardian for the saidrespondent (s)

sign (or affix your mark to) the declaration on the back of this notice

4 In the event of your failure to signify your express cousent in manner indicated above, take further notice that the Court may proceed under O 32, R 4, Code of Civil Proce dure, to appoint some other suitable person or one of its officers as guardian ad hiem of the defendant (s)

aforesaid. minor -

respondent (s)

Dated the day of 19 .

(Signed)

(To be printed on the reverse) I hereby acknowledge receipt of a duplicate of this notice and consent to act as guardian defendant (s)

-therein mentioned, of the minorrespondent (s)

(Signed) Y Z.

Witnesses 1

9.

#### No 13 SHAMONS TO WITKESS

(O 16 Rr 1.5) (Tatle )

To

I.

WHEREAS your attendance is required to on behalf of the in the above smit, you are hereby required [personally] to appear before this Court on the day of 19 , at

a clock to the foremen and to bring with you [or to send to this Court 1 1 spm of Rs , teing your travelling and other expenses and subsistence allowance for one day is herewith sent. If you fail to comply with this order without lawful

excuse, you will be subject to the consequences of non attendance laid down in R 12 of O 16 of the Code of Civil Procedure 1903 GIVEN under my hand and the seal of the Court this

day of 19 .

Judge

NOTICE -(1) If you are summoned only to produce a document and not to give evidence, you chall be deemed to have complied with the summons if you cause such docu

ment to be produced in this Court on the day and hour aforesaid (2) If you are detained tayond the day aforesaid a sum of Rs

will be tendered to you for each day s attendance beyond the day specified

Madras

Insert the following as Form No. 13 A -

Local Amendment

' No 13 A CERTIFICATE OF ATTENDANCE TO AN OFFICER OF GOVERNMENT SUMMONED IS A WITNESS IN A SUIT TO WHICH THE GOVERNMENT IS A PARTY.

(O 16 R 4 A)

(Cause title)

(designation) being a

(name) Government cervant was summoned to give evidence in his official capacity on behalf of the plaintiff ---- in the above - and was in attendance in this Court from the day of

defendant matter to the day of

(sociues e) and that a sum of Rupees has been paid into Court by the plantifi - towards his travelling and subsistence allowance for days according to

defendant has been

Article 1133 of the Civil Service Regulations and that the said amount-remitted to tha Government treasury at to be credited to Government under the head 'XVI-4-

Miscellaneous Fees and Fines '

Dated the

This is to certify that

day of

19

Presideng Judge or Chief Ministerial Officer '

No 14

# PROCLAMATION REQUIRING ATTENDANCE OF WITNESS

(O 16 B 10)

(Tatle )

Tο

Whereas it appears from the examination on oath of the serving officer that the sum mons could not be served upon the witness in the manner prescribed by law and whereas it appears that the evidence of the witness is material and he abscords and keeps out of the way for the purpose of evading the service of the summons This proclamation is, therefore, under R 10 of O 16 of the Code of Civil Procedure 1909, issued, requiring the attendance of the witness in this Court on the day of

o clock in the forenoon and from day to day until he shall have levio to depart, and if the witness fails to attend on the day and hour aforesaid he will be dealt with according to law

Given under my hand and the seal of the Court this

day of Julge

No 15

# PROCLAMATION REQUIRING ATTENDANCE OF WITNESS

(O 16 R 10) (Title )

To

is therefore under R 10 of O 16 of the Code of Civil Procedure 1908 issued, requiring the day of attendance of the witness in this Court on the

o clock in the foreneon, and from day 19 at today until he shall have leave to depart, and if the witness fails to attend on the day and hour aforesaid he will be dealt with according to law

Given under my hand and the seal of the Court this

day of

Julat

No. 16

# WARRANT OF ATTACHMENT OF PROPERTY OF WITHISS

(O 16, R 10)

(Tetle )

To

The Build of the Court Whereas the witness

has not, after the expiration of

the period limited in the proclamation issued for his uttendance, appeared in Court, lug property belonging to the said and to submit a return accompanied are hereby directed to hold under attachment witness to the value of

days

with an inventory thereof, within

19 .

day of

Given under my hand and the seal of the Court, this 10

Judge

# No. 17

# WARRANT OF ARREST OF WITNESS (O 16 R 10 )

(Tatte )

To

T.

The Bailiff of the Court

Whereas

has been duly served with a summons but has failed to attend (abscords and keeps out of the way for the purpose of avoiding service of a sum mone], You are hereby ordered to arrest and bring the said before the Court

You are further ordered to return this warrant on or before the 19

day of with an endorsement certifying the day

on upl the manner in which it has been executed or the reason why it has not been executed Given under my hand and the eal of the Court this

day of

19

Judge

No. 18

## WARRANT OF COMMITTAL (O 16 R 18)

(Tatle )

To

The Off cer in charge of the Juliat

Whereas the plaintiff for defendant) in the atoxi named suit has made application to this Court that sa urity be taken for the appearance of to give evidence (or to produce a do ument) on tha day of

19 and whereas the Court has called upon the said

to furni h such se nrity which ha has failed to do This is to require you to into your custody in the civil prison and to produce him receive the said tefora this Court at on the said day and on such other day or days as may be hereafter ordered

Given under my hand and the seal of the Court this 19

day of

Jidne

No 19

# WARRANT OF COMMITTAL (O 16 R 18)

(Title )

Tα

The Officer in charge of the Jail at

whose attendance is required before this Court in the above named case to give evidence (or to produce a document) has been arrested and brought before the Court in custody and whereas owing to the absence of the plaintiff (or defendant) the said caunot give such evidence (or produce such document) and whereas the Court has called upon the said to give security for his appearance on the day of

which he has failed to do This is to require you at. auto your custody in the civil prison and to to receive the said

produce him before this Court at

on the day of

Given under my hand and the scal of the Court this 19

day of

Judge

No of Suit

# Local Amendment.

Allahabad

x

ix

No 20

APPLICATION FOR ISSUE OF SUMMONS TO A PARTY OR WITNESS.

Names of parties In the Court of the Date fixed for hearing

| 1                                           | 2                                                    | 3                  |      | 4                                      |                             | 5               | 6 |
|---------------------------------------------|------------------------------------------------------|--------------------|------|----------------------------------------|-----------------------------|-----------------|---|
| Number of<br>witnesses<br>to be<br>summoned | Name and<br>full address<br>of each per<br>son to be | Rank or occupation | resi | Distance of<br>residence<br>from Court |                             | Cash paid for   |   |
|                                             | summoned                                             |                    | Rail | Road                                   | Travell<br>ing ex<br>penses | ing ex Dies ex- |   |
|                                             |                                                      |                    |      |                                        | İ                           |                 |   |
|                                             |                                                      |                    |      |                                        |                             |                 |   |
|                                             |                                                      |                    | ļ    |                                        |                             |                 |   |

# APPENDIX C

# DISCOVERY, INSPECTION AND ADMISSION,

No 1.

ORDER FOR DELIVERY OF INTERROGATORIES (O 11, R. 1)

In the Court of Civil Suit No

.. Paintilf

AB

CD.EF and GH

agasnst . Defendante

Upon hearing and upon reading the affidavit of 19 : It is ordered that the filed the

interrogatories in writing and that the said tiberty to deliver to the do answer the interrogatories as prescribed by O 11, R q and that the costs of this application be

#### No 2

# INTERROGATORIIS (0 11, R 4)

(Tite as en No 1 surva)

Interrogatories on behalf of the above named [plaintiff or defendant C D] for the examination of the above named [defendants & I and G H or plaintiff]

1 Did not etc.

I

2 Has not etc.

cto etc

(The defer in tE I rerequired to answer the interrojatories numbered

[The defendant G H is require I to answer interrogitaries ; unibere l

# 1/5/1/FR 10 1/T1 RROGATORIES (0 11 R 9)

(Title ac in No 1 stpra)

The in wer of the above is med defendent F I to the interrogatories for his examina t n by the above named plaintiff In answer to the said interrogatories I the above named F F make outh and say as

f lows -Enter answers to interrogatorics in paragraphs numbered consecutively

3 I object to answer the interro-atories numbered that [ state grounds of objection]

on the ground

It is ordered that

#### No. 4

#### ORDER FOR AFFIDALIT AS TO DOCUMENTS (0 11 R 12)

(Tyle as in No 1 supra)

Upon hearing the

days from the date of this order do within answer on affidavit stating which documents are or have been in his possession or power relating to the matter a question in this sait and that the costs of this application be

### No 5

# AFFIDAVIT AS TO DOCUMENTS (O 11 R 18)

(Title os su No 1 surra)

I the above named defendant C D make outh and say as follows -

- 1 I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto
- 2 I object to produce the said documents set forth in the second part of the first sche dula hereto (state grounds of objection)
- 3 I have had but have not now in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto
- 4 The last mentioned documents were last in my possession or power on [State when and t lat has become of them and in whose possession they now arel.

ıx

do at

5. According to the best of my knowledge, information and behef I have not now, an never had, in my possession, custody or power, or in the possession, custody or power of my other person on my behil, any account book of account, rougher, receipt, letter, memorandum, paper or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit or any of them, or wherein any entry has been made relative to such matters or any of them other than and except the documents set forth in the said fir and second schedules hereto

#### Va 6

#### ORDER TO PRODUCE DOCUMENTS FOR INSPECTION (O 11, R 14)

(Title as in No 1 supra)

Upon herring and upour reading the affidavit of filed the dry of 19 It is ordered that the

all reasonable times, on reasonable notice produce it situate at the following documents, namely, and that the

he at liberty to inspect and peruse the documents so produced, and to make notes of the r contents. In the mean time it is ordered that all further proceedings be stayed and that the costs of this raphication be

#### No 7

## NOTICE TO PRODUCE DOCUMENTS (0 11, R 16)

(Title as in No 1 suma)

Tike notice that the [plaininff or defendant] requires you to produce for his suspection the following documents referred to in your [plaint or written statement or affidavit dated the

day of 19
[Describe documents required 1

A I . Pleader for the

To Z , Pleader for the

#### No 8.

# NOTICE TO INSPECT DOCUMENTS (0 11, R 17)

(Title as in No 1 supra)

The notice that you can inspect the documents mentioned in your notice of the day of 19 [except the documents numbered

in that notice] at [susert place of inspection] on Thursday next, the instant, between the hours of 12 and 4 o clock

Or, that the [plaintiff or defendant] objects to giving you inspection of downess that the plaintiff or defendant of day of 19, on the ground that [state the ground]

# No 9.

# NOTICE TO ADMIT DOCUMENTS. (O. 12, R. 3)

## (Tetle as in No 1, supra)

Take notice that the plaintiff [or defendant] in this sult proposes to adduce in eviden the several documents hereunder specified, and that the same may be inspected by the

between the hours of

. and the defendant [c, plintiff], is hereby required, within forty-eight hours from the last mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, agned or executed, as they purport respectively to have been , that such as are specified as copies are true copies; and such documents as are stated to have been served.

sent or delivered were so served sent or delivered, respectively, saving all just exceptions to the admissibility of all such documents as oudence in this suit G II , pleader [or a jent] for plaintiff [or defendant]

To E F ; leader (or agent) jor defendant (or plaintiff)

Here describe the documents and specially as to each document whether it is original er a copy)

No. 10

# NOTICE TO ADMIT FACTS (0 12, R 5)

(Title as in No 1 supra)

Take mutue that the plaintiff for defendant in this out requires the defendant for l'aintiff to admit, for the purpose, of this suit only the several facts respectively herounder specified, and the defendant [or plaintiff] is hereby required, within six days from the service of this notice to admit the said several facts saving all just exceptions to the

G II pleader for grent) for plaintiff for desendant]

To E 1 pleader for agent) for defendant for plaintiff]

The facts the admission of which is required, are-1 That M died on the 1st January 1890

2 That he died intestate

3 That N was his only lawful son

4 That O died on the 1st turil 1896 2 That O was never married

No 11

ADMISSION OF 1 ACIS PURSUANT TO NOTICE (0 12 R 5)

(Title as in No 1 supra)

The defendant [or [Lintiff] in this built, for the purposes of this built only hereby admits the several facts respectively hereunder specified subject to the qualifications of Limitation, if any hereunder specified, saving all just exceptions to the admissibility or any such facts or any of them, as evidence in this suit

Provided that this admission is made for the purposes of this suit only and is not an admission to be used against the defendant for plaintiff) on any other occasion or by any one other than the plaintiff [or defendant, or party requiring the admission]

E Γ pleader [or agent] for defendant [or plaintiff] To G H pleader [or agent] for plaintiff [or defendant]

Facts admitted Qualifications or limitations if

any subject to which they are admitted

1 That M died on the 1st January, 1830 2. That he died intestate

3 That N was his lawful son 4. That O died 5. That O was nover married

3 But not that he was his only lawful son 4. But not that he died on the 1st April, 1896 5.

No 12.

# NOTICE TO PRODUCE (GENERAL FORM) (O 12. R 8.)

(Title as 11 No 1, supra)

Take notice that you are hereby required to produce and show to the Court at the aret hearing of this suit all books papers letters copies of letters and other writings and doorments in your custody, possession or power containing any entry, memorandum or minite relating to the matters in question in this suit, and particularly,

G H Pleader [or agent] for plaintiff [or defendant]

To E F pleader [or agent] for defendant [or plaintiff]

# APPENDIX D

## DECREES

No 1

DECREE IN ORIGINAL SUIT (0 20, Rr 0, 7) (Tatle )

Claim for in the presence of

This suit coming on this day for final disposal before

for the plaintiff and cl for the defendant it is ordered and decreed that

Total

Total

and that the sum of Rs be paid by the to the

account of the costs of this suit with interest thereon at the rate of per cent per annum from this date to date of realization

Ciran under my hand and the seal of the Court this

ئە رەغ

23

19 Judge Costs of Sust PLAINTIFF DEFENDANT Rs Rs. I A Stamp for power 1 Stamp for plaint Do. for petition Do for power Pleader a fen Do for exhibits Subsistence for witnesses 4 Pleader a fee on Rs. Service of process 5 Subsistence for witnesses Commissioner s fee 6 Commissioner a fee 7 Service of process

Total

# I.

Local Amendments Bengal

| PLAINTIFF                      | DEFENDANT                     |
|--------------------------------|-------------------------------|
| Rs   1                         | P Rs A 1                      |
| Stamp for plaint               | 1 Stamp for power             |
| Stamp for power , }            | , 2 Stamp for petitions and   |
| . Stamp for petitions and affi | affidavits                    |
| datrab                         | 3 Cost of exhibits including  |
| Cost of exhibits including     | copies made under the         |
| cories made under the          | Banker a Books Evidence       |
| Banker's Books Evidence        | Act 1801                      |
| Act 1801                       | 4 Pleader a fee               |
| . I leader s fee on Rs         | 5 Subsistence and travelling  |
| Subsistence and travelling     | allowances of witnesses (in   |
| allowances of witnesses (in    | cluding those of party if     |
| cluding those of party if      | allowed by Judge)             |
| allowed by Judge)              | 6 Process fees                |
| Process fees                   | 7 Commiss oper s fees         |
| Commissioner a fees            | 8 Dems paper                  |
| Demi paper                     | 9 Cost of transmission of re  |
| Cot of transmission of re      | cords                         |
| cords                          | 10 Other costs allowed under  |
| Other costs allowed under      | the Code and General Rules    |
| the Cods and General Rules     | and Orders                    |
| and Ordera                     | 11 Adjournment costs not paid |
| 2. Adjournment costs not paid  | in cash (to be deducted or    |
| in cash (to be added or de     | added as the case may         |
| ducted as the case may be)     | be)                           |

Substitute the following for the schedule of Costs of Suits in the form -

Total

| PLAINTIFF                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | AMOUNT | DEFENDANT                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | AMOUNT |   |  |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|---|--|
| Stamp for plaint Stamp for power Stamp for power Stamp for petition or affi Costs for exhibit Pleader a fee on Rs Subsistence (a) for plaintif or his against the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the stamp of the | Rs A P | 1 Stamp for power 2 Stamp for pertition or affi- data to the stamp for relation or affi- 3 Costs for exhibits 4. Pleader a fee 5 Sub takence (a) for defendant or his (b) agent (b) agent (c) agent | Rs     | A |  |

No 2. SIMPLE MONEY DECREL (Section 34) (Tatle )

Claim for

THIS suit coming on this day for final disposal before in the presence of

for the plaintiff and for the defendant it is ordered that the

do pay to the

the sum of

dix Rs

with interest thereon at the rate of per ceut per annua to the date of realization of the said sum and do also pay

Rs the costs of this suit with interest thereon at the rate of per cent per aunum from this date to the date of realization

GIVFN under my hand and the seal of the Court this

day of 19

### Costs of Sust

| PLAINTIFF   |                                                                                                                                              |                | DEFFNDANT |   |                            |                                                                                                                        |                |   |
|-------------|----------------------------------------------------------------------------------------------------------------------------------------------|----------------|-----------|---|----------------------------|------------------------------------------------------------------------------------------------------------------------|----------------|---|
| 3<br>4<br>5 | Stamp for plaint Stamp for power Stamp for exhibit Pleader's fee on Rs Sub istence for witnesses Commissioner a fee Se vice of process Total | R <sub>3</sub> | A         | P | 1<br>2<br>3<br>4<br>5<br>6 | Stamp for power Stamp for petition Pleader a fee Subsistence for witnesses Service of process Commissioner a fee Total | R <sub>5</sub> | P |

# Local Amendment

# Bengal

Carcel the table under the head Costs of Suit in Form No 2 and substitute therefor

| PLAINTI           | FF          |      | 1     | DEFENDANT                  |      |     |
|-------------------|-------------|------|-------|----------------------------|------|-----|
|                   |             | Rs ( | P     |                            | Re   | A   |
| Starup for 1 laru | t           |      | 1     | Stamp for power            |      |     |
| Stamp for powe    | r           | 1    | :   2 | Stamp for petitions and    |      | 1 . |
| Stamp for 1et     | tions and   | 1 .  | 1 1   | affidavils                 | 1    | 1   |
| affidavits        |             | 1 [  | 1 3   | Costs of exhibits includ   | 1    | 1 . |
| Cost of exhibits  | including   |      | 1 1   | ing copies made under      |      | 1 1 |
| copies made       |             | 1 1  | 1 1   | the Bankers Books          |      | 1 1 |
| Dinker's F        | ooks Ev     | 1 1  | 1 1   | Evidence 1ct 1891          |      | 1   |
| dence 1ct 18      | 91          | 1 1  | 1 14  | Pleader s fco              |      | 1   |
| I leader a fee or |             | 1 1  |       | Subsistence and travelling | 1    | 1 1 |
| Subsistence and   |             | 1 1  | 1 1   | allowances of witnesses    |      | 1 1 |
| allowances o      |             | 1 1  | 1 1   | (including those of        |      | Ι., |
| (including        | those of    | 1 1  |       | party if allowed by        |      | 1   |
| party if a        |             | 1 1  | 1 1   | Judge)                     |      | 1   |
| Judge)            |             | 1 1  | 16    | Process fees               |      | 1   |
| Process tees      |             | 1 1  | 17    | Commissioner s fees        |      |     |
| Commissioner s    | fees        | 1    | 1 8   | Demi paper                 |      |     |
| Demi paper        |             | 1 1  | 1 19  | Cost of transmission of re |      | 1   |
| Cost of transm    | ssion of    | 1 1  | 1 1   | cords                      |      |     |
| records           |             | i 1  | 1 10  | Other costs allowed under  |      | ,   |
| Other costs allo  |             | i 1  | 1 1   | the Codo and General       |      | - 1 |
| the Code an       |             | 1 1  | 11    | Rules and Orders           | 1    | 1   |
| Rules and O       | ders        | 1 1  | 11    | idjournment costs not      |      |     |
| Adjournment cos   | ts not paid | 1    | 1 1   | paid in cash(to be deduct  |      |     |
| in cash (to l     | se added or | i I  | + 1   | ed or added as the case    |      |     |
| deducted as       | the case    | 1 1  | 1     | may be)                    | - 11 |     |
| mu be)            |             | 1 1  |       |                            |      |     |
|                   |             |      |       | Trans.                     |      | -   |
|                   | Total       |      | 1 1   | Total                      | - 1  | ,   |

<sup>2</sup> This Rule will come into force from the 1st January 1928

#### INo 3

# PRELIMINARY DECRET FOR FORECLOSURE

(O 31. R 2-Where accounts are directed to be taken )

(Tetle)

This suit coming on this that it to referred to accounts following — div ete, it is hereby ordered and decreed as the Commissioner to take the

- (4) an account of what is due on this date to the plaintiff for principal and interest on his mortgage mentioned in the plaint (such interest to he computed at the rate 133abs on the principal, or where no such rate is fixed at 4x jet cent per annum or at such rate as the Court deems reasonable.
- (ii) an account of the income of the mortgaged property received up to this date to the pillutail or by any other person by the order or for the use of the plaintiff or which without the will'd default of the plaintiff or such precon might have been as received.
- (iii) an account of all sum of money preparly incurred by the planning up to the date frost charges, and expenses (either than the cost of the suit) in reject of the mortgage security together with interest thereon (such intrest to be computed at the cate egged between the porties or, failing such rate at the same rate is a payable on the principal, or failing to but such rate at anne per cent per annum)
  - (ii) an account of any loss or damage caused to the mortgaged preperty before this date by my act or emission if the planning which is destructive of, or permanently impurious to, the preperty or by his failure te perform suy of the duties imposed upon him by any law fer the time being in force or by the terms of the mortgage dead
- 2 And it is hereby further addred and decreed that any amount received under clau o (ii) or adjudged due under clause (ii) abore, together with interest thereen, shall first be adjusted against any sums paid by the plenutiff under clause (iii) together with interest thereon, and the balance, if any shall be added to the mortgage money or, at the ease may be be debted in reduction of the amount due to the plantiff on account of interest en the principal sum adjudged due and thereafter in reduction or discharge of the principal.
- 3 And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just sillowances on or before the day of and that upon and that the confirmed and countersized.
- such report of the Commissioner being received it small be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make
  - 4 And it is here's further ordered and decreed-
  - (1) that the defendant do pay into Court on or before the

day of or any later date

up to which time for payment may be extended by the Court such sum is the Court shall find due and the sum of Rs

court shall bud due and the snm of Rs costs of the suit awarded to the plaintiff,

(n) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adopted due in respect of such coats of the suit and such costs, charges and expenses as may be payable under R 10 together with such subequent interests as may be payable under R 10 of 0.3 of the First Schedule to the Code of Crul Procedure, 1903 the planning shall bring into Court all documents in his possession or power relating to the mortgaged property in the plannt mentioned, and all such documents shall be delivered over to the defendant, of to such person as ho oppoints and the planning the court of the defendant, of the such person as ho oppoints and the planning the planning that the court of the defendant, of the such person as ho oppoints and the planning that the planning that the court of the defendant, of the such person as the oppoints and the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the planning that the

I. Forms 3 to 11 were substituted by S 8 and Schednie, of the Transfer of Property (Amendment Supplementary) Act, 1929 (XXI of 1929)

shall if so required re convey or re transfer the said proporty free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall if so re quired deliver up to the defendant quiet and peaceable possession of the sad

5 And it is hereby further ordered and decreed that in default of payment as afcressed the plaintiff shall be at liberty to apply to the Court for a final decree that the defendant shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mort gaged property described in the Schedule annexed hereto and shall if so required deliver up to the plaintiff quiet and peaceable possession of the said property and that the parties shall be at liberty to apply to the Court from time to time as they May have occasion and on such application or otherwise the Court may give such directions as it thinks fit

#### SCHEDULE

# Description of the mortgaged property Local Amendments

#### Rangoon

Substitute the following -

Form No 3

# PRELIMINARY DECREE FOR FOREOLOSURE

# (Title)

It is hereby This suit coming on this day of being costs of this suit shall be pa d by ordered and declared that the sum of Rs a, and it is declared that the the defendant No amount due by the defendant No to the plaintiff is the sum of Rs balance of account as shown in the Schedule hereto and it is further doclared that the plaintid shell be entitled to apply for and obtain a final decree for foreclosure of the mortgage in an i

may apply for and obtain a decree for redemption provided that the defendant or b of the mortgago on payment ante Court of the amount so declared to be due on or before the and on compliance with all further day of orders of the Court and on payment of such further sums as the Court may determ us to be

payable on finally adjusting the account up to the date of payment

#### SCHEDIT P

| SCHEDULD                                    |                                                                                                                                                                                                                      |  |
|---------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|
| Due to the plaint if for redemption         | Rs                                                                                                                                                                                                                   |  |
| Due to the plaintiff for costs of suit      | Rs                                                                                                                                                                                                                   |  |
| mortgage                                    |                                                                                                                                                                                                                      |  |
| the defendant No                            | Ra                                                                                                                                                                                                                   |  |
| Lese costs of snit due to the defendant No. | Rs.                                                                                                                                                                                                                  |  |
| Due to the plaintiff                        | Rs                                                                                                                                                                                                                   |  |
|                                             | Due to the plannish for costs of sust Due to the plannish for costs etc. in respect of the mortgage. Less costs etc. in respect of the mortgage due to the defendant No. Lese costs of suit due to the defendant No. |  |

#### No 3 A

#### PRLLIMINARY DECREE FOR FORLCLOSURE

(O St R. 2 -Where the Court declares the amount due.)

(Tutle )

de lared that the up to th !

I a mortcase

for principal, the cum of Re of Rs. interest thereon, and the sum of Rs

for interest on the said principal the sum for costs, charges and exponses (other than the costs of the suit) properly incurred by the plaintiff in respect of the mortgage security, together with for the costs of this suit awarded to the

rlaintiff, making in all the sum of Rs. 2. And it is hereby ordered and decreed as follows -

(s) that the defendant do pay into Court on or before the

day of or any later date

up to which time for payment may be extended by the Court of the said sum

(se) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such cost of the suit and such costs charges and expenses as may he payable under R 10 to gether with such subsequent interest as may be payable under R 11 of O 31 of the First Schedule to the Code of Civil Procedure 1908, the plaintiff shall bring into Court alt documents in his possession or power relating to the mortgaged property in the plaint mentioned and all such documents shall be delivered over to the defendant or to such person as he appoints and the plaintiff shall if so required reconvey or re-transfer the said property free from the said mortgage and clear of and from atl meumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall if so required deliver up to the defendant quiet and peaceable possession of the said property

3 And it is hereby further ordered and decreed that in default of payment as aforesaid. the plaintiff may apply to the Court for a final decree that the defendant shall theuceforth stand absolutely debarred and fors losed of and from all right to redsom the mortgaged property described in the S hedule annexed hereto and shall f so required deliver up to the plaintiff quiet and peaceable possession of the said property, and that the parties shall be at liberty to apply to the Court from temo to time as they may have occasion and on such application or otherwise the Court may give such directions as it thinks fit

#### SCHEDULE.

Description of the mortgaged property

No 4

FINAL DECREE FOR FOREGLOSURE

(O 34 R. 3)

(Tulle)

Upon reading the preliminary decree passed in this suit on the

and further orders (if any) dated the day of

day of and the application of the plaintiff dated the for a final decree day of

and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the defendant or any person on his behalf or any other person entitled to redeem the said mortgage

It is hereby ordered and decreed that the defendant and all persons claiming through or under him be and they are hereby absolutely debarred and foreclosed of and from all right of redemption of and in the proporty in the aforesaid prelaminary decree mentioned . [and (if the defendant be in possession of the said mortgaged property) that the defendant shall deliver to the plaintiff quiet and peaceable possession of the said mortgaged property]

2 And it is hereby further declared that the whole of the liability whatsoover of the defendant up to this day arising from the said mortgage mentioned in the plaint or from this suit is hereby discharged and extinguished

# Local Amendment

Rangoon

×

# Form No 4

# FINAL DECREE FOR FORLCLOSURE

(Title)

Upon reading the preliminary decice passed in this suit on the

day of and the

and further orders dated the application of the plaintiff dated the day of

nament of the sum

for a final decree and after hearing the parties, and on it appearing that payment of the sum found due by the preliminary decree and compliance with the further orders of the Court has not been made within the time specified by any party entitling him to apply for a decree for redemetion.

It is hereby ordered and decreed that the defendants Nos and all persons claiming through or under them or any of them are hereby absolutely debitted from all right of redemption of the property described in the Schedule hereto and that the defendants Nos are freed from all habilities in respect of the mortgage mentioned in the Schedule

hereto and on recount of this suit and it is orde ed that the defendant he

shall deliver to the plaintiff possession

of the and projecty

SCHEDULE

The work saged propert s

The mortgage

# No 5

#### PRELIMINARY DECREE FOR SALE

(O 31 R 4-Where accounts are directed to be taken)

(Tatle )

This suit coming on this that it be referred to

day etc. It is hereby ordered and decord as the Commissioner to take the

- (i) in account of what is due on this date to the plaintiff for principal and interest on his mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fired, at air per cent. for
  - annum or at such rate as the Court deems reasonable),
    (ii) an account of the ancome of the mortgaged property received up to this date by
    the plantiff or by any other person by the order or for the use of the plantiff
    or which without the wilful delautt of the plantiff or such person night have
- been so received;

  (iii) an account of all sums of money properly incurred by the plaintiff up to this date
  for costs, charges and expenses (other than the costs of the sull) in respect of
  the mortgage security, together with interest thereon (such interest to
- computed at the rate agreed between the parties, or, failing such rate at the same rate as is payable on the principal, or Luling both such rates at use per cent per annum.

  (ii) an account of any foss or damages caused to the mortgaged property know that it is date in any act or omeration of the flauntil which is destructive of or left menerally injusious to the property or by his faiture to perform any of the date.
- imposed upon him by any law for the time king in force or by the femine the mortgage deel mortgage deel.

  2 'vad it is hreby further ordered and decreed that any amount received mode (it) or adjudged due under classe (r) store together with interest thereon, shall first be adjusted against any sums yields be the lithing under classe (iv) together with interest.

thereon and the bilines, it inv, shall to idded to the mortgage money or us the case may be to debited in red-citon of the amount due to the plintiff on account of interest on the principal sum adjudged due and therefiter in reduction or discharge of the principal.

A did it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despitch after making all just allowances on or before the day of and that upon which report of the Commissioner being recursed it shall be confirmed and countersigned subsect to such medication as may be necessary after consideration of such observious as the

parties to the suit may make

4 And it is hereby further ordered and decreed

(1) that the defendant do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court such sum as the Court shall find due and the

for the costs of the suit awarded

sum of Rs to the plaintiff

(n) that on such priment and on tyment the control before such date as the Court may they or such amount as the Court may adjudge due in respect of such costs, cf. the suit and such obsequent interest as may be payable under H. 10 together with such subsequent interest as may be payable under H. 10 of 31 of the I risk bednie to the Cote of Civil Procedure 1008 the planning half bring in to Court all documents in his possession of power relating to the most great pricial with the litust mentioned and all as in documents shall be delivered as the tip of the court of the litust mentioned and all as in deciments shall be delivered as required as compared to the consistence of the planning of the planning of the most gage, and clear of ridd from all incompositions, exceeded by the planning or any friend claiming under him or may greate under whom he claims, and shall it so required deliver up to the defendant quict and peaceable possession of the said property.

and it is he thy forther ordered and decreed that in idefault of payments a discossing to laminf mag apily to the bourt for a fixed decree for the sale of the innergraph property, and on such application being made the motigaged projectly or a sufficient part thereof shall to directed to be sold, and for the purposes of such sale the [laintiff shall produce before the Court, or "such officer as it appoints all documents in his possession or power relating to the mortigaged projects".

6 And it is hearly furth r ordered and decreed that the money realised by such sale sale hall he land into Gou it in the hall to duly applied (after deduction these of most flow again as of the sale) in 14 ment of the smoonst pay tide to the plantitif under this decree had under any further orders that may be passed in this start and it payment of my amount. In the the Context may adjudge due to the plantifif in respect of such cost of the work and each costs that give and expenses at may be payable under R 10 togethe with such subsequent intime is a may be payable under R 1 of 0.3 of the First Schedule to the Code of Civil Procedure 1903 and that the balance of A is ball be paid to the defendant or other persons entitled to receive the same

And it is been further ordered and decreed that if the moise isalized by such as shall not be sufficient for piyment in full of the amount payable to the pluntiff as alores and the plantiff shill be at liberty (where such remedy is open to him under the terms of his mortgage and is not birred by any law for the time being in force) to apply for a classical decree against the defendant for the amount of the balance and that the parties are at literty to apply to the Court for our time to time as, they may have occusion and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULL

Description of the montpajed property

Local Amendment

Rangoon

Form No 5

PRELIMINARY DECREE FOR SALL

(L'ille)

This suit coming on this

ordered and decreed that the sum of Rs being costs of this Suit shall be paid by the defendant No to the and it is declared that the amount due to the plaintiff by the defendant No

is the sum of Rs being the balance of account as shown in the Schedule A hereto, and it is further declared that the plaintiff shall be entitled to

apply for and obtain a final decree for sale of the property in suitb Provided that any of the defendants Nos may apply for and obtain

a decree for redemption of the mortgage on payment into Court of the amount so declared to and on compliance with all be due on or before the day of further orders of the Court and on payment of such further sums as the Court may determine to be payable on finally adjusting the account up to the dete of payment

And it is further declared that the amount due in the parties to the suit whose claims have been proved and the priorities of each parties to payment out of the sale proceeds are as shown in Schedule B hereto

# SCHEDILE A

|   | POHEDORE V                                                                                                     |           |
|---|----------------------------------------------------------------------------------------------------------------|-----------|
| 1 | Due to the plaintiff for principal and interest on<br>the mortgage                                             | Rs        |
| 2 | Due to the plaintiff for costs of suit                                                                         | Rs        |
| 3 | Due to the plaintill for costs ets, in respect of<br>the mortgage<br>Less costs, etc., due to the defendant No | Rs<br>Rs. |
|   | Less costs of suit due to the defendant No                                                                     | Rs        |

# CCHEPHIE P

| Order of Priority | Party | Amount due |
|-------------------|-------|------------|
| 1                 |       |            |
| 2.                |       |            |
| 3,                |       |            |

# No 5 A

# PRELIMINANY DECREE FOR SALL

Due to the plaintiff from defondant No

(O 31, R. 4 - When the Court declares the amount due)

#### (Tatle )

day, etc., It is hereby declared that the This suit coming on this amount due to the plaintiff on the mortgage mentioned in the plaint calculated up to the day of sa the sum of Rs

for interest on the sald principal, the sum principal the sum of Rs for costs, charges and expenses (other than the costs of

the suit) properly meurical by the plaintiff in respect of the mortgage security to ether for the costs of the suit awarded with interest thereon, and the sum of Rs to the plaintiff, making in all the anm of Ra

2 And It is hereby ordered and decreed as follows -

(1) that the defendant dn pay into Court on or helore the or any later date up to which day of time for payment may be extended by the Court the sald sum of Re

(u) that on such payment and on payment thereafter before such date as the Court may fix of such amount as the Canrt may adjudge due in respect of such cost of the suit and such costs, charges and expenses as may be parable unjet R. 10 together with such subsequent interest as may be payable under R. 11, of O 34 of the First Schadnle to the Code of Civil Procedure, 1,03, the

(a) (Or as otherwise apportinged) (b) (Or a specified part thereof)

plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required, reconvey or re transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and shall, fil so regulted, deliver up to the defendant quiet and peaceable possession of the said property

- 3 And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court lor a final decree for the sale of the mortgaged property; and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.
  - 1 And it is hereby further ordered and decreed that the money realized by such sale

Court may adjudge due to the plaintiff in respect of such costs of the suit, and such costs, charges and expenses as may be payable under R 10, together with such subsequent interest as may be payable under R 11 of O 31 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance of any shall be paid to the delendant or other persons entitled to receive the same

5 and it is hereby further ordered and decreed that if the money reshized by such sals shall not ke sufficient for payment in full of the amount payable to the plaintiff as aforesaid, the plaintiff shall be at liberty (where such remedy is open to him under the

٠.

SCHEDULE.

Description of the mortgaged property

No 6

FINAL DECRLE FOR SALE

(O 3) R 5)

(Tttle )

Upon reading the preliminary decree passed in this suit on the day of and inrther orders (il any) dated the

day of and the application of the plaintiff dated the for a final docree and after hearing the parties and

it appearing that the payment directed by the sud decree and orders has not been made by the defendant or any person on his behalf or any other person entitled to redeem the mortgage It is hereby ordered and decreed that the mortgaged property in the aforesaid preliminary

decree mentioned or a sufficient part thereof be sold, and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mertgaged property

2 And it is hereby further ordered and decreed that the money realised by such sale shall be paid into the Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under the aforesaid preliminary decree and under any inrther orders that may have here passed in this snit and in payment of any amount which the Court may have adjudged due to the plaintiff for such costs of the suit including the costs of this application and such costs, charges and expenses as may be payable under R 10, together with such subsequent interest as may be payable under R 11 of O 34 of the First Schedulo to the Codo of Civil Procedure, 1903, and that the balance, if any, shall be paid to the defendant on other persons entitled to re ere the same Local Amendment

#### Rengoon

ix

# Form No 6

# FINAL DECREE FOR SALE (Tatle )

Upon reading the preliminary decree passed in this suit on the and further orders dated the

and the application of for a final decree, and after the plaintiff dated the hearing the parties, and on it appearing that payment of the sum found due by the preliminary decree and compliance with the further orders of the Court has not been made within the time specified by any party entitling him to apply for a decree for redemption

It is hereby ordered and decreed that the mortgaged property mentioned in the whe dule t hereto a be sold and that for the purposes of such sale the parties shall produce before the Court or such officer as it appoints all documents of title in their possession or

power relating to the said property .

And it is further ordered and decreed that the proceeds of the sale (after deduction therefrom of the expenses of the sale) shall, subject to any orders as to setting off the amount due against the purchase money be paid into Court and applied in payment of the amounts found due to the parties under the proliminary decree and further orders of the Court to the order of priority as shown in the Schodule B hereto

It is further declared that the mortgages in respect of which the amounts are shown as due in Schedule B and the right to redeem the same, shall be extinguished, except as to the right of any party entitled thereto to obtain a personal decree against the mortgager for any balance unpaid

SCHEDULE 4.

The I roperty

SCHEDULE R.

| Order of Priority | Party | Amount due |
|-------------------|-------|------------|
| (1)               | ***   | •          |
| (2)<br>(9)        | •     |            |
|                   |       |            |

No 7.

PRILIVINARY DEGREE FOR REDEVIPTION WHI RE ON DEFAULT OF PAINENT BY MORTGAGOR A DI-CREE LOR LORECLOSURL IS PASSLD.

(O 34, R 7-Where accounts are directed to be taken )

(Title )

This suit coming on this decreed that it be referred to

day, et., It is hereby ordere i and as the Commissioner to tase the

day of

- accounts following -(i) an account of what is due on this date to the defendants for principal and interest on the mortgage mentioned in the Ilaint (such interest to be computed at the rate layable on the lancelal or where no an h rate is mod, at six per cent per annum or at such rate as the Court deems
  - (ii) an account of the income of the mortgaged property received up to this date to the defendant or by any other person by order or for the use of the defendant or which, without the wiful default of the defendant or such person might

- (iii) an account of all sams of money properly incurred by the defendant up to this date for coats churkes and expenses (other than the costs of the suit) in respect of the mortgage security together with interest thereon (such interest to be computed at the rate igneed between the parties, or failing such rate at the same rate as is juyable on the principal or fulling both such rates, at unneyer early errent per annum.)
  - (ii) in account of any loss or damago caused to the morigaged property before this date by any act or omnsion of the defendant which is destructive of, or per maneutity improves to the property or by his failure to perform my of the duties imposed upon him by any law for the time being in force or by the terms of the mortage deed.
- 2. It here's further ordered and decreed that any amount received under clause (n) or adjudged due unter clause (n) after together with interest thereon, shall be adjusted squast any sums just is the defendant under clause (n) together with interest thereon, and the latance if sut, shall be adjusted to the mortrage monor or, as the case may be, be debuted in reduction of the amount due to the defendant on account of interest on the principal sum adjudged due and therefore in reduction of algebrage of the principal.
- 3 And it is hereby further ordered that the stud Commissioner shall present the account to this Court with it convenient despitch after making all just allowauses on or before the day of the Comming in my length secured is shall be confirmed and countersured, subject to such modified.

the commit at new temp received it shall be constructed and counteragned, subject to such modification as in it is necessity after consideration of such objections as the parties to the suit may make

4 And it is height further ordered and decreed -

I.

- (i) that the plaintiff do pay into Court on or before the
  - day of , or any later dats up to which time for parment may to extended by the Court such sum as the Court shell in add und the sum of Rs to the defendant.
- (a) that, on such pyrment, and on pyrment thereafter before such data as the Court man first of such amount as the Court many adjudge due in respect of such coasts of the suit and such costs charges and a sycanes as may be payable under B 10, to effect with such subsequent interest as may be payable under B 10, to effect with such subsequent interest as may be payable under B 10 of 26 of the Tirst Schedulo to the Code of Civil Procedure, 1003 the defendant shall bring into Court all documents in his possession or power relating to the mort gag.d property in the planst monitoned and all such documents shall be delivered over to the plannist, or to such person with appoints and the defendant shall if so required, recourse or re transfer the said property free from the said morting and clear of and from all momentances created by the defendant or any person claiming under him or any porson under whom he claims and free from all highly whatsever arising from the mortings or this suit and shall, if so required, definer up to the plannish quiet and processible possession of the said property.
- 5 And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant shall be at hierby to apply to the Court for a final decree that the plannifs shall thenceforth stand absolutely detarred and foreclosed of and from all right to redeem the mort gaged property described in the Schedulo annexed hereto and shall, if so required deliver up to the defendant quest and peaceable possession of the said property, and that the parties shall be at liberty to apply to the Court from timo to timo as they may have occasion, and on such apply too the creatway the Court may give such directions as at think, fit

#### SCHEDULE.

payable under R 11 of O 34 of the First Schedulo to the Code of Civil Procedure, 1903 and that the balance if any, shill be paid to the defendant or other passons entitled to re ere the same

Rangoon

ix

#### Local Amendment

Form No. 6

FINAL DECREE FOR SALE (Tatle)

Upon reading the preliminary decree passed in this suit on the

day of and the application of

and lurther orders dated the for a final decree and after the plaintiff dated the hearing the parties and on it appearing that payment of the sum found due by the preliminary decree and compliance with the further orders of the Court has not been made within the time specified by any party entitling him to apply for a decree for redemption

It is hereby ordered and decreed that the mortgaged property mentioned in the sche dule 't hereto " be sold and that for the purposes of such sale the parties shall produce before the Court or such officer as it appoints all documents of title in their possession or power relating to the said property .

And it is further ordered and decreed that the proceeds of the sale (after deduction therefrom of the expenses of the sale) shall, subject to any orders as to setting off the amount due agriust the purchase money, he paid into Court and applied in payment of the amounts found due to the parties under the preliminary docree and further orders of the Court in the order of priority as shown in the Schedule B hereto

It is further declared that the mortgages in respect of which the amounts are shown as due in Schedule B and the right to redeem the same shall be extinguished, except as to the right of any party entitled thereto to obtain a personal decree against the mortgager for any bulance unpaid

SCHEDULE 4.

The Property SCHEDULE B.

Amount due. Order of Priority Party (2) (3)

No 7,

PRILIMINARY DECRUE FOR REDENPTION WHERE ON DEFAULT OF PAINENT BY MORTCACOR A DECREE FOR FORLCLOSURE IS PASSED.

(O 34, R 7-Where accounts are directed to be taken )

(Tatle )

This suit coming on this decreed that it be referred to accounts following -

day, etc , It is hereby ordered and as the Commissioner to take the

- (i) an account of what is due on this date to the defendants for principal and interest on the mortgage mentioned in the plaint (such interest to be computed at the rate pryable on the principal or where no such rate is fixed, at six per cent per annum or at such rate as the Court deems
  - (ii) an account of the income of the mortgaged property received up to this date by the defendant or by any other person by order or for the use of the defendant or which without the wilful default of the defendant or such person, in the

(a) (O

- dant or which without the wilful default of the defendant or such person might have been so received:
- (ui) an account of all sams of mones properly incurred by the defendant up to this date for costs, charges and exponess (other than the costs of the such in respect of the mortgage security together with interest thereon (such interest to be computed at the rate agreed letween the parties, or, failing such rate, at the same rate, as is payable on the principal, or, failing both such rates at nine per cent per annum).
  - (ii) an account of any loss or damage caused to the mortgaged property before this date by any act or emission of the defendant which is destructive of or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortcare deed.
- 2. And it is hereby further ordered and decreed that any amount received under clause (i) or adjudged don under clause (ii) above together with interest thereon, thall first be adjusted against any sums prid by the defendant under clause (iii) together with interest thereon, and the balance if ny shall be added to the mortgage monor, or as the case may be dedited in reduction of the amount due to the defendant on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.
- 3 And it is hereby further ordered that the said Commissioner shill present the account to this Court with all convenient despatch after making oil just allowances ou or before the day of the Commissioner being received it shall be confirmed and counterspined subject to such
- the Commissioner being received it shall be confirmed and countersigned subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make
  - 4 And it is hereby further ordered and decreed-
  - (1) that the plaintiff do pay into Court on or before the
    - day of or any later date up to which time for payment may be extended by the Court such sum as the Court such and the sum of Rs for the dependant.
  - (ii) that, on such payment and on payment thereafter before such date as the Conrt may fix of such amount as the Court may adjudge due in respect of such costs of the sunt and such costs charges and expenses as may be payable under R. 10 together with such subsequent interest as may be payable under R. 11 of O3 of the Irst Schedule to the Code of Civil Procedure 1903, the defondant shall hing into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned and all such documents shall be delivered over to the plaintiff, or to tuch person as he appoints, and the defendant shall il so required, reconvey or re-transfer the said property free from the said mortgage and clear of and from all incumbrunes created by the defendant or any person claiming under him or any person under whom he claims and shall if so required deliver up to the plaintiff quot and peaceable possession of the said property.
- 5 And it is breely further ordered and decreed that, in default of payment as a foresaid the defendant may apply to the Court for a final decree for the sale of the mortgaged property, and on such application being made into mortgaged property or a sufficient part thereof shall be directed to be sold, and for the purposes of such site the defendant shall produce before the Court or such officers as it appoints, all documents in his possession or power relating to the mortgaged property
- 6 And it is hereby further ordered and decreed that the money realized by such sale shall be paid into Court and shall be daily applied (latter doubtion threatem of the organes of the sale) in payment of the amount payabla to the defendant under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the defendant in respace of such costs of the suit and such costs, charges and expenses as may be payable under R 10 to 62 step the First Schedula to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to receive the same.

Rangoon

DECREE AGAINST MORTGAGOR PI

THE MO:

Upon reading the application of i decree passed in the suit on the day of satisfied that the net proceeds of the suit and he shown in the Schedule hereto, and that i legally recoverable from the

gany recoverable from the personally

It is hereby ordered and de

b the sum of I of six per cent per annum from the date of realization of the said sum and t

Party

PRELIMINARY DECREE FOR T PAYMENT BY MORTGAGO

(O 34, B 7 -Whea

This suit coming on this decreed that it be referred to following -

(t) an account of what is duo on it on the mortgage mention of rate payable on the principal annum or at such rate as th (ii) an account of the income of t

the defendant or by any o. 1 r

<sup>(</sup>a) Mortgagor.

<sup>(</sup>b) Mortgageo (c) (being the date of payment of pro-

dant or which without the wilful default of the defendant or such person might have been so received,

- (iii) an account of all sums of momory properly incurred by the defendant up to this date for costs, charges and expenses (other then the costs of the suit) in respect of the mortgage security together with interest thereon (such interest to be computed et the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or fulling both such rates at nine per cent tyer annumb.
- (ii) on account of any loss or damage cansed to the mortgaged property before this date by any act or omission of the defendant which is destructive of, or permanently injurious to the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortcase deed
- 2. and it is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (iii) above together with interest thereon, shall first be adjusted against any sums paid by the defendent under cleuse (iii) together with interest thereon, and the balance it nor shall be abled to the mortgage money or as the case may be, be debited in reduction of the amount due to the defendant on account of interest on the principal sum adjudged due and thereafter in reduction or discherge of the principal.

3 And 11 hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after mixing all just allowances on or before the day of and that upon such report of the Commissioner being received it shell be confirmed and countersigned subject to auch modification as may be necessary after consideration of such objections as the parties to the suit may make

4 And it is hereby further ordered and decreed-

I.

- (s) that the plaintiff do pay into Court on or before the
  - day of or any later data up to which time for payment may be extended by the Court such sum as the Court such sum as the Court such sum as the Court such and due and the sum of Rs for the coats of tha sunt awarded to the defendant.
- (ii) that on such payment and on payment thereafter before such date as the Conrt may fir of such amount es the Conrt may adjudge due in raspect of such costs of the sunt and such costs, chargee and expenses as may be payable under R. 10 together with such subsequent interest as may be payable under R. 11 of O 3 of the First Schedule to the Code of Civil Procedure 1903, the delendant shall bring into Court all documents in his possession or power relating to the mortegage property in the plaint mentioned, and all such documents shall be delivered over to the plaintift, or to such person are he appoints and the delendant shall, if so lequired, recovery or re transfer the said property free from the said mortage and clear of and from all incumbrances created by the defendant or any portion claiming under hum or any person under whom he claims and shall, if so required deliver up to the plaintiff quite and penceable possession of the said property.
- 5 And it is hereby further ordered and decreed that, in default of payment as sforsaind, the defendant may apply to the Court for a final decree for the sale of the mortagaged property, and on such application being made the mortagaged property or a sufficient part thereof shall be directed to be sold, and for the purposes of such shall the defendant shall produce before the Court or such officer as it appointe, all documents in his possession or power relating to the mortagaged property.

6 And it is hereby further ordered and decreed that the money realized by such sale shall be paid into Court and shall be duly applied (after adsuction thereform of the expenses of the sale) in payment of the emount rayable to the defendant under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the defendant in respect of unch costs of the suit and such costs, charges and expenses as may be payable under R 10, together with such subsequent interests as may be payable under R 11 of 0 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to receive the same

#### Local Amendment

Rangoon

Form No 7.

DEGREE AGAINST WORTGAGOR PERSONALLY FOR BALANCE AFTER THE SALE OF THE MORTGAGED PROPERTY

(Tstle)

Upon reading the application of the and reading the final decree passed in the suit on the day of and the Court being satisfied that the net proceeds of the sale held under the aforesaid decree amounted to Ris and have been paid to the parties, leaving balance (s) due as shown in the Schedule hereto and that the balances due and and and are

legally recoverable from the personally,

It is heroby ordered and decreed that the a

b the sum of Rs
of aix per cent per annum from the

do pay to with further interest at the rate day of cup to the

date of realization of the said sum and the costs of this application.

#### SCHEDULE

| Party | Amount due | Balance unpaid |
|-------|------------|----------------|
|       | 1          |                |
| 1     |            |                |
| 2     |            |                |
| 9     | 1          |                |
|       |            |                |
|       | 1 1        |                |

#### No 7 A

PRELIMINARY DEGREE FOR REDEMPTION WHERE ON DEFAULT OF PAYMENT BY MORTGAOOR A DEGREE FOR SALE IS PASSED

(O 34 R 7 -- Where accounts are directed to be taken)

### $\{Title\}$

This stit coming on this decreed that it be referred to following -

day, etc., It is hereby ordered and as the Commissioner to take the accounts

(i) an account of what is due on this date to the defendant for principal and interest on the mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent preaneum or at such rate as the Court deems reasonable).

(12) an account of the income of the mortgaged property received up to this date by the defendant or by any other person by the order or for the use of the defen-

<sup>(</sup>a) Mortgagor.

<sup>(</sup>b) Mortgagee
(c) (being the date of payment of proceeds of sale as aforesaid)

duct or which without the wilful default of the defendant or such person might have been so received

- (iii) an account of all sums of moses properly incurred by the defendant up to this date for costs charges and expenses (other than the costs of the sunt) in respect of the mortgage security together with interest thereon (such interest to be computed at the rate agreed between the parties or failing such rate at the aims rate as is payable on the principal or fullog both such rates at mine per cent [er annum]
- (ir) an account of any less or damage caused to the mortgeged property before this dato by any act or omission of the defendant which is destructive of or permanently injurious to the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mort size deal
- 2. Ind it is breich further ordered and decreed that any amount received under clause (in) or slyadged due under clause (ii) above together with interest thereon shall first be edinated against any sums prud by the defendant under clause (iii) together with interest thereon and the balance if any shall be added to the mortgage money or as the case may be deducted in reduction of the smount due to the defendant on account of interest on the principal sum adjuged due and thereafter in reduction or discharge of the principal.
- 3 and it is hereby further ordered that the said Commissioner shall present the account to this Court with all concennent despatch after making all just all lownoises on or below the company of the concennent despatch after making all just all properties the Commissioner bears greated it shall be confirmed and on the confirmed and and the confirmed that the confirmed and on the confirmed that the confirmed and on the confirmed that the confirmed and on the confirmed that the confirmed and on the confirmed that the confirmed and on the confirmed that the confirmed and on the confirmed that the confirmed and on the confirmed that the confirmed and on the confirmed that the confirmed that the confirmed and on the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that the confirmed that
- before the day of and that upon such report of the Commissioner being received it shall be confirmed and countersage of subject to such modification as may be recessary after consideration of such objections we the part of the autit may make
  - 4 And it is hereby further ordered and decread-

I

- (i) that the plaintiff do par 10to Court on or before tho
  - day of or any later date up to which time for psyment may be extanded by the Court such sum as the Court shall find due and the sum of Rs for the costs of the suit awarded to the defendant.
- (i) that on such 1 syment end on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the sunt end such costs charges and expenses as may be payable under R 10 together with such subsequent interest as may be payable under R 11 of 0 31 of the First Schedule to the Code of Cril Procedure 1903 the defendant shall being into Court all documents in his possession or power relating to the mortgaged property in the plant it mentioned and all such documents shall be delivered over to the planting or to such person as he approach and the defendant shall it so required neverty or a standard the such court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the cour
- 5 And it: hereby further ordered and decrees that in default of py ment as aforesaid to defonded may apply to the Court for a finel decree for the sale of the mortgaged property and on such application being made the mortgaged property or a sufficient part thereof shall be directed to be sold and for the purposes of such sale the defondant shall reduce be the Court or such officers it appoints all documents in his possess on or power relating to the mortgaged property
- G And it is berely further ordered and decreed that the money realized by such sale shall be paid not Court and shall be also applied (site deduction theratom of the expanse of the sale) in payment of the amount payable to the defendant under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the defendant in respect of such costs of the suit and such costs charges and expenses as may be payable under R 10 together with such authorites the samp be payable under R 11 of 0.3 of the First Schedule to the Code of Civil Procedure 1908 and that the balance if any shall be paid to the plaintiff or other persons entitled receive the same

7 And it is hereby further ordered and decreed that, if the money realized by such sale shall not be sufficient for payment in full of the amount payable to the defendant as aforesaid the defendant shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the plaintiff for the amount of the balance, and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit

## SCHEDILLE

Description of the mortgaged property

#### No 7 B

PRELIMINARY DECREE FOR REDEMPTION WHERE ON DEFAULT OF PAYMENT BY MORTGAGOR A DECREE FOR FORECLOSURE IS PASSED

(O 34 R 7-Where the Court declares the amount due )

#### (Title)

This suit coming on this

day, eto, It is hereby declared that the amount due to the defendant on the mortgage mentioned in the plaint calculated up to this day of se the sum of Re

for interest on the said principal the sum for principal, the sum of Rs for costs charges and expenses (other than the costs of the sun)

properly incurred by the defendant in respect of the mortgage security together with interest for the costs of the suit awarded to the thereon and the sum of Ra defendant making in all the sum of Rs

- 2 And it is hereby ordered and decreed as follows -
  - (1) that the plaintiff do pay into Court on or before the

or ao) later date up to which time for piyment may be extended by the Court the said sum of Rs

- (11) that on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of su h costs of the suit and such costs, charges and expenses as may be parable under R 10 together with such subsequent interest as may be payable under R 11 of O 34 of the First Schedule to the Code of Civil Procedure, 1903 the de fendant shall bring into Court all documents to his possession or power relation to the mortgaged property in the plaint mentioned and all such documents shill be delivered over to the plaintill, or to such person as he appoints and the de fendant shall if so required re convey or re transfer the sud property free from the sud mortgago and clear of and from all mountrances created by the def n dant or any person cluming under him or any person under whom he claims 17d free from all liability whatsoever arising from the mortgage or this suit and shall if so required deliver up to the plaintiff quiet and peaceable possession of
- 3 and it is hereby further ordered and decreed that in default of payment as abre a the defendant may apply to the Court for a final decree that the plaintiff shall thenceforth and absolutely deturned and foreclosel of and from all right to redeem the mortgaged fright described in the Schedule unnexed heretn and shall, if so required deliver up to the delendant quiet ind percorble possession of the sud property, and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion and on such application of otherwise the Court may give such directions as It thinks fit

#### SCHEDULE

2909

No 7 C PRELIMINARY DECREE FOR REDIMPTION WHERE ON DEFAULT OF PAYMENT

BY MORTGAGOR A DECRET FOR SALE IS PASSED

(O 31 R 7-Where the Court declares the amount due)

#### (Tatle)

day etc. It is hereby declared that the This suit coming on this amount due to the defendant on the mortgage mentioned in the plaint calculated up to this day of is the sum of Ra for remember

the sum of Re for interest on the said principal the sum of R. for costs charges and expenses (other than the costs of the suit) properly incurred by the defen dant in re pect of the mortgage security together with interest thereon and the suit of for the rost of this sail awarded to the defendant making in all the sum of Rs

2 \nd it is hereby ordered and decreed as follows —

τ

- (1) that the plaintiff do 1 av mito Court on or before the or any later date up to which time the lay day of ment may be extended by the (ourt the said sum of Rs
- (a) that on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such co to of the suit and each costs charge and expenses as may be payable under it 10 together with an hauberquent juterest as may he payable under R 11 of O 34 of the First S hedule to the Code of Civil Procedure 1908 the defendint shall tring into Court all documents in his possession or power relating to the mort gaged property in the plaint mentioned and all such documents shall be delisered over to the plaintiff or such person as he appoints and the defendant shall if so required re convey mr re transfer the said project; to the plaintiff free from the said mortgage and clear of and from all incumbrances created ov the defendant or any person claiming under him or and person under whom he claims and shall if so required deliver up to the plaintiff quiet and poaceable no session of the said property
- 3 And it is hereby further ordered and decreed that in delault of promont is aforesaid the defendant may apply to the Court for a final decree for the sale of the mortgaged tro perty and on such application being made the mostgaged property a sufficient part thereof shall to directed to be sold and for the purposes of sull whe the detention shill produce before the Court or such officer as it appoints all d umout in his po t on or power relating to the mortgaged property
- 4 And it is hereby further ordered a d decreed that the mo so realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale; in payment of the amount payable to the defendint under this decree and upder any furthe orders that may be pased an this suit and in proment of any amount a bick the Court may admidge due to the defeudant in respect of such costs of the aust and such co to charges and expense to may to parable under R 10 together with such subsequent intere t as may be proble under R 11 f O 34 of the Frist S hedule to the Code of Civil I recedure 1,08 and that the balance if in hall is paid to the plaintiff or other persons cutitled to the same
- 5 And it is hereby further ordered and le roel that if the miles in liked by such sale shall not be sufficient for the payment in full of the amount | vible to the defendant as iforesaid the defendant shall be t liberts (where such relined of it to min under the terms of the mortgage and is not berred by my law for the time lend, in force) to apply for a personal de-ree against the plaintiff for the amount of the balance and that the parties are at liberty to apply to the Court from time to time as they may have occasion and on such apply ation or otherwise the Court may give such directions as it thinks fit

#### SCHEDULE

## No 7 D

## FINAL DECREE FOR FOREOLOSURE IN A REDEMPTION SUIT ON DEFAULT OF PAYMENT BY MORTGAGOR

(0 34, R. 8)

(Tatle )

Upon reading the preliminary decree in this suit on the

day of and further orders (if any) dated the

, and the application of the defendant day of

dated the for a final decree and after day of bearing the parties, and it appearing that the payment as directed by the said decree and orders has not been made by the plaintiff or any person on his behalf or any other person entitled to redeem the mortgage

It is heroby ordered and decreed that the plaintiff and all persons claiming through or under him be and they are hereby absolutely debarred and foraclosed of and from all right of redemption of and in the property in the aforesaid preliminary decree mentioned" [and (if the plaintiff be an possession of the said mortgaged property) that the plaintiff shall deliver to the defendant quiet and peaceable possession of the said mortgaged propertyl

2 And it is hereby further declared that the whole of the liability whatsorer of the plaintiff up to this day arising from the said mortgage mentioned in the plaint or from this suit is hereby discharged and extinguished

No 7 E

FINAL DECREE FOR SALE IN A REDEMPTION SUIT ON DEFAULT OF PAYMENT BY MORTGAGOR

(O 31 R 81

(Tatle)

Upon reading the preliminary decree passed in this ouit on the

day of and further orders (if any) dated the

and the application of the defendant dated the day of for a final decree and after hear not he natice and it ap day of

nearing that plaintiff or ai

It is he

nary decree the defendant shall produce before the Court, or such officer as at appoints all decuments " his possession or power relating to the mortgaged property

nary decree and under any further orders that may have been passed in this suit and in part ent of any amount which the Court may have adjudged due to the defendant for such costs of this suit including the costs of this application and such costs, charges and expenses as may be marghle under P 10 teach. n il. be payable under R 10, together with the subsequent interest as may be payable under R 11, of O 34 of the First Schedule to the Code of Civil Procedure, 1903, and that the balance of any, shall be paid to the plaintiff or other persone entitled to receive the same

No 7 P

FINAL DECREE IN A SUIT FOR FOREGLOSURE, SALE OR REDEMPTION WHERE THE MORTGAGOR PAYS THE AMOUNT OF THE DECREE

(O 34, Rr 3, 5 and 8)

(Tatle )

day for further consideration and it appearing This snit coming on this

2911

that on the

day of

day of

the mortgagor or , the same being a person entitled to redeem, has paid into Court all amounts due to the mortgagee under the preliminary decree dated the

, It is hereby ordered and decreed that -

(i) the mortgages do execute a deed of re conveyance of the property in the afore said preliminary decree mentioned in favour of the mortgagor "[or, as the case whe has releamed the property] or an acknowledgment of the amount due in his favour,

(ii) the mortgagee do hring into Court all documents in his possession and power relating to the mortgaged property in the suit.

And it is hereby further ordered and decreed that, upon the mortgages executing the

deed of re conveyance or acknowledgment in the manner aforesaid.-(1) the said sum of Re he paid out of Court to the

mortgagee,

(11) the said deels and documents brought into the Court be delivered out of Court to the mortgagor "[or the person making the payment] and the mortgagee do when so required concar in registering, at the cost of the mortgagor "[or other person making the pyament] the sail deed of re conveyance or the acknowledg ment in the office of the Sub Registrar of

(iii) "(if the mortgages plaintiff or defendant as the case may be, is in possession of the mortgaged property) that the mortgages do forthwith deliver possession of the mortgaged property is the aforesaid preliminary decree mentioned to the mortgagor for such person as aforegaid who has made the payment]

#### No 9

DECREE AGAINST MORTGAGOR PERSONALLY FOR BALANCE AFTER THE SALE OF THE MORTGAGED PROPERTY

(O 34 Rr 6 and 8 A)

( I'ttle )

Upon reading the application of the mortages (the plaintiff or defendant as the case may be) and reading the final decree passed in the suit on the

and the Court being satisfied that the nat proceeds of the day of sale held under the aforesaid final decree amounted to Rs and have been paid to the applicant out of the Court on the day of

and that the balance now due to him under the aforesaid decree is Rs

up to the data of realization of the and sum and the costs of this application

And whereas it appears to the Court that the said sum is legally recoverable from the mortgagor (plaintiff or defendant as the case may be) personally

It is hereby ordered and decreed as follows -

That the mortager (plaintiff or defendant as the case may be) do pay to the mortgagee (defendant or plantiff as the case may be) the said sum of Rs

with further interest at the rate of six per cent per annum from the (the date of payment out of Court referred to above) day of

#### Local Amendment Rangoon

Form No 8 PRELIMINARY DECREE FOR REDEMPTION

(Ts le )

This suit coming on this day of It is hereby ordered and decreed that the sum of Rs being costs of this suit shall be paid by the

\* Words not required to be deleted.

ıx defendant No to the a, and it is hereby declared that the amount due to the defendant No. by the plaintiff is the snm of Rs being the balance of account as shown in the schedule hereto, and it is further declared that on payment into Court of the said amount on or before the

day of and on compliance with all further orders of the Court and on payment of such further sums as the Court may determine to be payable on finally adjusting the account up to the date of payment the plaintiff shall be entitled to apply for and obtain a final decree for redemption and that if the plaintiff fails to make full payment as aforesaid the defendant Νa shall be entitled to apply for and obtain a decres b

### COMPANY

|   | BOHED                                              | J Li E              |    |
|---|----------------------------------------------------|---------------------|----|
| 1 | Due to the defendant No                            | on the mortgage     | Rs |
| 2 | Due to the defendant No                            | for costs of suit   | Rs |
| 3 | Due to the defendant No<br>respect of the mortgage | for costs etc in    | Rs |
|   | Less costs etc in respect of<br>the plaintiff      | the mortgage due to | Rs |
|   |                                                    |                     | R, |

Less costs of suit due to the plumiff

Due to the defendant No

Rs

#### PRELIMINARY DECREE FOR PORECLOSURE OR SALE

1st Mortgagee Plaintiff 13 Mortgagor Defendant No. 1 2nd Mortgagee]

Defendant No. 2 (O 31 Rr 2 and 4)

(Title )

day eto . It is hereby declared that the The suit coming on this amount due to the plaintiff on the mortgage ment oned in the plaint calculated up to this

day of is the sum of Rs for interact on the sail principal the sum for principal the sum of Rs

for costs charges and a of Ra incurred by the plaintiff in respect of the mortgag sum of Rs for the costs of th ... a 404 3 m 2 all the sum of Rs

(Similar declarations to be introduced with regard to the ariount due to defe dark No 2 in respect of his mortjaje of the mortgage rious f due thereunder has beco a payite

2 It is further declared that the plaintiff is entitled to payment of the amount due to him in priority to defendant No 2º [or [if there are several subsequent mortisace] that the several parties hereto are entitled in the following order to the payment of the sums due to them respectively -1

and it is hereby ordered and decreed as follows -

(i) (a) that defendants or one of them do pay into Court on or before the or any later date up day of

(a) or as otherwise apportioned

(b) for sale or foreclosure

. Words not required to be deleted

to which time for payment has been extended by the Court the said sum of Rs . due to the plaintiff, and

(b) thet defendant No 1 do pro into Court on or helore the

Ţ

day of or any later date up to which time for pijment has been extended by the Court the said sum of Rs due to defendant No 2, and

(a) that, on payment of the sum declared to be due to the plaintiff by defend into or either of them in the numer piecerbled in clause (i) (a) and on payment there efter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs charges and ox peness as may be payable under R 10 of 0 3t of the First Schedule to the Code of Uril Procedure 100s. the plaintiff shull bring into Court all documents in his posses on or power relating to the mortgaged property in the plaint mentioned and all such documents shull be delivered over to the defendant No.

(who has made the payment), or to such person as he appoints and the latanifs shull it so required, re coursey or not transfer the said property free from the sail merigage and clear of and from all mountscances created by the plantiff or any person clearing under him or any person under whom he claims and also free from all limitity whatever arising from the mortgage or this rule of shull it so required deliver up to the defendant \( \) \( \)

(who has made the payment) quiet and perceable

possession of the said property
(similar declarations to be introduced of defendant No 1 jays the arrount found or scalared to be due to defendant No 2 with such constants as may be necessary having regard to the nature of 11 mortgage)

4 And it is hereby further ordered and decreed that in default of payment as aforeand of the amount due to the plaintiff the plaintiff is all le at laborty to apply to the Court for a final decree.

- (i) "In the case of a rootings by conditional sales or an anomalous rootings where the only pressed promited for we the mortpape deed so forcelours and not rais! that the defendants pointly and severally shall themeforth stand absolutely debarred and forceloned at and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall it so required deliver to the plaintiff quet and paccable possession of the said Property or
- (ii) "(in the case of an t other wordgage) that the mortgaged property or a sufficient part thereof shall be sold, and that for the purposes of such sale the plaintiff shall produce before the Court or such other as it appoints all documents in his possession or power relating to the mortgaged property and
- (iii) "(iii) the case where a sale is ordered under cleave a (iii) above) that the money realised is such side shall be paid into Gourt and he duly applied (fater deduction therefore of the expenses of the sale) in payment of the amount paythe to the planutiff under that decree and under any further orders that may have been passed in this such and in payment of the amount which the Court may adjudge due to the planutiff in respect of such costs of this, such and case the cast of this, such and expenses as may be payable under R 10 together with such subsequent unterest as may be payable under R 11 of 0 at of the First Schedule to the Code of Crisi Procedure 1908 and that the balance if any shall be applied in payment of the sument due to defendant No 2 and that it any talance be left it shall be paid to the defendant No 1 or other persons entitled to receive the same and
  - (ii) that if the money realised by such sale shall not be sufficient for payment in full of the amounts due to the planntid and defendant No 2 the planntid or defendant No 2 or both of them as the case may be shall be at liberty (when such remedy is open under the terms of their respective mortgages and is not tarmed hy any law for the time being in force) to apply for a personal decree against defendant No 1 for the amounts remaining due to them respectively

<sup>\*</sup> Words not required in be deleted,

defendant No. to the a and it is hereby declared that the amount due to the defendant No. by the plaintiff is the sam of Rs Leine the balan a of ac ount as shown in the schedul, hereto and it is further de lared that on navment into Court of the said amount on or before the

ıχ

and on compliance with all further orders of the Conrt and on payment of such further sums as the Court may determine to be payable on finally adjusting the account up to the date of payment the plaintiff shall be entitled to apply for and obtain a final de reel t redemp ion and that if the plaintiff fails to make full payment as aforesaid the defendant No. shall be entitled to apply for and obtain a decree b

#### C 011111111111

|   | SCHEDU                                                                      | JLE .             |         |
|---|-----------------------------------------------------------------------------|-------------------|---------|
| 1 | Due to the defendant to                                                     | on the mort age   | Rs.     |
| 2 | Due to the defendant \o                                                     | for costs of suit | $R_{s}$ |
| 3 | Due to the defendant \a. respect of the mortgage Less costs etc in repet of | for costs etc in  | Rs.     |
|   | the plaintiff.                                                              |                   | Rs      |
|   |                                                                             |                   | R.      |
|   | Le 2 co to of suit due to the p                                             | lun 11            | R       |
|   | Due to the defendant \c                                                     |                   | R       |
|   |                                                                             |                   |         |

\0 0

## PRELIMINARY DECREE FOR FORECLOSURE OR SALE

Ist Mortalet Plain tiff ı s My 1,25 1

Defendant No 1 na V : age I Defendant to 2

(O 34 Rr 2 and 4)

(Talle )

day etc . It is hereby de lared that the The suit coming on this amount due to the plaintiff on the morigage ment oned in the plaint calculated up to the

to the sum of Ra day of for interest on the said prin ipal the i for principal the sum of Rs. for costs charges and expenses (other than the costs of the a- 1) of Re incurred by the plaintiff in respect of the mortgage entity with interest thereon and the for the costs of this cuit marded to the plaint a min su sum of Rs

all the sum of Rs (Similar declarations to be introduced with regard to the emotit due o defe No 2 i respect of his mortjage if the mortjage ito ey due therewiler las be ne f at the date of the suit)

- 2. It is further de lated that the plaintiff is entitled to payment of the am high to him in priority to defendant to 2" for (if there are several subsequent mority in the several parties hereto are entitled in the following order to the payment of a conduct of the payment of a conduct of the payment of a conduct of the payment of a conduct of the payment of the paym due to them re pectively -]
  - and it is hereby ordered and decreed as follows -(i) (a) that defendants or one of them do pay into Court on or be e 1 e or any later da e up day of

<sup>(</sup>a) or as otherwise apportuned

<sup>(!)</sup> for sale or forcelosure

<sup>.</sup> Words not required to be deleted

to which time for payment has hen extended by the Court the said sum of Rs due to the plaintiff; and

(b) that defendant No. 1 do pay into Court on or before the

day of or nuy later date up to which time for pixment has been extended by the Court the said sum of Rs dun to defendant No 2, and

(ii) that on a summet of the sum declared to be due to the plannil by delead into or either of them in the minner presented in clause [i] [a] and on payment there after before such date as the Court may need such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be parallel under R | 11 of 0 | 31 of the First Schedule to the Code of Giril Procedure 1905, the Illalith Sahil bring into Court all documents in his posses one or power relating to the mortgaged property in the plaint mentioned and all such documents shall be delivered over to the delendant No.

(who has made the payment), or to such person as he appoints and the Januthi shall it so required, re convey or set transfer the said property free from the said mortgage and clear of and from all incumbraness created by the plaintil or any parson claiming under him or any preson under whom he claims, and also free from all Hability whatsoever arrang from the mortgage or this suit and about the required deliver up to the defendant No

(who her made the pryment) quiet and perceable

(Similar declarations to be introduced of defendant No 1 juys the amount found or octared to be due to defendant No 2 with such careations as may be necessary having regard to it enclare of 1s mortgage)

4 And it is hereby further ordered and decreed that in defeult of payment is aforested of the amount due to the plaintiff the plaintiff shall be at liberty to apply to the Court for a final decree—

- (1) "In the case of a mortyaye by conditional sales or an anomalous mortgage whose the only rended procurade for such mortgage dead's preclosure and in ota call that the defendants jointly and severally shall thouseforth stand absolutely debarred and foreclosed of and from all right to redeem this mortgaged property described in the Schedule annexed horeto and shall, it so required deliver to the plaintiff quiet and perceal to possession of the and property.
- (ii) "[in the case of an i other mortgage] that the mortgaged property or a sufficient part thereof shall be sold and that for the purpose of such sale the plantiff shall produce before the Court or such officer as it appoints all documente in his possession or power relating to the mortgaged property and

6041 \*

piaved in the suit and in payment of the amount which the Court may adjudge due to the pluntin in respect of such costs of this with and cush cost charges, and exputes as may be payable under R 10 tagether with such subsequent to the Code of Cryf Froedure 100g and that the balance if any shall be applied in payment of the mount due to defendant No 2 and that they balance be left it shall be paid to the defendant No 2 or other persons entitled to receive the same.

(iv) that if the money realised by such sale shall not be sufficient for payment in full of the amounts due to the plaintid and defendant No 2, the plaintid or defendant No 2 or both of them as the case may be, shall be at libert; (when such remed is open under the terms of their respective mortgages and is not brirned by any law for the time being in force) to apply for a personal dettee against defendant No 1 for the amounts remaining due to them respectively.

- 5 And it is hereby further ordered and decreed-
- (a) that if defendant No 2 pays into Court to the credit of this suit the amount adjudged due to the plannif, but defendant No 1 makes default in the payment of the said amount defendant No 2 shall be at liberty to apply to the Court to keep the planniff a mortgage alive for his benefit and to apply for a fluid decree (in the same manner as the planniff much that done under clause 4 dout)"—
  - \*(i) that defendant No 1 shall thenceforth stand absolutely debarred and foreclosed of and from all right to redsem the mortgaged property described in the sciedule annexed hereto and shall is so required, deliver up to defendant No 2 quet and peaceable possession of the said property 1 or
- "[(ii) that the mottgaged property or a sufficient part thereof be sold and that for the purposes of such sale defendant No 2 shall produce before the Court or such officer as it appoints all documents in his possession or power relating to
- the mortgaged property ] and (b) (if on the application of defendant No 2 such a final decree for foreclosure is
- O And it is hereby further ordered and decreed "[in the case where a sale is ordered under clause b about.]—

  (i) that the money realised by such sale shall be paid into Court and be duly applied.
  - (after deduction therefrom of the expenses of the sale) first in payment of the amount paid by defendant No 2 in respect of the plaintiff a meriggee and the costs of the suit in connection therewith and in payment of the amount which the Contr may adjudge due in respect of subsequent interest on the said amount, and that the balance if any shall then be spilled in payment of the amount adjudged due to defendant No 2 in respect of his own mortage noise this decree and any further orders that may be passed and in payment of the amount which the Court may adjudge due in respect of such costs of time and such costs charges and expenses as may be payable to defendant no 2 under R 10 together with such subsequent interest is may be payable and that the balance if any shall be paid to defendant No 1 or other primas entitled to receave the same and
  - (a) that if the meany restrict by such sale shall not be sufficient for payment in full of the amount does not step so the planning in energing of defendant to 2 a mortgage defendant No 2 shall be at liberty (where stem mody to open to he under the terms of his mortgage and is not berned by any law to the time teep in force) to apply for a personal decree against defendant No 1 for the amount of the behance
- 7 And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court from time to time as they may have occasion and on such application or other was the Court may are such directions as at think fit.

### SCHEDULE

Description of the mortgaged property

#### Form No 9

#### FINAL DECREE FOR REDEMPTION

#### (Title )

Upon reading the preliminary decree passed in this suit on the day of and further orders dated the 19, and the decree and after hearing the part is and on it appearing thir payment of the sum found due by the preliminary decree and sule

quent orders has been made and all further orders of the Court have been complied with by the

It is hereby ordered and decreed that the defendant No shall deliver to the plantiff or to such person us the plantiff appoints in this behalf the mortgaged property specified in the Schedule hereto and all documents in the possession or power of the defendant No reliting to the said property, and shall execute and have registered (as required by the pluntiff and at the cost of the plantiff either (1) an eshapowlegiment in writing that all lights created by the mortgage in such have been extinguished, (ii) vertransfer to the pluntiff or to such third person as her hard property freed from the mortgage and from all nemubrances created by the defendant or by any person driving title from limit, or (iii) a transfer of the mortgage to such third person as the plantiff may direct.

#### SCHEDULE

(The property)

Note —This form is applicable, with substitution of the proper party for the 'plaintiff' where the decree is in favour of a party other than the plaintiff'

#### Rangoon

Defendant No 2

Renumber Forms 12 to 23 as 10 to 21 respectively

#### No 10

## PRELIMINARY DECREE FOR REDEMPTION OF PRIOR MORTGAGE AND

### FORECLOSURE OR SALE ON SUBSEQUENT MORTGAGE

[Plaintiff 2nd Vortgagee,

Defendant No 1 . Mortgager,

1st Mortgagee 7

(O 34 Rr 2 4 and 7)

(Tatle)

The suit coming on this amount due to defendant No 2 on the mortgage mentioned in the plaint calculated up to this any of Street as the sum of Rs for principal the sum of Rs for content of the sum of Rs for costs charges and expenses (other than the costs of this suit)

provedy neutred by defendant No 2 in respect of the mortgage security with interest thereon and the sum of Rs.

for the costs of this suit awarded to defendant No 2, making in all the sum of Rs.

Similar declaration to be introduced with regard to the amount due from defendant No 1, to the maintiff in respect of his morthous of the monthage where there makes

- No 1 to the plaintiff in respect of his mortgage if the mortgage money due there under ias become payable at the late if the suit)
- 2 It is further declared that defendant No 2 is entitled to payment of the amount due to him in priority to the plantint "for it (there are several subsequent mortgages) that the several parties bereto are entitled in the following order to the payment of the sums due to them respectively —]
  - 3 And it is hereby ordered and decreed as follows -
    - (t) (a) that the plaintiff or defendant No 1 or one of them do pay into Court on or before the day of or any later date up to which time for payment has been extended by the Court the said sum of Rs due to defendant No 2, and
      - (b) that defendant No 1 do pay into Court on or before the
    - day of or any later date up to

- which time for pryment has been extended by the Court the said sum of Rs due to the plaintiff . and
- (11) that on payment of the sum declared due to defendant No. 2 by the plaintiff and defendant No 1 or either of thom in the manner prescribed in Clause (i) (a) and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs charges and expenses as may be payable under R 10 together with such subsequent interest as may be payable under R. II of O 34 of the Pirst Schedule to the Code of Civil Procedure, 1908, defendant No 2 shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned and all such documents shall be delivered over to the plaintiff or defendant No 1 (whoever has made the payment) or to such person as he appointe and defendant No 2 shall if so required re convey or re transfer the said property free from the said mortgage and clear of and from all encumbrances created by defendant No 2 or any person claiming under him or any person under whom he claims and

111 (Similar declarations to be introduced if defendant No 1 pays the amount for dor deceared due to the plaintiff with such carrations as may be necessary having regard to the nature of his viorigage)

- 4 And it is hereby further ordered and decreed that, in default of payment as aforesaid of the amount due to defendant No 2, defendant No 2 shall be at liberty to apply to the Court that the suit he dismissed or for a final decree-
  - (1) \*(in the case of a vortgage by conditional sale or a vanovialous variyaje where il e only remedy provided for in the

that the plaintiff and and defen

forth stand absolutely debarred

the mortgaged property described in the Schedule annexed herete and shall it so required deliver to the defendant No 2 quiet and peaceable possession of the said property or

- (11) "(in the case of any other mortgage) that the mortgaged property or a sum cent part thereof shall be sold and that for the purposes of such sale defendant to 2 shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged | roperty, and
- (111) "(in the case where a sale is ordered under clause 4 (11) about the mount realised by such sele shall be paid into Court and be duly applied (after deduc tion therefrom of the expenses of the sale) in payment of the amount payable to detendant No 2 under the decree and any further orders that may be passed in this suit and in payment of the amount which the Court may adjudge due to defendant No 2 in respect of such costs of the suit and each costs charges and expenses as may be Jayable to the plaintiff under R 10 togother with such subsequent interest as may be payable under R 11 of O 34 of the First Schedule to the Code of Civil Procedure 1908 and that the balance if any shall be applied in payment of the amount due to the plaintiff and that, if any balance he left it shall be paid to defendant No 1 or other persons entitled to receive the same and
- (11) that if the money revised by such sale of the amounts due to defendant No plaintiff or both of them, as the es remedy is open under the terms of their respect a ... . o o

by any law for the time being in force to apply for a personal decree against defendant No 1 for the amounts romaining due to them respectively

- 5 And it is hereby further ordered and decreed -
- (a) that if the plaintiff page into Court to the credit of this suit the amount adjudged

due to defendant No. 2 but defendant No. 1 makes default in the payment of the said innount the plannfill shall be it liberty to apply to the Court to keep defendant No. 2 mortgage alive for his benefit and to apply for a final decree for the same manner as the defendant No. 2 might have done under clause & about!—

- \*(ii) that defendant No 1 shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgood property described in the Schedula aunced hereto and shall if so required, deliver up to the plaintiff quest and reveable pos essons of the said property ] or
- "(in) that the mortraged property or a sufficient part thereof he sold and that for the purpose of such sale the a juntific shall produce before the Court or such check as it appoints all documents in his journal or jower relating to the mortraged property.)
  - and (b) (if on the application of defendant No 2 such a final decree for foreclosure is passed) that the whole of the hability of defendant No 1 arising from the plaintiff's mortgage or from the mortgage of the defendant No 2 or from this suit shall tellegened to have been discharged and extinguished
- 6 And it is hereby further ordered and decreed (in the case where a sale is ordered under clause 5 ab it) —

  (i) that the money realized by such sale shall be paid into Court and be duly applied.
  - amount juid by the plaintiff in respect of defondant No 2 e mortgage and the costs of the sunt in concesson therewith and in payment of the amount which the Court may adjudge due in respect of subsequent interest on the said amount and that the balince it any shall then be applied in payment of the amount adjudged due to the plaintiff in respect of his own mortgage under this decree and any further orders that may be passed and in payment of the amount which the Court may adjudge due in respect of such costs of the call and such costs charges and expense as may be payable to the plaintiff under R 10 together with such subsequent interests a may be payable bunder P 11 of 0 31 of the First Schedule to the Code of Chil Precedente 1008 and that the balince it any shall be paid to defendant No 1 or other persons entitled to receive the same and

(after deluction therefrom of the expenses of the sale) first in payment of the

- (a) that if the money realized by such sale shall not be sufficient for payment in full of the amount due in respect of defendant No 2 s mortgage of the plainting mortgage defendant No 2 shall be at 1 berty (where such remedy is open to him under the terms of h s mortgage and is not barred by my law for the terms being in force) to apply for a personal decree against defendant No 1 for the amount of the ballons.
- 7 And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court from time to time is they may have occasion and on such application or otherwise th C ut thay give such directions as it thinks fit.

#### SCHLDDLE

De crapt on of the mortgage's property

No 11

#### PRELIMINARY DECREE FOR SALE

[ Plaintiff-Sub or derivative mortgagee

.

Defendant No 1 -Mortgagor

Defendant No 2 -Original mortgagee ]

(O 31 R 4)

(Tatle )

This suit coming on this

day, etc , It is hereby declared that the

amount due to defendant No. 2 on his mortgage cal ulated up to this

dar of 15 the sum of R. for principal the sum of Re-

for intere t on the said print ipal the sum of Ra. for costs charms and expenses (other than the co to of the suit) in respect of the mortgage counity toge to with interest thereon and the sum of Rs. for the co to of the suit and 'c'

to defendant No 2 making in all the sum of R. (Similar declarations to be introduced with regard to it a amount due from define to No. 2 to the plaintiff in respect of his mortgage)

2 And it is hereby ordered and decreed as follows -

(1) that defendant to 1 do pay into Court on or before the said

day of to whi h time for payment may be extended by the Court the said and dne to defendant No. 2.

(Sin ilar declarations to be introduced with regard to the amount due to he ! " lefendar ! No 2 being at liberty to say such an ount )

in the manner prescribed in clause 2 (i) and on payment thereafter be' es- b date as the Court may fix of such amount as the Court may adjude at the re pect of such costs of the sust and such costs charge, and expen as as mar to payable under R. 10 together with such subsequent interest as may be payable under R. 11, of O 34 of the Fir & Schedule to the Code of Civil Procedure 100the plaintiff and defendant No. 2 shall bring into Court all documents in the ! and all su h documents (except such as relate only to the sub-m 11,350) shall be delivered over to defendant to 1 or to such person as he appoints, and de'en and No 2 shall if so required re couvey or re transfer the property to de ...dant to 1 free from the said mortgage clear of and from all incumbrances c es 12r defendan. to 2 or any person claiming under him or any person under wh mit claims and free from all liability arising from the mortale or this sait and shall if so required deliver up to defendant to I quiet and rea eable po of the said property and

(ii) that on payment of the sum declared due to defendant to 2 by defendant t

(m) that upon payment into the Court by defendant to 1 of the amount use to defendant to 2 the plaintiff shall be at liberty to apply for payme. 13 hald the sum declared due to him together with any subsequent costs of the suit and other costs charges and expenses as may be pavable under R 10 to, hen h such subsequent interest as may be pavable under R. 11 of O Si of the F. Schedule to the Code of Civil Procedure 1903 and that the balance if any said then be paid to defendant No. ? and that if the amount paid into the Catt not sufficient to pay in full the sum due to the plaintiff the plaintiff that to at liberty (if such remedy to open to him by the terms of the mortgage and a barred by any law for the time being in force) to apply for a persual against defendant to 2 for the amount of the balance.

3 And it is further ordered and decreed that if defendant No. 2 part into C art to the credit of this suit the amount adjudged due to the plaintiff the plaintif shall him, into the Court all documents et. [as in sub clause (is) of clause 2]

And it is hereby further ordered and de reed that an default of payment by as a dants Nos. 1 and 2 as aforesaid the plaintiff may apply to the Court for a final de ree! and on such application being made the mortabed property or a sufficient part there is and dire ed to be sold and that for the purposes of such sale the plaintiff and defendantly shall produce before the Court or such officer as it appoints all documents in their por power relating to the mortgaged property

and it is hereby further ordered and decreed that the money realised by so had shall be paid into Court and be duly appl of latter deduction therefrom of the expensed the sale) first in payment of the amount due to the plaintiff as specified in clau of above with a costs of the surf and other costs charges and expenses as may be payable under R. 10 t schot with uch subsequent interest as may be pavable under R. 11 of O 34 of the birst beholing to the Code of Civil Procedure 100, and that the balance if any shall be applied in page of

the amount due to defendant No 2; and that, if any balance be left at shall be paid to defendant No 1 or other persons entitled to receive the same

6 and at is bereby further ordered and decreed that, if the monoy realised by such sale shall not be sufficient for payment in full of the amounts payable to the plannist and detendant No 2 the plaintiff and detendant No 2 or both of them, as the case may be shall set at liberty (if such trends) is open under their respective mortgages and must be bream by an in law for the tune being in force) to apply for a personal decree against detendant No 2 or defendant No 1 (as the case may be for the summer of the ballows.

7 And it is increby further ordered and decreed that, if defendant No 2 pays into Court to the credit of this suit the amount adjunded due to the plantiff, but defendant No 1 makes detault in payment of the amount due to the defendant No 2, defendant No 2 shall be at hierit to apply to the Court for a final decree for foreclosure or said (is the case may be)—(declarations in the ordinary form to be introduced according to the nature of defendant No 2 s word 192 and the remedict open to him theremeder)

8 and it is hereby further ordered and decreed that the parties are at liberty to apply to the Court as they may have occasion, and on such application or otherwise the Court may true such directions as it thinks fit.

#### SCHEDULE.

Description of the mortgaged property

# No 12

#### DECRLE FOR RECTIFICATION OF INSTRUMENT

#### (Tatle )

It is hereby declared that the ... dated the does not truly express the intention of the parties to such

day of

be rectified by

#### No 13

## DECREE TO SET ASIDE A TRANSFER IN FRAUD OF CREDITORS

#### (Title)

It is hereby declared that the 19 , and made between

and it is decreed that the said

ĩ.

, dated the

day of

is void as against the plaintiff and all other the creditors, if any, of the defendant,

#### No 14.

#### INJUNCTION AGAINST PRIVATE NUISANCE.

#### (Tatle )

Let the defendant
pertually restrained from burning or causing to be burnt, any busics on the defendant's plot of
land marked B in the sameted plan, so as to occasion a nursance to the planning as the owner
or occupier of the dwelling house and garden mentioned in the plaint as belonging to and
burn occupied by the planning.

#### No 15

### INJUNCTION AGAINST BUILDING HIGHER THAN OLD LEVEL,

#### (Lutle)

petually restrained from continuing to erect upon his premises in

any house or building of a greater height than the huildings which formerly stood upon his gold premises and which have been recently pulled do vn so or in such manner as to darken injure or abstruct such of the plaintiff a windows in his said premises as are ancient lights.

#### No 16

### INJUNCTION RESTRAINING USE OF PRIVATE ROAD

### (Tstle )

Let the defendant

his agents servants and workmen be per petually restrained from using or permitting to be used any part of the lene at

the soil of which belongs to the plaintiff as a carriage way for the passage of certs carriages or other vehicles either going to or from the land marked B in the annexed plan or for any purpose whatsoever

### No 17.

## PRELIMINARY DECREE IN AN ADMINISTRATION SUIT

#### (Title )

It is ordered that the following accounts and inquiries be taken and made that is

to say -In creditor a sust-

- 1 That an account be telen of what is due to the plaintiff and all the other craditors of the daceased
  - In suit by legatees-
  - 2 That an account be taken of the legacies given by the testator a will
  - In suits by next of hin-
- 3 That an inquiry be made and account taken of what or of what share if any the plaintiff is entitled to as next of kin for one of the next of kin] of the intestate
- [After the first paragraph the decree will where necessary order in a creditor sant inquiry and accounts for legetees heres at law and next of him In suits by claimants other than oreditors after the first paragraph in all cases an order to inquire and take an account of ereditors will follow the first paragraph and such of the others as may be necessary will follow omitting the first formal words The form is continued as in a creditor a suit ]
  - 4 An account of the funeral and testamentary expenses
- 5 An account of the moreable property of the deceased come to the hands of the defendant or to the hands of any other person by his order or for his use
- 6 An inquiry what part (if any) of the moveable property of the deceased is outstand if and undisposed of
- 7 And it is further ordered that the defendant do on or before the
- next pay into Court all sums of mone) which shall be found to have come to his hands or to the hands of any person by his order or for his use "shall find at necessary for carrying out the objects of the
- 8 And that if the suit to sell any part of the moreable property of the deceased that the same be seld accord agir and the pro ceds paid into Court
- 9 And that Mr L. F be receiver in the suit (or proceeding) and receive and set in all outstanding debts and outstanding moveable prop rty of the decease? and pay the same into "frad shall give scennty by bond for the due pe formance the hands of the of his duties to the amount of
- 10 and it is further ordered that if the movemble property of the deceased be found insufficient for carrying out the obje is of the snit then the following further inquiries le made and accounts taken that is to say-
  - (a) An inquiry what immoveable property the deceased was seized of or entitled to at the time of his death
    - " Here insers name of proper officer

- (f) in inquiry what are the incumbrances (if any) affecting the immoveable property of the deceased or any part thereof,
- (c) An account so far as possible of what is due to the several incumbrancers, and to include a statement of the prierities of such of the incumbrancers as shall consent to the sale heremafter directed
- 11 and that the immortable property of the deceased, or so much thereof as shall be necessary to make un the fund in Court sufficient the earry out the object of the suit, be sold with the approbation of the Judge free trum incumbrances (if any) of such incumbrancers as shell consent to the sale and subject to the incumbraness of such of them as shall not consent
- 12 And it is ordered that G. H. shall have the conduct in the sale of the immoveable property and aball prepare the conditions and contracts of sale subject to the approval of the and that in case any dnubt or difficulty shall arise the papers shall

be submitted to the Judge to settle

13 And it is further ordered that the the purpose of the inquiries hereinbefore directed, the "shall advertise in the newspapers according to the practice of the

Court or shall make such inquiries in any other way which appear to the "to give the most useful publicity to such inquiries

14 And it is ordered that the above medicies and accounts he made and taken, and that all other acts urdered to be done be completed, before the , and that the "do certify the result of the inquiries and the accounts and that all other acts urdered are completed, and have his certifi

cate in that behalf ready for the inspection of the parties on the day of 15 And lastly, it is ordered that this sout [or proceeding] stand adjourned for making

final decree to the day of [Such part only of this decree is to be used as is applicable to the particular case ]

## No 18.

## FINAL DECRLE IN AN ADMINISTRATION SUIT BY A LEGATEE

## (Talle )

1. It it ordered that the defendant do, on or before the

, pay into Court the sum of Rs , the balance by the said certificate found to be due from the said defendant on account of the estate of for interest,

, the testator, and also the sum of Rs per cent per annum, from the day of at the rate of Ba.

to the do v of . amounting together to the aum of Rs 2 Let the of the said Court tax the costs of the plaintiff and defendant in this suit, and let the amount of the said cests, when so taxed, he paid out of the

said sum of Rs. erdered to be paid into Court as eforesaid as follows -(a) The coats of the plaintiff in Mr his attorney for

pleader] or and the coats of the defendant to Mr. his attorney for pleader ?

(b) And (if any debts are due) with the residue of the said sum of Rs.

after payment of the plaintiff a and defendant a costs as aforesaid let the sums, found to be named to the several creditors mentioned in the schedule to the certificate, of the

, together with anbsequent internation such of the debts as bear interest, be paid, end, after making such payments, let the amount coming to the several legatees mentioned in the achedule, together with subsequent interest (to be verified as atmosaid), be paid to them

3 And If there should then be any residue, let the same be paid in the residuary legates

petually restrained from continuing to erect upon his promises in

any house or building of a greater height than the buildings which formerly stood men his said premises and which have been recently pulled down so or in such manner as to darken injure or obstruct such of the plaint if a windows in his said premises as are ancient lights.

### No 16

#### INJUNCTION RESTRAINING USL OF PRIVATE ROAD

(Talle)

Let the defendant his agents servants and workmen be per petually restrained from using or permitting to be used any part of the lane at the soil of which belongs to the plaintiff as a carriage way lor the passage of carts carriages or other vehicles either going to or from the land marked B in the annexed plan or for any purpose whatsoever

#### No 17.

## PRELIMINARY DEGREE IN AN ADMINISTRATION SUIT

(Title)

It is ordered that the following accounts and inquiries be taken and made that is to say -

- In creditor a sust-
- I That an account be taken of what is due to the plaintiff and all the other creditors of the deceased
  - In surt by legatees-
  - 2 That an account be taken of the legacies given by the testator a will.
  - In susta be next of hin-
- 3 That an inquiry be made and account taken of what or of what share if any the plaintiff is entitled to as next of him for one of the next of him of the intestate

- 4 An account of the funeral and testamentary expenses
- 5 At account of the moveable property of the deceased come to the hands of the defendant or to the hands of any other person by his order or for his use
- 6 An inquiry what part (il any) of the mo cable property of the deceased is ontstand of and undisposed of
- "shall find it necessary for carrying out the objects of 3 And that if the suit to sell any part of the moveable property of the decessed that the same be sold accord ugly and the proceeds paid into Court
- 9 And that Mr C F be receiver in the suit (or proceeding) and receive and get in all outstanding debts and outstanding movesble property of the decessed and pay the same into "(and shall give seenrity by bond for the due performance the hands of the rupees) of his dut es to the amount of
- 10 And it is further ordered that if the moveable property of the deceased be found insufficient for carrying out the objects of the suit then the following further inquiries be made and accounts taken that is to say-
  - (a) An inqu ry what immoveable property the deceased was serzed of or entitled to at the time of his death

- (b) An inquiry what are the incumbrances (if eny) affecting the immoveable property of the deceased or my part thereof,
- (c) in account so far as possible of what is due to the several incumbrancers, and to include a statement of the priorities of such of the incumbrancers as shall consent to the sale beremafter directed
- 11 And that the immerciable property of the deceased, or so much thereof as shall be necessary to make up the fund in Court sufficient to carry out the object of the suit, he sold with the approbation of the Judge free from incumbrances (if any) of such incumbrancers as shall consent to the sale and subject to the incumbrances of such of them as shall not consent
- 12 And it is ordered that G. H. shall have the conduct of the sale of the immoveable property, and shall prepare the conditions and contracts of sale subject to the approval of the

and that in case any doubt or difficulty shall arise the papers shall be snimitted to the Judge to settle

Ť.

13 And it is further ordered that for the purpose of the inquiries hereinbefore directed, the "shall advertise in the newspapers eccording to the practice of the Court or shall make such inquiries in any other way which appear to the "to give the most useful publicity to such inquiries

14 And it is ordered that the shore inquiries and accounts be made and taken, and that all other ects ordered to be done to completed, before the , and that the \*do certify the result of the inquiries and the accounts and that all other acts ordered are completed, and have his cortifi-

cete in that behalf reads for the suspection of the parties on the day of 15 And lastly, it is ordered that this suit [or proceeding] stand adjourned for making

final decree to the day of [Such part only of this decree is to be used as is applicable to the particular case ]

## \_\_\_ No 18

### FINAL DECREE IN AN ADMINISTRATION SUIT BY A LEGATEE

(Telle )

L It it ordered that the defendant do, on or before the , pay into Court the enm of Ra , the balance by the said certificate found to be due from the said defendant on account of the estate of

, the testator and also the sum of Rs for interest. at the rate of Ra per cent per annum, from the

day of to the day of , amounting together to the sum of Ra of the said Court tax the costs of the plaintiff and

defendant in this suit, and let the emount of the said costs, when so taxed, be paid out of the said sum of Ra ordered to be paid into Court as aforesaid, as follows -

(a) The costs of the pisintiff to Mr , his attorney for pleader] or and the costs of the defendant to Mr . his stiorney [or pleader ]

(b) And (if any debis are due) with the residne of the said sum of Rs

after psyment of the plaintiff e and defendant a costs as aforesaid. let the sums, found to be owing to the several creditors mentloned in the

schedule to the certificate, of the ", together with subsequent interest on such of the dobts as bear interest, be paid, and, after making such payments, let the amount coming to the several legatees mentioned in the schedula, together with subsequent interest (to be verified as aforesaid), he paid to them

3 And if there should then be any residue, let the same he paid to the residuary legates

## No 19

PRELIMINARY DECREE IN AN ADMINISTRATION SUIT BY A LEGATEE, WHERE AN EXECUTOR IS HELD PERSONALLY LIABLE FOR THE PAYMENT

#### OF LEGACIES

#### (Tatle )

- I It is declared that the defendant is personally liable to pay the legacy of R. bequeathed to the plaintiff ,
- 2 And it is ordered that an account be taken of what in due for principal and interest on the said legacy
- 3 And it is also ordered that the defendant do, within weeks after the date of the certificate of the . pay to the plaintiff the amount of what the "shall certify to be due for principal and interest
- 4 And it is ordered that the defendant do pay the plaintiff his costs of suit the same to be taxed in case the parties differ

## No 20

## FINAL DECREE IN AN ADMINISTRATION SUIT BY NEXT OF KIN

#### (Title )

- "of the said Court tax the costs of the plaintiff and 1 Lat the defendant in this suit and let the amount of the said plaintiff a costs, when co taxed be paid by the defendant to the plaintiff out of the sum of Rs balance by the said certificate found to be duo from the east defendant on account of the personal estate of E F the intestate within one week after the transion of the said soals and let the defendant retain for her
- by the said own use out of such sum her costs when taxed

Gazette etc

- 2 And it is ordered that the residue of the said sum of Rs
- siter payment of the plaintiff s and defendant e costs as aforesaid, he paid and applied by defendant as follows -
  - (a) Let the defendant within one week after the taxation of the said costs by the "as aforesaid pay one third share of the said residus to the plaintiffs A B and C D his wife in her right as the sister and one of
  - the next of kin of the said E F, the intestate. (b) Let the defendant retain for her own use one other third share of the said residue as the mother and one of the pert of kin of the said E F the intestate
  - (c) And let the defendant within one week after the taxation of the said costs by "as aforesaid pay the remaining one third share the of the said residue to G H as the brother and the other next of kin of the said E F the miestate

#### No 21

PRELIMINARY DEGREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP AND THE TAKING OF PARTNERSHIP ACCOUNTS

## (Tatle)

- It is declared that the proportionate shares of the parties in the partnership are as follows -
- It is declared that this partnership shall stand dissolved for shall be deemed to have been dissolved as from the day of it is ordered that the dissolution thereof as from that day be advertised in the

And it is ordered that be the receiver of partnershipestate and effects in this suit and do get in all the outstanding book debts and claims of the partnership

And it is ordered that the following accounts be taken -

3 An account of all dealings and transactions between the plaintiff and defendant, from

1 An account of the credits property and effects now belonging to the said partner\*

ship, 2 An account of the debts and habilities of the said partnership.

the foot of the settled account exhibited in this suit and marked (A) and not disturbing any

subsequent settled accounts And it is ordered that the goodwill of the business heretofore carried on by the plaintiff and defendant as in the plaint mentioned and the stock in trade, be sold on the premises, and

"may, on the application of any of the parties, fix a reserved hidding for all or any of the lots at such sale, and that either of the parties is to be at liberty to lad at the sale

and it is ordered that the above accounts to taken, and all the other acts required to be

done be completed before the day of

and that the "do certify the result of the accounts, and that all other acts are completed and have his certificate in that behalf ready for the inspection of the day of parties on the

and lastly it is ordered that this suit stand adjourned for making a final decree to the day of

No. 22

FINAL DECREL IN A SUIT FOR DISSOLUTION OF PARTNERSHIP AND THE TAKING OF PARTNERSHIP ACCOUNTS

(Tatle ) It is ordered that the fund now in Court, amounting to the sum of Rs

be applied as follows I In payment of the debts due by the partnership set forth in the certificate of the

"amounting in the whole to Rs 2 In payment of the costs of all parties in this suit, amounting to Rs

[These costs must be accertained before the decree is drawn up ]

3 In payment of the sum of Rs to the plaintiff as his share of the . being the residue of the partnership assets of the sum of Rs said sum of R,

now in Court, to the defendant as his share of the partner-hip assets. [Or And that the remainder of the said sum of Rs be paid

to the said alaintiff (or defendant) in part payment of the sum of Rs

certified to be due to him in respect of the partnership accounts ]

i And that the defendant [or plaintiff] do on or before the day of pay to the plaintiff [or defendant]

the sum of Rs being the balance of the said sum of due to him, which will then remain due

No 23. DECREE FOR RECOVERY OF LAND AND MESNE PROFITS

(Tatle)

It is hereby decreed as follows -1 That the defendant do put the plaintiff in possession of the property specified in the

schedule hereunto annexed

Re

2 That the defendant do pay to the plaintiff the sum of Rs with Interest thereon at the rate of per cent per annum to the date of realization on account of mesne profits which have accrued due prior to the institution of the suit

Or 2 That an inquiry be made as to the amount of mesne profits which have accrued due prior to the institution of the suit

3 That an inquiry be made as to the amount of mosne profits from the institution of the suit until [the delivery of possession to the decree holder] [the relinquishment of possess sion by the judgment debtor with notice to the decree holder through the Court [ [the exput tion of three years from the date of the decree]

#### Schedule

### Local Amendment

Madras

ix

Add the following form as berm No 21, 112 "No 21,

DECREE SANCTIONING A COMPROMISL OF A SUIT ON BEHALF OF A MINOR

(Set out the terms of the compromise)

OR A LUNATIC. (Tatle )

sence of atc., and O D, the hat this suit may be comproday of

part, and the said C D by the said guardian ad litem of the other part, (or, on the terms hereafter set forth) and, it spearing to this Court that the said compromise is fit and proper said for the beneft of the said minor this Court doth sanction the said compromise on behalf of the said minor sud with the consent of all parties hereto. It is ordered as follows -

## APPENDIX E.

## EXECUTION.

No 1

NOTICE TO SHOW CAUSE WHY A PAYMENT OR ADJUSTMENT SHOULD NOT BE RECORDED AS CERTIFIED.

(0, 21, R 2)

(Tatle )

To

lix

hae Whereas in execution of the decree in the above named suit recoverable under the applied to this Court that the sum of Rs

and should be recorded as certified, this is to give you notice that paid deeree has beenadjusted

you are to appear before this Court on the day of aforesaid should not be recorded as payment 19 , to show cause why the adjustment

certified

Oren under my hand and the seal of the Court, this

day of

Judge

No 2 PRECEPT (Section 46). (Telle)

Court

nf Proce hold of the decree Dated the

day of

Judge

Schedule

T

#### No 3. ORDER SENDING DECREE FOR EXECUTION TO ANOTHER COURT. (O 21, R 6.)

(Tatle )

Whereas the decree holder in the above suit has applied to this Court for a certificate to

g that the judgment the said Court and ider O 21 R 6 of the

Or icre !

That a copy of this order be sent to with a copy of the decree and of any order which may have been made for execution of the same and a certificate of non satisfaction day of

Dated the

Judge

No. 4

CERTIFICATE OF NON SATISFACTION OF DECREIL

(O, 21, R 6.)

(Tette )

Certified that not satisfaction of the decree of this Court in Suit No of 19 , a copy which is herounto attached, has been obtained by execution within the juri-diction of this Court Dated the day of

Judge

No. 5. CERTIFICATE OF EXECUTION OF DECREE TRANSFERRED TO ANOHHER COURT

(O 21, R 6)

(Potte)

|                                                                   |                  |                                      |                      | (True)                                               |                    |                 |                             |         |
|-------------------------------------------------------------------|------------------|--------------------------------------|----------------------|------------------------------------------------------|--------------------|-----------------|-----------------------------|---------|
| Number of suit and the<br>Court by which the<br>decree was passed | Names of parties | Date of application for<br>execution | Number of the execu- | Processes issued and<br>dates of service thore<br>of | Costs of execution | Amount realized | Low the case is disposed of | Remarks |
| 1                                                                 | 2                | 3                                    | 4                    | 5                                                    | 6                  | 7               | 8                           | 9       |
|                                                                   |                  |                                      |                      |                                                      | Rap                | Rap             |                             |         |

Signature of Muharrir in charge

Local Amendment.

Signature of Judge

Rangoon

In the heading of Form No 5 for the words and figures 'O 21 R 6, the word and ngures ' Section 41 ' shall be substituted

date of realization on account of mesne profits which have accrued due prior to the institution of the suit

2. That an inquiry be made as to the amount of mesne profits which have accrued due prior to the institution of the suit

the institution of ashment of posses Jourt | [the expira

Schedule.

Madras

#### Local Amendment

Add the following form as borm No 24, 112

"No 24. DECREE SANCTIONING A COMPROMISE OF A SUIT ON BEHALF OF A MINOR OR A LUNATIC.

(Tatle )

This suit coming on this day for final disposal in the presence of etc. and O D, the defendant, a minor by E. F., his guardian od litem, applying that this aust may be compro dayof mised in the terms of an agreement in writing, dated the

part, and the said C D by s hereafter set forth) and, it or and for the beneat of the schulf of the said minor, and

## APPENDIX E.

### EXECUTION.

No. 1.

NOTICE TO SHOW CAUSE WHY A PAYMENT OR ADJUSTMENT SHOULD NOT BE RECORDED AS CERTIFIED.

> (O. 21, R 2) (Tatle )

To

Whereas in execution of the decree in the shore named suit applied to this Court that the sum of Rs

recoverable under the

paid -and should be recorded as certified, this is to give you notice that decree has beenadjusted

you are to appear before this Court on the

19 .

day of

payment - aforesaid should not be recorded as 19 , to show cause why the adjustment

certified

day of Given under my hand and the seal of the Court, this

No 2

PRECEPT. (Section 46). (Tatle)

1 a Conti

Judge

of the decres-Dated the

day of

19 Judge

Dated the

f th

Judge

### No. 3. ORDER SENDING DECREE FOR EXPORTION TO ANOTHER COURT (O 21, R 6.)

(Telle)

Whereas the dourge holder in the above suit has applied to this Court for a certificate if be sent to the Court of - nepi an

Ordere !

That a copy of this order be sent to with a copy of the decree and of any order which may have been made for execution of th same and a certificate of non satisfaction

dis of

Judie

No. 4 CERTIFICATE OF NON SATISFACTION OF DECREIL

(0. 21. R 6.) (Talle)

Certified that not satisfaction of the decree of this Court in Suit No of 19 a copy which is hereunto attached has bee Dated the

day of

No 5 CERTIFICATE OF EXECUTION OF DECREE TRANSFERRED TO

ANOTHER COURT (O 21, R 6) (Tatle )

ow the case is disposed Date of application Number of suit and Costs of execution of parties mount realized execution ő Number dates of AXIOS C 9 3 ß 9 5 7 3 2 R a p Rap

Signature of Muharerr in charge

Local Amendment,

Signature of Judge

Rangoon

In the heading of Form No 5 for the words and figures 'O 21, R C, ' the word and figures ' Section 41 ' shall be substituted

<sup>(1)</sup> If partial, strike out no" and state to uhat extent

## No 6

## APPLICATION FOR EXECUTION OF DECREE.

(O 21, R 11)

In the Court of

, decree holder, hereby apply for execution of the decree herein below set forth -

| As a wonded in the decree till byment and spread on a population, if and the form of parties and appropriate to the standard and the decree till byment and application, if and the form of parties and application, if and the standard and the decree till byment and application, if and the standard and the decree till byment and application, if and the standard and the decree till byment and application, if and the standard and the decree till byment and application, if and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the standard and the st |             |                  |                 |                                              |                                       |                                                           |                                                                                                                      |                                     |                           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
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| None of memory of the country of the | 1           | 2                | 3               | 4                                            | 5                                     | 6                                                         | 7                                                                                                                    | 8                                   | 9                         | 10                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 789 of 1897 |                  | Outober 11 1897 | Хо                                           | Мове                                  | Rs 724 recorded on application, dated the 5th March, 1899 | Rs 314 8 2 pencepal (interest at 6 per cent per annum, from date of decree till pyment ]                             | Rs A 47 10                          | Against the defendant G D | sale of motease perfy a sought?  I may that the total town of the mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R moveable property as per annexed hat and sale of summoreable property as per annexed hat a mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of R mount of |

declare that what is stated herein is true to the best of my knowledge and belief , decree holder. Signed

day of

19

. decree holder

## CLECUTION

[When attackment and sale of smmoreable property is sought ] Description and Specification of Property

The undivided one third share of the judgment debtor in a house situated in the village of value Rs 40 and bounded as follows -

East by G s house west by H s house, south by public road, north by private lane and J s house declare that what is stated in the above description is true to the best

of my knowledge and belief and so for as I have been able to ascertain the interest of the defendant in the property therein specified

No 7

NOTICE TO SHOW CAUSE WHY EXECUTION SHOULD NOT ISSUE

1((O 21, R 16)) (Tatte )

To Whereas

I.

has made apply ation to this Court for execution of deeree in Suit No

on the allegation that the said decree has been transferred to him by assignment this is to give you notice that you are to appear below this Court 19 Lo day of

on the show cause why execution should not be granted

Given under my hand and the seal of the Court, this day of

Signed

No. 8

WARRANT OF ATTACHMENT OF MOVEABLE PROPERTY IN EXECUTION OF A

DECREE FOR MONEY

(O 21, R 30)

(Tatle )

To The Built of the Court

W hereas was ordered by decree of this Court passed on the n Suit No day of

pay to the plaintiff the sum of Rs

noted to the margin, and whereas the said sum of Decree has not been paid . These are to command you to attach the moveable property of the said as set forth in the schedule hereunto annexed, or which Principal Interest shall be pointed out to you by the said Costs and Costs of execution unless the said shall pay to Further Interest yon the said sum of Rs. together with Rs the Total costs of this attachment, to hold the same until further orders from this Court

You are further commanded to return this warrant on or before the 19 , with an endorsement certifying the day on which and manner day of in which it has been executed, or why it has not been executed

Given under my hand and the seal of the Court, this

day of

Judae

19 , to

S hedule

19

<sup>1</sup> This reference was substituted for the reference '(O 21, R. 22)' by S 2 and Sch I of the Repealing and Amending Act, 1914 (X of 1914)

## No 6 APPLICATION FOR EXECUTION OF DECREE

(O 21, R 11)

In the Court of

1 below set forth -

x

, decree holder, hereby apply for execution of the decree herein

| 783 of 1897                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | 1  | No of suit                                                                                                             |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|------------------------------------------------------------------------------------------------------------------------|
| A 1-Plaintiff . , G D Delendant                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | 2  | Numes of parties                                                                                                       |
| October 11, 1897                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | 3  | Date of decree                                                                                                         |
| No                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | 4  | Whether any appeal pre<br>ferred from decree                                                                           |
| Мове                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | 5  | Payment or adjustment<br>made if any                                                                                   |
| Rs 72 4 recorded on application dated the 4th March, 1899                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | 6  | Previous application, if<br>any, with date and<br>result                                                               |
| Rs S14 B. principal (interest at G per eent per andum from date of decree till payment ]                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | 7  | Amount with interest due upon the decree or other rolled granted thereby together with particulars of any cross decree |
| Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   Re A P   R  | 8  | Amount of costs, if any, awarded                                                                                       |
| Against the defendant C D                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | 9  | Against whom to be executed                                                                                            |
| [If hen attachment and add of worcable property is sought]  I pray that the interest of the property is an interest on the property in sought in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property in the property | 10 | Mode in which the<br>assistance of the Court<br>is required                                                            |

I knowledge and helief

declare that what is stated herein is true to the best of my , decree holder.

day of

Staned 13

Dated the

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nf
   A B of
                                    against
C D of
  etc.
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know all men by these presents that we, I J of and K L of etc. and M N of

etc are jointly and severally bound to the Judge of the Court of in Rs to be paid to lie said Judge, for which payment to be made we bind ourselves, and each of us, in the whole, our and each of our heirs, executors

and administrators, jointly and severally by these presents Dated this day of

and whereas the moveable property specified in the Schedule hereunto annexed has been attached under a warrant from the said Court dated the

19 , in execultou of a decree in favour of an suit No of

σn the ale of and the said property has been left in the charge of the said I J

Now the condition of this obligation is that, if the above bounden L. J. shall duly account to and produce when required before the said Court ell and every the property aforesaid and shall obey any further order of the Court in respect thereof, then this obligation shall

te v d otherwise it shall remain in full force IJ h L

MN Signed and delivered by the above bounden

an the presence of

A B. of

' Form No 15 B. DOND FOR SAFE CUSTODY OF MOVEABLE PROPERTY ATTACHED AND LEFT IN CHARGE OF ANY PERSON AND SURETIES

[O 21, R. 43 (1) (c)]

In the Court of

Civil Suit No.

of

I.

egainst Know all men by these presents that we, I J of etc, and K L

etc, and MN of

etc. are jointly and severally bound to the Judge of the Court of to be paid to the said Judge for which in Rupees navment to be made we bind ourselves, end each of us, in the whole our and each of our heirs,

executors and edministrators, jointly end severally, by these presents

day of And whereas the moreable property specified in the schedule hereunto annexed has been attached under a warrant from the said Court, dated the day of

19 . in execution of a decree in favour of in suit No ο£ 19 on the fife of

for an

shall c otherw nabroo

L J were a surety for the restoration of property taken in execution of a decree KL

MN Signed and delivered by the above bounden an the presence of

For the word "dated" substitute the words "Given under my hand and the seal of the Court, this day of

Add the following Form -"Form No 15-A

BOND FOR SAFE CUSTODY OF MOVEABLE PROPERTY ATTACHED AND LEFT IN CHARGE OF PERSON INTERESTED AND SURETIES.

(O 21, B. 43)

entitled to be released according to the terms and provisions of section 58 of the Code of Civil Procedure 1908, and the Court does hereby fix annas per diem as the

day of 19

Judge

No 15

ORDER FOR THE RELEASE OF A PERSON IMPRISONED IN EXECUTION OF A DECREE

> (Sections 58 59 1 (Title )

Тα

dix

The Officer in charge of the Jail at Under orders passed this day, you are hereby directed to set free judgment debtor now in your custody

Judge

Calcutta

Dated

Local Amendments Form No 15 A

BOND FOR SAFE CUSTODA OF WOVEABLE PROPERTY ATTACHED AND LEFT IN CHARGE OF ANY PERSON AND SURETILS

(Order NI A Rules 3 (a) and (5)

at

In the Court of Civil Suit No

A B of against

Know all men by these presents that we I J of

etc and h L of eto are jointly in Rupess

t to he made we bind ourselves and rs and administrators jointly and

severally by these presents

and whereas the movemble property/irrestock specified in the Schedule hereante annead on attached under a manufacture of the schedule hereante annead on attached under a manufacture of the schedule hereante annead on attached under a manufacture of the schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annead on a schedule hereante annea has been attached under a warrant from the said Court dated the

19 in execution of a decree in favour of on the file of

and the said property has been left in the charge of the said I J

bounden L J shall dolf every the property/live livestock alosesa d) and obligation shall be soid bove bounden I J in the

execution proceedings I J K L V V

Signed and delivered by the above hounden in the presence of

Labore Ad I the following -

Form No 15-A

BOND FOR SAFE CUSTODY OF MOVEABLE PROPERTY ATTACHED AND LEFT IN CHARGE OF PERSON INTERESTED AND SURETIES (O 21 R 43)

In the Court of

Civil Suit No

etc.

day of

oπ

against

in R.

C D of

know all men by these presents that we I J of and h L of

etc are jointly and severally bound to the Judge of the Court of to be raid to the said Judge, for which payment to

be made we bind ourselves and each of us in the whole, our and each of our heirs, executors and administrators jointly and severally by these presents Dated this day of and whereas the moveable property specified in the Schedule hereunto annexed has been

attached under a warrant from the said Court dated the

1) . in execution of a degree in favour of an suit No

αf

and the said property has been left in the charge the ble of of the said I J Now the condition of this obligation is that, if the above bounden I J shall duly account

for and produce when required before the said Court all and every the property aforesaid and shall obey any further order of the Court in respect thereof then this obligation shall te se d otherwise it shall remain in full force

οf

IJ K L M N

I.

Signed and delivered by the above bounden

in the pressure of

A B of

A B of

Form No 15 B EGND FOR SAFE CUSTODY OF MOVEABLE PROPERTY ATTACHED AND LEFT IN CHARGE OF ANY PERSON AND SURETIES

[O 21 R 43 (1) (c)]

In the Court of at

Civil Suit No

of

against CD of know all men by these presents that we, I J of

etc. and K L

atc, and MN of eto, are jointly and everally bound to the Judge of the Court of to be paid to the said Judge for which in Rupees

payment to be made we bind ourselves and each of ue, in the whole, our and each of our heirs, executors and administrators, jointly and severally, by these presents

Dated this day of And whereas the moveable property specified in the schedule hereunto annexed has been attached under a warrant from the said Court, dated the

19 In execution of a decree in favour of m suit No of 19 on the file of

L. J. were a surety for the restoration of property taken in execution of a decree 11 ĥL

MN Signed and delivered by the above bounders

in the presence of

Madras For the word "dated" substitute the words "Given under my hand and the seal of the Contrt this day of

Add the following Form -"Form No 15 A

BOND FOR SAFE CUSTODY OF MOVEABLE PROPERTY ATTACHED AND LEFT IN CHARGE OF PERSON INTERESTED AND SURETIES

(O 21, R 43)

21

In the Court of

Civil Smt No.

nf.

AB of agasnst

CD of

etc and K L of Know all men by these presenta that we IJ of ete are jointly and severally bound to the Judge of etc and MN of to he paid to the said the Court of in Rupees Judge for which payment to be made we bind ourselves and each of ue in the whole our and each of our heirs executors and administrators jointly and severally by these presents

day of And whereas the moveable property specified in the schedule hereunto annexed has been 19 attached under a warrant from the said Court dated the day of in execution of a decree in favour of of 19 ın suit No

and the said property has been left in the charge of the said on the file of 1 3

t if the above hounder 1 J shall duly ac Courts all and every the property afore respect thereof then this obligation shall

1 J KL MN

ìх

Signed and delivered by the above bounden Rangoon

in the presence of

The following shall be inserted as From No 15 A -

Form No. 15 4

FORM OF RECEIPT FOR MONLY DEPOSITED IN CONNECTION WITH THE ATTACHMENT OF PROPERTY TOGETHER WITH NOTICE TO DECREE HOLDER

Court of Faccution Case No.

of 19

tersus on account of the following expenditure to Received the sum of Re he incurred in connection with attachment of property as per list appended -Rs

Process Fees Rules-1 15 (1) (b) (11) 2 17 (1) (c) (11) (2)

1 Custody Fees 2 Feeding charges 3 Conveyance charges

4 Other expenses (to be specified)

Total

N B -The decree holder is hereby warned that the sum deposited by him for re and that unless a further curring charges will be exhausted on the day of 19 deposit is made before that date the attachment will cease Date this day of 19 Bailtf!

List of property to be attached

No. 16

ATTACHMENT IN EXECUTION

PROHIBITORY ORDER WHERE THE PROIERTY TO BE ATTACHED CONSISTS OF VIONEABLE PROPERTY TO WHICH THE DEFENDANT IS ENTITLED SUB-JECT TO A LIEN OR RIGHT OF SOME OTHER PERSON TO THE

IMMEDIATE 1 OSSESSION THEREOF (0 21 R 46)

(Title) Tα Whereas

has failed to

cature at Rangoon and

2 Strike out if used in the High Court of Judicature at Rangoon and the Small Cause Court Rangoon

T. day of 19 , in Snit No

for Rs in favour of . It is ordered that the defendant be, and is hereby, prohibited and restrained until the further order of this Court, from receiving from the following property in the possession

of the said . that is to say, to which the defendant is entitled, subject to any claim of the said as hereby probabited and restrained, until the further and the said

order of this Court, from delivering the said property to any person or persons whomsoever, Given under my hand and the seal of the Court, this

Judge.

No 17.

ATTACHMENT IN EXECUTION. PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF DEBTS NOT SEGURED BY NEGOTIABLE INSTRUMENTS

(O 21, R 46)

(Title )

To

of 19 , in favour of

has failed to

WHEREAS satisfy a decree passed against on the day of

19 in Suit No. for Ra ordered that the defendant be, and as hereby, prohibited and restrained, until the further order of this Court, from receiving from you a certain debt alleged now to be due from

you to the said defendant, namely, and that you, the said be, and you are hereby, prohibited and restrained, until the further order of this Court, from making payment of the said debt, or any part thereof, to any person whomsoever or otherwise

than into this Court GIVEN under my hand and the seal of the Court, this

Judge.

No 18

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF SHARES IN THE CAPITAL OF A CORPORATION.

(O 21, R 46)

(Talle )

To

day of

Defendant and to

Corporation

has failed to satisfy a decree passed on the

WHEREAS agamst day of

. Secretary of

19 , m Snit No

, for Rs

of 19 , in favour of

19 .

it is ordered that you, the defendant, be, and you are hereby, prohibited and restrained, until the further order of this Conrt, from making any transfer of shares in the aforesaid Corporation, namely, payment of any dividends thereon; and you, , the Secretary of the

said Corporation, are hereby prohibited and restrained from permitting any such transfer or making any such payment

Given under my hand and the seal of the Court, this day of

Judge.

# No 19

# ORDER TO ATTACH SALARY OF PUBLIC OFFICER OR SERVANT OF BAILWAY COMPANY OR LOCAL AUTHORITY (O 21, R 48)

(Title)

Τa WHEREAS

judgment debtor in the above named case, is a (describe office of judgment debior) receiving his salary (or allowthe said case, has applied in this Court for the attachment of the saiary (or allowances) of the said

the decree, You are hereby required to withhold the said sum of from the salary of the said

in monthly and to remit the said sum (or monthly instal

ments) to this Court

Given under my hand and the scal of the Court, this 19 .

day of Judge

No. 20

### ORDER OF ATTACHMENT OF NEGOTIABLE INSTRUMENT

(O 21, R 51)

(Tttle)

The Balliff of the Court

instalments of

Whereas an order has been passed by this Court on the day of

19 , for the attachment of . You are hereby directed to seize the said

and bring the same into Court Given under my hand and the scal of the Court, this 19 .

day of Judge

No 21

ATTACHMENT

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF MONEY OR OF ANY SECURITY IN THE CUSTODY OF A COURT OF JUSTICE

OR OFFICER OF GOVERNMENT (O 21, R 52)

(Title)

Tο Sir

Dated the

Τo

The plaintiff having applied, under R 52 of O 21 of the Code of Civil Procedure, 1008, for an attachment of certain money now in your hands (kere state how the money is supposed to be in the hands of the person addressed on what account, etc.), I request that you will hold the said money subject to the further order of this Court,

I have the honour to be

Sır.

Your most obedient Servant, Judge

19 .

day of

No 22

NOTICE OF ATTACHMENT OF A DECREE TO THE COURT WHICH PASSED IT

(O 21, B 53)

(Tatle )  $T_0$ 

The Judge of the Court of Sir.

I have the honour to inform you that the decree obtained in your Court on the

day of in Snit No.

Ť.

of 19 , in which he was

19 , by

and Was has been attached by this Court on the

2935

----

application of sait specified above. You as Court until you receive an

celled or until execution of the to be executed or ty his judgment genter . the

I have the honour, etc ; Judge 10 .

Dated the

day ol

No. 93.

NOTICE OF ATTACHMENT OF A DECREE TO THE HOLDER OF THE DECREE.

(O. 21, R 53)

(Tate) Tα Whereas an application has been made in this Court by the decree-holder in the above

of which

suit for the attachment of a decree obtained by you on the 19 in the Court of iu Suit No of 19 . 10 11.30

and . It is ordered that you, the said W 24 , be, and you are hereby. prohibited and restrained, until the further order of this Court, from transferring or charging

the same to any way Given under my hand and the seal of the Court, this

day of Judge

19 .

No 21.

ATTACHMENT IN EXECUTION

PROBLETORY ORDER WHERE THE PROPERTY CONSISTS OF IMMOVE ABLE PROPERTY.

(O 21, R 51)

(Title.)

To

Defondant. ; It 18

Whereas you have failed to satisfy a decree passed against you on the day of 10 , in Suit No

of 19 , in favour ol

for Ra

, be, and ordered that you, the said you are herby, prohibited and restrained, until the further order of this Court, from trainferring or charging the property specified in the schedule derounds among due, by sale, gits or otherwise, and that all persons be, and that they are hereby prohibited from receiving the value

by purchase, gift or otherwise Given under my hand and the seal of the Court, this 19 .

day of

Judge.

Schedule

### No 25

# ORDER FOR PAYMENT TO THE PLAINTIFF, ETC, OF MONEY, ETC, IN THE

### HANDS OF A THIRD PARTY (O 21, R. 56)

To

(Tatle )

Whereas the following property cution of a decree in Suit No the

for Rs

has been attached in exe 19 , passed on of

19 . in favour of . It is ordered

that the property so attached, consisting of Rs Ra in currency-notes, or a sufficient part thereof to satisfy the said decree, shall be paid over by you, the said

19 .

in money and

Owen under my hand and the seal of the Court, this

day of Judge

No 26

# NOTICE TO ATTACHING CREDITOR (O. 21, R 58)

(Tatle )

Tо Whoresa

this Court for the removal of attachment on instance in execution of the decree in Suit No you notice to appear before this Court ou

has made application to placed at your of 19 , this is to give

19 exther in

person or by a pleader of the Court duly instructed to support your claim, as attaching creditor Given under my hand and the seal of the Court, this 19 .

day of

Judge

No 27

# WARRANT OF SALE OF PROPERTY IN EXECUTION OF A DEGREE FOR MONEY

(O 21, R 66)

(Tatle)

The Bailiff of the Court

то

These are to command you to sell by auction, after giving

day's previous notice, by affixing the same in this Court house, and after making due proclamation, the

property attached under a warrant from this Court, deted the 19 , in execution of a decree in day of

favour of in Sust No

of 19 , or so much of the said property as shall realize the sum of Rs \* -

, being the

19 .

of the said decree and costs still remaining unsatisfied You are further commanded to return this warrant on or before the

day of with an endorsement certifying the manner in which it has been executed, or the reason why it has not been executed

Owen under my hand and the seal of the Court, this

Judge.

Αt

No 28

# NOTICE OF THE DAY FIXED FOR SETTLING A SALE PROCLAMATION

(O 21 R 66)

(Tatle )

То

of sale

T.

Whereas in the above named suit for the sale of

Judgmeet debtor , the decree holder, has applied , You are hereby informed

that the 19 . has been fixed for cettling the terms of the proclamation

day of

Given under my hand and the scal of the Court, this 19 .

day of Judge

No 22

## PROCLAMATION OF SALE (O 21, R 66) (Tatle)

Notice is hereby given that under R C4 of O 21 of the Code of Civil Procedure, 1903, an order has been passed by this Court for the sale of the attached (1) Sust Ne of 19 property mentioned in the angested Schedule in satisfaction of the decided by the of in which claim of the decree holder in the suit (1) mentioned in the was plaintiff and margin amounting with costs and interest upto date of sale to the was defendant

sum of The sale will be by public auction, and the property will be put up for sale in the lots spanfied in the Schedule. The sale will be of the property of the judgment debtors above named as mentioned in the Schedule below, and the liabilities and claims attaching to the said

property, so far as they have been ascertained, are those specified in the Schedule against each lot. In the absence of any order of postpouement the sale will be held by

at the monthly sale commencing O Clock on the

In the event, however, of the debt above specified and of the costs of the sale being tendered or paid before the knocking down of any lot, the sale will be stopped

At the sale the public generally are invited to bid, either personally or by duly authorised agent. No bid by or on behalf of the judgment creditors above mentioned, however, will he accepted nor will any sale to them be said without the express permission of the Court pre viously given. The following are the further

### Conditions of sale

- 1 The particulars specified in the Schedule below have been stated to the best of the information of the Court, but the Court will not be answerable for any error, misstatement or omission in this proclamation
- 2 The amount by which the biddings are to be increased shall be determined by the officer conducting the sale. In the event of any dispute arising as to the amount bid, or as to the bidder, the lot shall at once be again put up to auction
- 3 The highest bidder shall be declared to be the purchaser of any lot, provided always that he is legally qualified to bid, and provided that it shall be in the discretion of the Court or officer holding the sale to decline acceptance of the highest bid when the price offered appears so clearly madequate as to make it addisable to do so /

C P C 368 & 369

- 4 For reasons recorded it shall be in the discretion of the officer conducting the sile to adjourn it subject always to the provisions of R 69 of O 21
  - 5 In the case of moveable property the price of each lot shall be paid at the time of sile or a soon after as the officer holding the sale directs and in default of payment the property shall forthwith be again put up and re sold
  - 6 In the case of immorable property, the person declared to be the purchaser shall pay immediately after such declaration a deposit of 25 per cent on the amount of his purchase money to the officer conducting the sale and in default of such deposit the property shall forthwith be unture pages maight es old
  - 7 The full amount of the purchase money shall be paid by the purchaser below the Court closes on the infreenth day after the sale of the property exclusive of such day or if the fittenth day, be a Sunday or other boldsy then on the first office day after the fifteenth day.
  - 8 In default of payment of the balance of purchase money within the period allored the property shall be re-vold after the assue of a fresh notafication of cale. The depoint size defraving the expenses of the sale may if the Gonet thinks it be forfested to Government and the delaulting purchases shall forefact all claim to the property or to any part of the sum for which it may be subsequently sold.

Given under my hand and the seal of the Court this day of 19

J idge

|               |                                                                                                               | Sciedule of Property                                                                                                                            | ¥                                                                         |                                                                                                                           |
|---------------|---------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------|
| Number of lot | Description of property to be sold with the name of each owner where there are more judgment debtors than one | The revenue assessed upon the estate or part of the estate if the properts to be sold as an interest in an estate paying resenue to Govern ment | Detail of<br>any encum<br>brances to<br>which the<br>property is<br>luble | Claims if any which have been put forward to the property and any other known paties lars bearing ou its nature and value |
|               |                                                                                                               |                                                                                                                                                 |                                                                           |                                                                                                                           |
|               |                                                                                                               |                                                                                                                                                 |                                                                           |                                                                                                                           |

### Local Amendments

### Allahabad

In Form No 29 (Proclamation of Sale) delete the sentence. No bid by previously given in the paragraph above conditions of sale

### Madras

Ad I the following as a Note to Form No 29 (proclamation of sale)-

and the

No. 30

ORDER ON THE NAZIR FOR CAUSING SERVICE OF PROCLAVATION OF SALE

(O 21 R 66)

(Tatle )

To

The Nazir of the Court

Whereas an order has been made for the sale of the property of the judgment debtor specified in the Schedule hereunder annuald and whereas the 19 has peen fixed for the sale of the said

copies of the proclamation rreperty of sale are to the warrant made over to you and you are hereby ordered to have the proclama tion pathshed by heat of drum within each of the projecties specified in the said Schedule to and copy of the aid proclamation on a conspicuous part of each of the said properties and afterward on the Court hou and then to submit to this Court a report showing the dates

on which and the manner in which the pro lamations have been published Dated the

day of

Jidge

No 31

Schedule

CERTIFICATE BY OFFICER HOLDING A SALE OF THE DEFICIENCY OF PRICE ON A RESALE OF PROPERTY BY REASON OF THE PURCHASERS DEFAULT.

> (O 91, R 71) (Tatle )

Certified that at the re-sale of the property in execution or the decree in the abovenamed cuit in consequence of default on the part of parchaser there was a deficiency in the price of the said property amounting to Rs

and that the expenses attending such re asle amounted to Rs making a total of Rs which sum is recoverable from the

defaulter

day of

19

Officer holling the sale

No 32

NOTICE TO PERSON IN POSSESSION OF MOVEABLE PROPERTY SOLD

IN EXECUTION

(O 91, R 79.)

(Title)

To Whereas

day of

Dated the

has become the purchaser at a public sale in execution of the decree in the above suit of now in your possession, you are hereby prohibited from delivering possession of the said to any

person except the said

Given under my hand and the seal of the Court this

19 .

Judac.

2940 EXECUTION SCR

dix

No 33 PROHIBITORY ORDER AGAINST PAYMENT OF DEBTS SOLD IN EXECUTION TO AN

OTHER THAN THE PURCHASER, (C 21, R 79)

Whereas

(Title) To

has become the

and to

purchaser at a public sale in execution of the decree in the above suit of you

being debts due from to you be, and you

: it is ordered that you are hereby, prohibited from receiving, and you

from making payment of, the said

debt to any person or persons except the said Given under my hand and the seal of the Court, this

day of

19 .

Judge

No 31 PROHIBITORY ORDER AGAINST THE TRANSPUR OF SHARES SOLD IN EXECUTION.

(O. 21, R. 79)

To

(Trille ) and

. Secretary of Corporation

, the purchaser aforecaid, or from

has become the purchaser of a Whereas public sale in execution of the decree, in the above suit, of certain shares in the above Corporation that is to say, of standing in the name of you

You

; it is ordered that be, and you are hereby, prohibited from making any transfer of the said shares to any person

except the said receiving any dividends thereon, and won

, Secretary of the said Corporation, from permitting any such transfer of making any such payment to any person except the said the purchaser aforesaid

Given under my hand and the seal of the Court, this

day of

Judge.

No. 35

CERTIFICATE TO JUDGMENT-DEBTOR AUTHORIZING HIM TO MORTGAGE, LEASE OR SELL PROPERTY. (O 21, R 83)

(Tatle )

Whereas in execution of the decree passed in the above suit an order was made on 19 , for the sale day of of the under-meationed property of the judgment debtor , and whereas the Court has, on the application of the said judgment debtor, postponed the 'said sale to enable him to raise the amount of the decree by

mortgage, lease or private sale of the said property or of some part thereof :

This is to certify that the Court doth hereby authorize the said judgment debtor to make the proposed mortcage lease or sale within a period of

from the date of this certificate , provided that all monies payable under such mortgage, lease or sale shall be paid into this Court and not to the said judgment debtor

### Description of property

Given under my hand and the seal of the Court, this day of

Judge

No 85

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE

(O 21 Rr 90, 92)

(Tatle )

То

T

Whereas the under mentioned property was sold on the

day of 19 in execution of the decree pissed in the the decree holder [or above named suit and whereas judgment-debtor] has applied to this Court to set aside the sale of the said property on the ground of a material irregularity [or fraud] in publishing [or conducting] the sale namely that

Take notice that if you have any cause to show why the said application should not be granted you should appear with your proofs in this Court on the day of 19 , when the said application will be heard and determined

Given under my hand and the seal of the Court, this day of 19 .

Description of property

Julge

No 37

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE

(O 21 Br 91, 92)

(Title )

T'n

Whereas

, the purchaser of the

under mentioned property sold on the day of 19 , in execution of the decree passed in the above named suit, has applied to this Court to set aside the sale of the said property on the ground that

the judgment debtor had no saleable suterest therein

Take notice that if you have any cause to show why the said application should not he granted, you should appear with your proofs in this Court on the

19 , when the said

day of application will be heard and determined

Given under my hand and the seal of the Court, this day of 19 .

Description of property

Judze

2942 EXECUTION SCH

No 38 CERTIFICATE OF SALE OF LAND (0 21, R 94)

lix

Patna

(Tetle ) has been declared pur This is to certify that

chaser at a sale by public auction on the day of in execution of decree in this suit and that the said

sale has been duly confirmed by this Court Given under my hand and the seal of the Court, this

day of 19 .

Local Amendments Nagpur ' hetween the words, The In Form No 38 insert the words for Rs

Judge

purchaser and At a sale

Substitute the following for form No 33

Form No 33'

Certificate of sale of land (O 21, R 94) District

In the Court of at

Execution case No. of 19 .

Decree holder. tersus Judgment debtor

This is to certify that son of resident of caste , by occupation , has been declared the purchaser . Thans District 19 , of the property

at a sale by public auction on the day of of this Court and that the said specified below in execution of the decree in suit No sale has been duly confirmed by this Court Given under my hand and the seal of the Court this

day2 Judge

Specification and price of properties3

No 39

ORDER FOR DELIVERY TO CERTIFIED PURCHASER OF LAND AT A SALE IN EXECUTION (O 21, R 95)

(Trile)

Ta The Bailiff of the Court

has become the certi at a sale in execution of Whereas 19 , you are hereby fied purchaser of of , the certified purchaser, decree in suit No ordered to put the said as aforesaid in possession of the same

1 If the decree has been received by transfer from other Court enter name of that Court

2 The date when the sale became absolute 3 Particulars sufficient to identify the property including the name of each regi traited

sub district in which any part of the property is situated should be fully stated

EXECUTION 2943

CIVEN under my hand and the seal of the Court, this day of 19 .

Local Amendment

Judge

1

Madras
Substitute the following for the old one -

ORDER FOR DELIVERY TO CERTIFIED PURCHASER OF LAND AT A SALE
IN EXECUTION (O. n. R. 95)

(Title )

То

The Bulliff of the Court

Whereis has become the certified purchaser of

at a sale in execution of decreo in suit No of 10 , you are horeby ordered to put the said , the certified purchasers, as a foresaid, in posses som of the same and you are kerch further required to state in your return whether there are corn on the land and whether you have deletted them to.

Given under my hand and the seal of the Court this

19 Judge

No. 40

SUMMONS TO APPEAR AND ANSWER CHARGE OF DESTRUCTING EXECUTION OF DECREE (0 21, R 97)

(Tatle)

То

day of

Whereas

Me above suit has complained to this Court that you have resisted (or obstructed)
the officer charged with the execution of the warrant for possession

You are hereby summoned to appear in this Court on the

complaint
Given under my hand and the scal of the Court this

the Court this

Judge.

day of

No. 41

WARRANT OF COMMITTAL (O 21, R 98)

(Tulle )

То

The Officer in Charge of the Jail at

Whereas the under mentioned project, has been decreed to

Whereas the under mentioned project, has been decreed to

Plantill in this suit, and whereas the Comer is satisfied that

without any test cause resisted for elserneted; and is stall re-state for obstructing the said

cause resisted [or obstructed] and is still re ating [or obstructing] the said in obtaining posession of the property, and whereas the said has made application to this Court that the said

committed to the chil prison .

lan

You are hereby commanded and required to take and receive the said into the civil prison and to keep him imprisoned therein for the period

days Given under my hand and the seal of the Court, this

day of 19 .

Judge

No 42

AUTHORITY OF THE COLLECTOR TO STAY PUBLIC SALE OF LAND.

(Section 72)

(Tatle )

Tη

ωŧ

. Collector of

SIR In answer to your communication No.

, dated , representing that the sale in execution of the decree land situate within your district is objectionable. I have the honour to inform you that you are authorized to make provision for the satisfaction of the said decree in the manner recommended by you

I have the honour to be, SIR

Your obedient Servant,

Judge

### Local Amendments

Allahahad

Add the following as form No 43 -

Form No 43

The security to be furnished under Section 50 (4) shall be, as nearly as may be, by a bond

in the following form -In the Court of

Suit No.

A.B of CD of arannst

at

of 19

Plaintiff Defendant

Whereas in execution of the decree in the suit aforesaid, the said C D has been arrested , and whereas the said under a warrant and brought before the Court of C D has applied for his discharge on the ground that he undertakes within one month to apply under section 5 of Act No III o

ordered that the said C D shall

sufficient security in the sum of Rs upon, and that he will within one month from this date apply under section 5 of Act No 114 of 1907, to be declared an insolvent.

, have voluntarily become Therefore I. E. F. inhabitant of security and do hereby bind myself my heirs, and executors to

the said Court and his successors in office that the said C. D will appear at any time when called upon by the said Court, and will apply in the manner and within the time hereinbefore set forth, and in default of such appearance or of such application, I bind myself, my helfs and executors, to pay to the said Court on its order, the sum of Rs 19 .

Witness my hand at

thas

day of

(Signed) E F.

Surety

# APPENDIX F

### SUPPLEMENTAL PROCEEDINGS.

### No. 1.

# WARRANT OF ARREST BEFORE JUDGMENT. (O. 38, R. 1.)

| The B<br>Where                   |   | the Cour | t |
|----------------------------------|---|----------|---|
| Princips!<br>Interest<br>Costs . | : |          |   |
|                                  |   | Total    |   |

, the pluntiff in the above suit, claims the

sum of Rs as noted in the margin and has proved to the satisfaction of the Court that there is probable exuse for believing that the defendant a about to .

These are to command you to demand and re-

ceive from the said the sum of Rs as sufficient to satisfy the plaintiff's claim, and unless the said

he may show cause why he should not furnish accuraty to the amount of Rs, for his personal appearance before the Court, unbit unch times at he said aut shall be fully and finally disposed of, and until satisfaction of eny decree that may be passed against him in the aut.

Given under my hand and the seal of the Court, this day of

Judge

No. 2.

SECURITY FOR APPEARANCE OF A DEFENDANT ARRESTED BEFORE JUDGMENT.

(O 38, R. 2) (Taile)

Whereas at the instance of the defendant has been arrested and brought before the Court.

And whereas on the failure of the said defendant to show cause why he should not

furnish security for his appearance, the Conrt has ordered him to furnish such security.

Therefore, I have coluntarily become surety and do bereby hind myself, my here and executors, to the said Court, that the said defendant shall appear at any time when called upon while the suit is pending and until statisticism of any decree that may be

when called upon while the sut is pending and until satisfaction of any decree that may be passed against him in the said ant; and in default of such appearance I but my hers and executors, to pay to the said Court, as its order, any sum of money that may be adjudged account to gain defendant in the said sub.

day o (Signed)

Witnesses 1 2

2946

No 3

# SUMMONS TO DEFENDANT TO APPEAR ON SURETY S APPLICATION FOR DISCHARGE (O 38 R 3)

(Title )

Τo

day of Whereas who became surety on the for your appearance in the above suit has applied to this 19

Court to be discharged from his obligation You are hereby summoned to appear in this Court in person on the

AM when the said day of 19 at application will be heard and determined

Given under my hand and the seal of the Court this

day of

Judge

No 4

# ORDER FOR COMMITTAL (O 88 R 4)

(Tatle )

Tο plaintiff in this suit has made application to the Whereas Court that security be taken for the appearance of to as ver any judgment that may be passed against him in the suit and whereas the Court has called upon the defendant to furnish such se urity or to offer a sufficient deposit in lieu of security which he has failed to do it is ordered that the sail defin be committed to the civil prison until the decision of the

dant suit or if judgment be pronounced against him unt I satisfaction of the decree

Given under my hand and the seal of the Court this day of

Judge

No 5 ATTACHMENT BEFORE JUDGMENT WITH ORDER TO CALL FOR SECURITA FOR

FULFILMENT OF DECREE (O SS R 5)

(Tatle )

To

The Bailiff of the Court

has proved to the sati faction of the Court

Wherevs that the defendant in the above suit These are to command you to call upon the said defendant e ther to furn sh 19 day of or before the to produce and place at the d posal security for the sum of rupees or the value thereof or such portion of the value as may be sufficient to satisfy any decree that may be pased against him or to appear and show cause why he should not furnish security and you are further ordered to attach the valo and secure custed and are the further order of the Court and you are further commanded to return this warrant on or before the and of the court and you are further commanded to return the great of the commanded to the court and the manner is which it has been executed or

the reason why it has not been executed

C ven under my hand and the seal of the Court this

Ji los

### No 6

# SECURITY FOR THE PRODUCTION OF PROPERTY (O 38 R 5)

Whereas at the instance of the plaintiff in the above suit

the defendant has been directed by the Court to furnish security in the um of R to produce and place at the di posal of the Court the property specified in the Schedule hereunto anuexed

Therefore 1 mives from the said Court that the said defendant shall produce and place at the disposal of the Court when required the property specified 1: the said Schedule or the alue of the same or such portion thereof as may be sufficent to saisly the decree and metallicity he so long I thind mixelf my heirs and executors to pay to the said Court at it order the said sum of Rs sum of exceeding the said sum as the said Court may adduce

### Sel ed de

Witness my hand at

this

day of

(S gned)

ir itue=ses

10

### No 7

# ATTACHMENT BEFORE JUDGMENT ON PROOF OF FAILURE TO FURNISH SEGURITY

(O 38 R 6)

(Tatle )

To

The Bauliff of the Court

Whereas the plantoff in this suit has applied to the Gourt to call upon the defendant to furnish security to fulfil uzu decree that may to passed against him in the suit and where a the Court has called upon the said to furnish such security which he has failed to do Tlese are to command you to attach the property of the said

are to command you to attack

and keep the sume under safe and secure cu tody until the further order
of the Court and you are further commanded to return this warrant on o before the
day of
day of

day of 19 with an endorsement certifying the date on which and the manner in which it has been executed or the reason thirt has not been executed

Given under my hand and the seal of the Court, this day of

Judge

Judge

No 8 TEMPORARY INJUNCTIONS (Tatle.)

. Pleader of [or Counsel for]

(O 39, R 1)

Upon motion made unto this Court by the plaintiff A B, and upon reading the petition of the said plaintiff in this matter filed [this day] [or the plaint filed in this suit on the day of or the written statement of the said plaintiff filed on the

] and upon hearing the sysdence day of of

thereof [if after notice and defendant not appearing add, and also the evidence of as to service of notice of this motion upon the defendant C D ] This Court doth order that an injunction be awarded to restrain the defendant

C D, his servants, sgents and workmen, from pulling down, or suffering to be pulled down, the house in the plaint in the said suit of the plaintiff mentioned for in the written statement, or petition, of the plaintiff and evidence at the hearing of this motion mentioned], being No 9, Oilmongers Street, Hindupur, in the Talul of

and from selling the materials whereof the eard house is composed, until the hearing of this suit or until the further order of this Court

Dated this 19 . day of

[Where the injunction is sought to restrain the negotiation of a note or bill, the ordering part of the order may run thus -]

to restrain the defendants

from parting with out of the custody of them or any of them or endorsing, assigning or negotiating the promissory note [or bill of exchange] in question, deted on or , etc., mentioned in the

plaintiff's plaint [or petition] and the evidence heard at this motion until the hearing of this suit, or until the further order of this Court. to restrain the defen

[In Copurtant cases]

dunt C D, his servants, agents or workmen, from printing, publishing or vending a book. , or any part thereof,

until the, etc

about the

called

[Where part only of a book is to be restrained]

to restrain the defendant C D, his servants, agents or workmen from printing publishing selling or otherwise disposing of such parts of the book in the plant [or petition and evidence, etc.] mentioned to have been published by the defendant as herein after specified, namely, that part of the said book which is entitled

and also that part which is entitled

for which is contained in page to page both inclusive] until . etc.

to restrain the defendant C D, his agents, servants and workmen, from making or vending any perforated bricks [or as the case may be] [In Patent cases] upon the principle of the inventions in the plaintiff's plaint [or petition, etc., or written stitument, etc ] mentioned belonging to the plantiffs, or either of them, during the remainder of the respective terms of the patents in the plaintiff a plaint [or as the case may be] mentioned, and from counterfeiling, imitating or resembling the same inventions, or either of them, of making any addition thereto, or subtraction therefrom, until the hearing, etc

to restrain the defendant [In cases of Trade marks] C D, his servants, agents or workmen, from selling, or exposing for sale, or procuring to be old, any composition or blacking for as the case may be described as or purporting to be blicking manufactured by the plaintiff A B, in bottles having affixed thereto such labels as in the plantiff's plant [or petition, etc ] mentioned, or any other labels to contrived or expressed as, by colourable imitation or otherwise, to represent the composition or blacking sold by the defendant to be the same as the composition or blacking manufactured and sold by the planning A B and from using trade cards so continued or expressed as to represent that any composition or blacking sold or proposed to be sold by the defendant is the same as the composition or blacking manufactured or sold by the planning A B, until the expression of blacking manufactured or sold by the planning A B, until the expression of blacking manufactured or sold by the planning A B, until the expression of blacking manufactured or sold by the planning A B.

[To restrain a partner from in any way interfering in the business]

to restrain the defendant C D, his agents and sevenats from entering into any contract and from accepting drawing endorange or negotiating any bill of terchange, note or written security in the name of the purinesship firm of B and D, and from contracting any delit, buring and selling any goods and from making or astering into any reschol or written promise agreement or undertaking, and from doing, or causing to be done any act, in the name or on the credit of the said partnership firm of B and D, or whereby the said partnership firm can or may in any minuter become or be made finish to or for the partnership farm can or row in the performance of any contract, promise or undertaking until the, and

[6] I oy

APPOINTMENT OF A RECEIVER, (O 40, R 1)

(Tatle )

To Whereas

has been attached in execution of a decree

passed in the above sust on the

day of

19, in favour of
the Court) appointed you are hereby (subject to your giving security to the satisfaction of
the Court) appointed you are hereby counter Order 40 of the Code of Civil Procedure,
1903 with full power under the provisions of that Order

of the Code of Civil Procedure,
1903 with full power under the provisions of that Order

You are required to render a due and proper account of your receipts and disbursements in respect of the said property on . You will be entitled

to remuteration at the rate of authority of this appointment

per cent upon your receipte under the

Given under my hand and the seal of the Court this day of

Judge

Madras

Local Amendment

Substitute the following for Form No 9 --

APPOINTMENT OF A RECEIVER

(O 40 R 1)

(Tatte)

Whereas it appears to the Court that in the above suit it is just and covenient fo appoint a receive of the properties specified below for whereas the properties specified below have been attached in execution of a decree passed in she above suit on the day of 19 , in favour of

It is hereby order at the same and the segmented funded to be grounded to the studies of the Courthbe recovere of the said property and of the runs sauces and profits thereof under Order 60 of the Code of Over Proceeding 1938 with all powers under the provinces of that order except that he shall not without leave of the Court, (1) grant leaves for a term exceeding three years or (2) institute suits in any Court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (except since in a court (excep

<sup>1</sup> Forms 6 and 7 were renumbered 2 and 10, respectively, by S 2 and Sch I of the Repealing and Amending Act, 1914 (V of 1914)

10

day of

and

### parties

and it is further ordered that the ----to the above suit and all persons claiming under defendants

them do deliver up quiet possession of the properties, moveable and immoveable, specified below together with all leases, agreements for lease, kahuloats, account books, papers, memoranda and writings relating thereto to the said receiver And it is further ordered that the said receiver do take possession of the said property, moveable and immoveable, and collect the rents, issues and profits of the said immoveable property, and that the tenants and occupiers do attorn and pay their ients in arien and growing sents to the said receiver. And it is further ordered that the said receiver shall have power to bring and defend suits in his own name and shall also have lower to use the names of the plaintiffs and defendants where necessary. And it is further ordered that the receipt or receipts of the said receiver shall be a sufficient discharge for all such am of sums of money or property as shall be pud or delivered to him as such receiver

and it is further ordered that the said receiver do, out of the first money to be received by and shall be entitled to retain in his haids him pay the debts due from the said for current expenses, but subject thereto shall par his nethe sum of Rs receipts as soon as the same come to his hands, into Court to the credit of the suit He shall once in every months file his accounts and vouchers in Court, the first account to be filed on the

day of and to be passed on the He shall be entitled to the commission at the rate of Rs per cent on the per month (or as the case may be) as net amounts collected by him or to the sum of Rs.

his remuneration (or he shall act without any remuneration) And it is further ordered (where an additional office establishment is required) that the said recover shall be allowed to charge to the estate in addition to his own office establishment

the following further establishment -(Here enter specification of property )

Given under my hand and the seal of the Court this

No 1 [10]

BOND TO BE GIVEN BY RECEIVER (O 40, R 3)

(Tatle)

Know all men by these presents that we,

ınd , are jointly and severally bound to

to be paid to the of the Court of in Rs

For which pay said or his successor in office for the time being ment to be made we bind ourselves and each of us, in the whole, our and each of our heirs executors and administrators, jointly and severally, by these presents Dated this

day of Whereas a plaint has been filed in this Court by for the purpose of there insert the object of suit

has been appointed, by order of the atom And whereas the said mentioned Court to receive the rents and profits of the immoveable property and to get in in the said plaint the outstanding moveable property of

named Now the condition of this obligation is such that if the above bounden

shall duly account for all and every the sum and sums of money which he shall so receive on account of the rents and profits of the immovcable property. at such periods as the and in respect of the moveable property, of the said as and Court's shall appoint and shall duly pay the belauces which shall from time to take be certified to be due from him as the said Court hath directed or shall hereafter direct them that the directed or shall hereafter direct then this obligation shall be word, otherwise it shall remain in full force.

Signed and delivered by the above boundon in the presence of

Note -If deposit of money is made, the memorandum thereof should follow the terms of the condition of the bond

<sup>1</sup> Forms 6 and 7 were renumbered 9 and 10, respectively, by S 2 and Sch I of the Repealing and Amending Act, 1914 (A of 1914)

### Local Amendments.

Allahabad

No. 11 id the following as Form- Nos 11 and 12 -

The security to be furnished under O 38 R 9 shalf be, as nearly as may be, by a bond in the following form -In the Court of зŧ State No. of 19 .

Planteff Defendant

Amount of suit. Bunees Whereas in the out above specified the plaintiff on his faring t do certain property of the said defendant.

the said Court that the said defendant

aforesaid has applied to . may be called on to furnish sufficient security to fulfil any decree that may be passed against him in the said suit or that , may be attached.

And where i on the future of the said defendant to furnish such security, or, show cause wha it should not be furnished the property aforesaid of the said defendant

ha been attached by order of the said Court inhabitant of Therefore 1 have voluntarily become scennity and herety tind myself my hours and executors to

Judge of the and tourt and his successors in office, that the said defendant , hall produce and nin cut the disposit of the said Court, when required, the property herein below specified namely (here have description of the property or refor to an annoxed Schedule), or the value of the same r such portion thereof as may be aufficient to fulfil such docree and shall when required pay the costs of the attachment and in default of his so doing I find misolf. as Judge of the said Court and his successors in my heirs and executors to pay to office on its order will sum to the extent of supces (here enter a sufficient sum to cover the amount of suit with Loris and the costs of attachment) as the said Court may admided against the said defendant

Witness my hand at

this day of

> (Signod) Surety

Witnesses

No 12

The security to be invasshed under O 39, R 2 (2) shall be, as far as may be, by a bond

in the following form -In the Court of

Sust No. of 19

19 .

Plaintiff. Defendant

Whereas in the suit above specified, instituted by the said plaintiff, . from there state the breach of contract or other restrain the said defendant injury) the said Court has on the application of the said plaintiff, injunction to restrain the said defendant from the repetation (or the continuance) of the said

breach of contract (or urougful act complained of), and required security from the said defen dant against such repetition (or continuance) , have voluntarily

, inhabitant of Therefore I become security and do hereby bind myself my heirs and executors.

as Judge of the said Court and his successors in office that the said defendant.

shall abstain from the repetition (or continuance) of the breach of contract aforesaid (or uronyful act, or from the commettal of any breach of contract or enjury of a like hind, arising out of the same contract, or relating to the same property or right), and in default of his so abstaining I bind myself, my heirs and executors to pay mto Court, on the order of the Court, such sum to the extent of rupees , as the Court shall adjudge against the said defendant

Witness my hand at thie day of 19 .

(Signed) Surety

Witnesses

# lix

# APPENDIX G

## APPEAL, REFERENCE AND REVIEW.

No 1
MEMORANDUM OF APPEAL (0 41, R. 1)
(Talle)

The

above named appeals to the

at from the decree of 19, dated the 19, and sets forth the following grounds

day of objection to the decree appealed from, namely —

No. 2 SECURITY BOND TO BE GIVEN ON ORDER BEING MADE TO STAY EVECUTION OF DECREE

(O 41 R 5) To

This security bond on stay of execution of decree executed by witnesseth —

an Smit No

witnesseed , the plaintiff in Suit No.

That , the plaintiff in Suit No.

Arving sued , the defendant, in this Court and a decree bring been passed on the day of 19 , in Isvour of the plaintiff

he said decree in the

to execute the decree, the defendent has
has been called upon to furnach security

mortgaging the properties specified in the Schedule hereunic annexed and covenant that the decree of the first Court be confirmed or varied by the Appel'ate Court the said defendant shall duly act in secondance with the decree of the Appellate Court and shall pry whitever may be payable by him thereinder and if he should fait therein then any amonate on particular the shall be realized from the properties hereby mortgaged and if the proceeds of the sile of the said properties are insufficient to pay the smoont due I and my legal representatives will be personally liable to pay the balance To this effect I execute this security bond that day

Schedule

(Signea)

Witnessed by

\_\_\_\_

No 3 SECURITY BOND TO BE GIVEN DURING THE PENDENCY OF APPEAL (O st. E 6) (Trife)

To

This security bond on stay of execution of decree executed by

witnesseth—
That , the plaintiff in Snit No of 19 .

That having sued , the defendant, in this Court and a decree having term having the day of in favor of the

passed on the day of plantiff, and the delendant having preferred an appeal from the said decree in the Court, the said appeal is still pending.

Now the plantiff, decree holder has applied for execution of the said decree and said series and some control of the said decree and said series are said series.

has been called upon to turnsh security 'tecordingly I of my our free will stand on the stand upon to turnsh security 'tecordingly I of my our free will stand of the to the extent of IB's mortgaging the properties specified in the Schodule herealto annexed, and covenant that if the decree of the first Court be Schodule herealto annexed, and covenant shall restore any property which may be or varied by the Appellate Court the planning shall cut on any property which may be decree of the Appellate Court and shall pay whatever may be payable by him thereunded and if he should faul therein then suy smoonnt so payable shall be realized from the properties hereby mortgaged and if the proceeds of the sale of the said properties are

insufficient to pay the amount due I and my legal representatives will be personally liable to pay the talance. To this effect I execute this security bend this 10 day of

Scl edule

Witnes ed to

(Signed)

Iso 4

SECURITY FOR COSTS OF APPEAL (O 41 R 10) (Title )

To This occurity bond for co to of appeal executed by witne oth -

The appellant has preferred an appeal from the decree in Suit No against the respondent and has been called upon to furnish security accord

ingly I of my own free will stand eccurity for the costs of the appeal morriging the ingret of into one free with stands ecurity not the costs of the typesal indiringing the representation of the costs of the typesal indiringing the representation of the typesal indiringing the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the representation of the repr To this effect I execute this security bond this

Sched tle

(Signed)

Witnes ed by 2

No 5

INTIMATION TO LOWER COURT OF ADMISSION OF APPEAL (O 41 R 19) (Title)

Tο

Nou are hereby directed to take notice that in the above smit has preferred an appeal to this Court from the decree passed by you therein on the day of

You are requested to send with all practicable despatch all material papers in the suit day of

Dated the

No 6

NOTICE TO RESPONDENT OF THE DAY FIXED FOR THE HEARING OF THE APPEAL (O 41 R 14)

(Tatle )

of the Court of Appeal from the

dated the day of 19

To

Respon lent.

Judge

Judze

Take notice that an appeal from the decree of in this and registered in this Court and that the case has been presented by has been fixed by this 19 day of

Court for the hearing of this appeal If no appearance is made on your behalf by yourself, your pleader, or by some one by law authorized to act for you in this appeal it will be heard and decided in your

Given under my hand and the seal of the Court, this 19 day of

ix [Note—If a stay of execution has been ordered, intimation should be given of the fact on this notice]

Madras Local Amendment

Insert the following 'Note' namely —
'Note — Viso take notice that if an address for service is not filed before the aforestid date this appeal is liable to be heard and decided as if you had not made an appearance'

Insert the following as Forms Nos 6 A and 6 B -

NOTICE TO RESPONDENT (0 41 1, R 2)

Appeal from the (Cause title )

of the Court of day of Respondent

To dated the

Madras

To

To

otes
(If the appellant appears in person insert his aldress for service)
Given under my hand and the seri of the Court, this
day o

Registrat
Interlocutory application No
and execution has been stated for order made) by order dated the
day of

19 "No 6B

MEMORANDUM OF APPEARANCE (0 41 1 R 8)

(Cause Title)
The notice that the respondent intends to appear and defense the above appeal, and that his address for services of all notices and process is (native address)

address;

The said respondent requires a list of the papers which the appellant proposes to translate
and print

Dated the day of 19
Signed C D
Valit for Repeater

The Registrar High Court of Judicature Madras

NO 7 NOTICE TO A PARTY TO A SUIT NOT MADE A PARTY TO THE APPEAL BUT JOINED BY THE COURT AS A RESPONDENT

(O 41, R 20) (Title)

Whereas you were a party in suit No of 19 in the Court ferred an appeal

terron and Chart to the Chart temporalest in Jay of

behalf on the said day and at the said hour the appeal will be heard and decided in our absence.

Orven under my hand and the seal of the Court, this day of

Judge

### No. 8 MEMORANDUM OF CROSS OBJECTION. (O 41, R 22) (Tatle )

Whereas the

has preferred an appeal to the Court at

from the decree of of 19 , dated the

in Suit No. day of

and whereas notice of the day fixed for hearing the appeal day of 19 , tho

was cerred on the

Appeal No

The

file, this memorandum of cross objection under R 22 of O 41 of the Cole of Civil Procedure 1905 and sets lorth the following grounds of objection to the decree appealed from namely -

Yo 9

DECREE IN APPEAL (O 41, R 35)

above named appeals to the

(Title) from the decree of the Court of

dated the day of

Memorandum of Appeal

Plaintiff Defendant

from the decree of the day of namsly

in the above suit, dated 10 , for the following reasons,

19

Judge

This appeal coming on for hearing on the 19 bufore for the appellant and of

day of , in the presence of for the respondent,

at as ordered-The costs of this appeal, as detailed below amounting to Rs The costs of the original suit are to be paid by GIVEN under my hand this

, sre to

Costs of Appeal

day of

|   | 1mount Respondent              |    |   | Amount |                      |    |   |    |
|---|--------------------------------|----|---|--------|----------------------|----|---|----|
|   |                                | Rs | 1 | P      |                      | Rs | 1 | ₽. |
| 1 | Stamp for memorandum of appeal | i  |   | ļ      | Stamp lor power      |    |   |    |
| 2 | Do for power                   | 1  |   | l      | Do lor petation      |    |   | ı  |
| 3 | Services of processes          |    | ı | 1      | Service of processes |    |   | İ  |
| 4 | Pleader's fee on Rs .          | ì  | 1 | ì      | Pleader s fee on Rs  | ì  | Ì | ]  |
|   | TOTAL . ,                      | 1  | 1 | 1      | TOTAL                |    |   |    |

### Local Amendments

Calcutta Cancel the words from 'Memorandum of Appeal" to 'the following reasons, namely" -Form No 9

# Madras

Omit the entire portion beginning with the words "Memorandum of Appeal" and ending with the words 'the following reasons, namely -" "Form No 9

### Patna

In the schedule of costs in the form of Decree in Appeal, add 'Copying or typing charges' the item "pleader's fee on Rs" in the columns for Appellant and Respondent. telow the stem "pleader's fee on Rs " in the and number the new entry in the first column as "5".

No. 10

APPLICATION TO APPEAL in forma pauperis (0 44 R. 1) (Tatle )

above named present the accompanying memorandum of appeal from the decree in the above suit and apply to be allow i to appeal as a pauper

Annexed is a full and true schedule of all the moveable and immovable property b long ing to me with the estimated value thereof

Dated the day of 19 . (Signed) Note -Where the application is by the plaintiff he should state whether he applied and

No 11.

NOTICE OF APPEAL in forma pauperis (0 44, R. 1)

(Title)

Whereas the above named has applied to be allowed to appeal as a pauper from the decree in the above suit dated the day of

han s 13 and whereas the day of you desire to show s opportunity will be

day of

19

was allowed to sue in the Court of first instance as a pauper

Judge

No 12 NOTICE TO SHOW CAUSE WHY A CERTIFICATE OF APPEAL TO THE KING IN

> COUNCIL SHOULD NOT BE GRANTED (O 15 P 3) (Title)

To

Take notice that has applied to this Court for a certificate that as regards amount or value and nature that above case fulfils the requirements of section 110 of the Code of Civil Procadure 1903 or that

it is otherwise a fit one for appeal to His Majesty in Council as fixed for you to show canday of

why the Court should not grant the certificate asked for Given under my hand and the seal of the Court this day of

Registrar

Madras

Local Amendment

Forms 12 A, 12 B and 12 C

Insert the following as new forms after the Form No 12 -4 No 12 A.

CERTIFICATE OF LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL (O 45 R 7)

is of sufficient value and the findings of

se Code of Civil Procedure, praying for the

al to His Majesty in Conneil against the

decres of this Court in

suit No

of 19

The petition coming on for hearing upon perusing the petition and the grounds of appeal to IIIs Vargety in Council and the other papers material to the application and upon the degree of the petitioner and of

| •                                   | THE PARTY IN THE PARTY | CACL IND                  | T/L ATC II   | 2001                          |
|-------------------------------------|------------------------|---------------------------|--------------|-------------------------------|
| re pendent (if he appea             | t) this Court doth cer | tuly that the             | amount       | of the subject matter of      |
| the cust in the Court of            | first instance is -    |                           | — and the    |                               |
| pet matter in di pute<br>Rs. 10 000 |                        | wards of Rs<br>Unjesty in |              | value<br>also of the value of |
| upwards of Rs 10 000                |                        | 2                         |              |                               |
| or that the decree                  |                        | directly                  |              | to                            |
| final order                         | appeared from involves | indirectly                | some chilin  | respecting                    |
| un ti oiuti                         | Rs 10 000              | municetty                 | decreo       | respecting                    |
| property of the value of            | unwards of Rs 10 000   | and that the              |              | appealed from does not        |
| afirm the decrion of th             |                        |                           |              |                               |
|                                     | No                     | 12 B                      |              |                               |
| CERTIFIC VIE                        | OF LEAVE TO APP        | LAL TO HIS<br>R 7)        | S WIJESTY    | IN COUNCIL                    |
| (In ca es where th                  | a subsect matter is of | sufficient val            | ne and the f | indings of the Court are      |

concarrent ) Read the retition precented under O 45 R 3 of the Cole of Civil Procedure praying for a grant of a certificate to enable the petitioner to appeal to His Majesty in council against the decree - of this Court in suit No

final order The petition coming on for hearing upon perusing the petition and the grounds of appeal to His Majesty in Council and other papers material to the application and upon hearing the arguments of for the petitioner and of for the respondent (if he amount appears) this Court doth certify that the -of the subject matter of the suit in the Conrt of value Rs 10 000 amount

- and the -- of the subject matter in dispute first instance is upwards of Rs 10 000 value Rs 10 000 on appeal to His Majesty in Council is also of the value of or that the upwards of Rs 10 000 directly to

dccree - property of appealed against involves some claim or question indlrectly responting final order Rs 10 000 docree the value of . and that the affirming - appealed from suvolves upwards of R. 10 000 final order the following substantial question (s) of law tiz -

Form 12 C

# CERTIFICATE OF LEAVE TO APPEAL TO HIS VIAJESTY IN COUNCIL

(O 45 R 7)

(In cases where the subject matter in dispute is either not of sufficient value or is incapable of money valuation )

Read patition presented under O 45 R 3 of the Code of Civil Procedure praying for the decroe

grant of a certificate to enable the petitioner to appeal to His Majesty in Council against the final order of this Court in sunt No

The petition coming on for hearing nion i erusing the petition and the grounds of appeal to His Majesty in Council and other papers material to the application and upon hearing the

arcuments of for the petitioner and of amount for the respondent (if he appears) this Court doth certify that the--of the subject matter of

value

of 10 .

below Rs 10 000 in value the suit both in the Court of the first instance and in this Court 13-

- this incapable of money valuation

```
Court in the exercise of the discretion vested in it is satisfied that the case is a fit one for appeal
to His Majesty in Council for the reasons set forth below, tiz -
   No 13
       NOTICE TO RESPONDENT OF ADMISSION OF APPEAL TO THE KING IN
                                 COUNCIL (0 45, R. 8)
```

(Tatle )

To Whereas in the above case, has furnished the security and made the deposit required by

O 45 R 7 of the Code of Civil Procedure, 1908 Take notice that the appeal of the said to His Majesty in Oouncil has been admitted on the day of

Given under my hand and the seal of the Court, this

Registrar

No 14.

NOTICE TO SHOW CAUSE WHY A REVIEW SHOULD NOT BE GRANTED

(O 47, R 4) (Tatle )

To

Take notice that decree passed on the

day of day of , IS Theu lof you to save the Court should not grant a review of its decree in this case

Orven under my hand and the seal of the Court, this day of 19

Judge

# APPENDIX H MISCELLANEOUS

No 1

AGREEMENT OF PARTIES AS TO ISSUES TO BE TRIED

(0 14, R 6) (Tatle)

WHEREAS we, the parties in the above suit, are agreed as to the question of lateral for of law] to be decided between us and the point at issue between us is whether a claim dounded on a bond, dated the in the said suit, is or is not beyond the statute founded on a bond, dated the filed as Exhibit of limitation (or state the point at issue whatever it may be)

We therefore severally bind over-cives that, upon the finding of the Court in the will pay to the said for such sum as the Court shall negative [or affirmative] of such issue,

will accept the said sum of will accept the said sum of or such sum as the Court shall hold to be day) in a dances and for that proposed to the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of the said sum of th the sum of Rupees hold to be due thereon), and I, the said full satisfaction of my claim on the bond aloresud [or that upon such finding I, the said will do or abstain from doing, ele, etc ]

Plaintiff Defendant

Witnesses -

Dated the

day cf

IJ.

the

 $_{\rm 1R}$ 

19

No 2 NOTICE OF APPLICATION FOR THE TRANSFER OF A SUIT TO ANOTHER COURT FOR TRIAL (Section 24)

In the Court of the District Judge of No

WHEREAS an application dated tho has been made to this Court by

day of the

now pendlug in the Court of the Sait No of 19 , m which is plaintiff and

by defendant for the transfer of the suit for trial to the Court of a t lon are hereby informed that the day of 19 has been

uxed for the hearing of the application when you will be heard if you desire to offer any objection to it

day of GIVEN under my hand and the seal of the Court this Judge

No 3

NOTICE OF 1 ANNEAT INTO COURT (O 24 R 2)

(Tatle)

TAKE notice that the defendant has paid into Court Rs and save that that sum is sufficient to satisfy the plaintiff a claim in full

1 1 Plca ler for the detendant

To Z Pleader for the plaintiff

No 4

NOTICE TO SHOW CAUSE (GENERAL FORM)

(Title)

To Whereas the above name 1

In the Court of

has made

application to this Court that You are hereby warned to appear in this Court in jerson or by a pleader duly

instructed on the day of 19 at O clock in the forenoon to show cause agriust the application, failing wherein the said application will be heard and determined ex parte

GIVEN under my hand and the seal of the Court this 13 day of

Judae

Allahabad

Local Amendment

Form No 4 Notice to show can a (General form)

district Civil Suit No. of 19

Miscellaneous No. of 19

resident of

e ersus

resident of

Wherea

 $T_{0}$ 

instructed on show cause as

mincd exparte and it will be presumed that you consent to be the appointed Guardian for the suit

Given under my hand and the seal of the Court, this 13

day of Judge

|      |    |           | 110 0    |                           |    |       |    |
|------|----|-----------|----------|---------------------------|----|-------|----|
| LIST | OF | DOCUMENTS | PRODUCED | Plaintiff<br>By-defendant | (0 | 13, R | 1) |
|      |    |           | (Tetle)  | derendani                 |    |       |    |

| No | Description of document | Date if any which the document bears | Signature of party or pleader |  |  |  |  |
|----|-------------------------|--------------------------------------|-------------------------------|--|--|--|--|
| 1  | 2                       | 3                                    | 4                             |  |  |  |  |
|    |                         |                                      |                               |  |  |  |  |
|    |                         | 1                                    |                               |  |  |  |  |
|    |                         |                                      |                               |  |  |  |  |

Local Amendment

Allahahad

Form No 5 plaintiff

LIST OF DOGUMENTS PRODUCED BY defendant

In the Court of aţ District Surt No ο£ 19 .

(O 13 R 1)

tersus

Plaintiff Defendant

List of documents produced with the plaint (or at first hearing) on behalf of plaint if (or defendant) day of This list was filed by this 19 .

| 1            | 2                                                  |                                                               | 3          | 4 |
|--------------|----------------------------------------------------|---------------------------------------------------------------|------------|---|
| Serial<br>No | Description<br>and date if any,<br>of the document | What became                                                   | Roman      |   |
|              |                                                    | If brought on the record the exhibit mark put on the document |            | 1 |
|              |                                                    | ĺ                                                             | ** * " = " | 1 |

Signature of party or pleader producing the list

NOTICE TO PARTIES OF THE DAY FIXED FOR EXAMINATION OF A WITKESS ABOUT TO LEAVE THE JURISDICTION (O 18 R 16)

(Title) Plaintiff for Deferdath

Τо WHERE IS in the above suit application has been made to the Court by . , a witness requir 1

, in the said suit may be taken immediately that the examination of by the said

and it has been shown to the Court's satisfaction that the said witness is about to leave the Court's jurisdiction (or any other good and sufficient cause to be stated)

TAKE notice that the examination of the sud witness

taken by the Court on the Dated the

I.

Patna

day of

day of 19

10

NO 7

COMMISSION TO EXAMINE ASSENT WITNESS (O 26, Rr 4 18)

(Tatle)

то WHERE IS the evidence of

is required by the , you are requested to take the evidence the above suit, and whereas

on interrogatories | r tita toce of such witness. , and you are hereby appointed Commissioner for that purpose The evidence will be taken in the presence of the parties or their agents if in attendence who will be at liberty to question the witness on the points specified and you are further requested to make return of such cyidonce as soon as it may be taken

Process to compel the attendance of the witness will be assed by any Court having jurisdiction on your apply atton being your ice in the above is herewith forwarded

A sum of Ra

GIVEN under my hand and the seal of the Court this day of

Local Amendment

Judae

will be

Judge

Add the following ' Note at the foot -"NOTE -The Commissioner has power under Chapter X of the Indian Evidence Act to control the examination of witnesses"

No 8

# LETTER OF REQUEST (O 26, R 5)

(Title )

(Heading - To the Presidut and Judges of etc etc or as the case may be)

in which A B is Whereas a suit is now pending in the plaintiff and C D is defendant, and in the eard suit the plaintiff claims

(Abstract of Claim)

and whereas it has been represented to the said Court that it is necessary for the pur poses of justice and for the due determination of the matters in dispute between the parties, that the following persons should be chamined as witnesses upon oath touching such matters, that is to say

> G H of and I J of

And it appearing that such witnesses are resident within the jurisdiction of your honour able Court

Now I of the said Court, have the honour to request, and do hereby request that for the reasons aforesaid and for the assistance of the

said Court, you, as the President and Judges of the said some one or more of you, will be pleased to summon the said witness (and such other witnesses as the agents of the card plaintiff and defendant

> та уоп he proces,

question in the presence of the agents of the plans on due notice given, attend such examination

And I further have the honour to request that you will be pleased to cause the auswers of the said witnesses to be reduced into writing, and all books, letters, papers and documents produced upon such examination to be duly marked for identification, and that you will be further pleased to authenticate such examination by the seal of your tribunal, or in such other way as is in accordance with your procedure, and to return the same, together with such n quest in writing, if any, for the examination of other witnesses to the said Court

(Note -If the request is directed to a Foreign Court, the words "through His Majesty Secretary of State for Foreign Affairs for transmission's should be inserted after the work "other witnesses in the last line of this form }

No 9

## COMMISSION FOR A LOCAL INVESTIGATION, OR TO EXAMINE ACCOUNTS (O 26, Rr 9, 11)

(Tatle )

To

Whereas it is deemed requisite, for the purposes of this suit, that a commission should be issued; You are hereb! for appointed Commissioner for the purpose of

Process to compel the attendance before you of any witnesses, or for the production of any documents whom or which you may desire to examine or suspect, will be issued by any Court having jurisdiction on your application

, being your fee in the above, is herewith A sum of Rs forwarded

Given under my hand and the seal of the Court, this

day of

To

ix

Judge

Judje

No 10

## COMMISSON TO MAKE A PARTITION. (O 26, R 18)

(Tatle )

Tο Whereas it is deemed requisite for the purposes of this suit that a commission should be assued to make the partition or separation of the property specified in, and according to the rights as declared in the decree of this Court, dated the

and are directed to make such inquiry as may be necessary, to divide the said property according to the best of your shill near many be necessary, to divide the said property according to the best of your skill and judg to allot such shares to the soveral parties a paid to any party by any other party for the 1

Process to compel the attendance before you of any witness, or for the production of any documents whom or which you may desire to examine or inspect, will be issued by any Court

having jurisdiction on your application , being your fee in the above, is herewith for A sum of Rs warded

Given under my hand and the seal of the Court this

day of 19 .

No 11

NOTICE TO MINOR DEPENDANT AND GUARDIAN. (0 32, B. 3)

(Title )

Manor Defendant

Natural Guardian

Whereas an application has been assessed on the lift of the plaintiff in the alors suit for the appointment of a gn minor, and your unless within OF OF SOME

is made to this Court for the appointment of youl Here insert the name of the gnardian

you the minor to act as guardian for the suit the Court will proceed to appoint some other per on to act as a guardian to the minor for the jurgo es of the said suit

Civen under suv hand and the ceal of the Court this day of

Lucal Amendment

Jidze

# Allahabad

In Appendix H for form to 11 under the heading totice to Minor defendant and guardian ubstitute No 11

LEFS IS

Of

NOTICE TO MINOR DEFENDANT AND GUARDIAN

In the Court of at.

District

re ident of

Snit No

of 19

resident of

(1)

Minor defendant

and Inatural

(2)

-guardian certificated

on the part of the plaintiff in the above suit for the appointment of a guardian for the suit to

the person in who e care the minor is alleged to be. Wherea an application has been presented

Plantiff

Defer Jar t

mmcrdelendant you aid m nor nd yon (2)

1natural the guardian or the person in who e care the minor is alleged to be are herely required to take

not e that unless within days from the service upon you of this notice on

the suit t as the

son cf

resident of

Given under my hand and the seal of the Court this 15

day of Judze

Madras

Substitute the following for 1 orm No 11 -

No 11

NOTICE TO CLARDIAN APPOINTED OR DECLARED OR TO FATHER OR OTHER NATURAL GUARDIAN OR TO THE LERSON IN CHARGE OF THE MINOR

(O 32 R 3 (5) ]

(Tulle)

٦o Guardian at pointed or declared or f the or other natural guardian or person in chirge of the m nor

in the above or you are hereby required

vice upon you of this lotice of some friend of the said

-guardian for the purpose of the said shit the Court will proceed to appoint Minor to act ascome other person to act as guardian of the said minor for the purposes of the said

Given under my hand and the ceal of the Court this day of 19 Judge ardian is named cut out the natural and certificated whom the m nor lives

lix

| ıx. |    | ALV ALE REPORTED AND AND AND AND AND AND AND AND AND AN            |
|-----|----|--------------------------------------------------------------------|
|     |    | NOTICE TO PROPOSED GUARDIANS OF A MINOR—                           |
|     |    | RESPONDENT                                                         |
|     | To | Order 32, B 3 (9)                                                  |
|     |    | (X Z)                                                              |
|     |    | (Name to description and place of residence of proposed guardian ) |
|     |    | Take notice that \in has presented a position to the G             |

has presented a petition to the Court praying appellant

defendant (s) and the same will be heard that you be appointed guardian ad litem to the minorrespondent (s) on the day of

2 The affidavit of X has been filed in support of this application defendant (s)

-you are requested to 3 If you are willing to act as guardian for the saidrespondent (s) sign (or affix your mark to) the declaration on the back of this notice 4 In the event of your failure to aignify your express consent in the manner indicated above take further notice that the Court may proceed under O 32, R 3, Code of Civil Proce dure to appoint some other suitable person or one of its officers as guardian ad litem of the

defendant (s) minoraforosard

respondent (s)

Dated this

day of 19 . (Ed)

(To be printed on the reverse ) I hereby acknowledge receipt of a duplicate of this notice and consent to act as guardian dolendant (s)

of the minortherein mentioned respondent (s)

Witnesses 9

Signature

For Form No 11 substitute the following -

appointment of you defendant

Nagpur

 $T_0$ 

No 11

NOTICE TO MINOR DEFENDANT AND GUARDIAN (O 32 R 4 A)

(Tatle )

Minor Defendant Legally appointed Guardian Actual

Proposed

Guardian

on the part of the plaintiff

Whereas an application has been presentedon behalf of the minor defeudant as the guardian of the suit of the minor (you the said minor1) you the proposed guardian for the

his legally appointed guardian and you actual

appear bef re the arranded 11 15 made to ninor for the

e other Person nmon, in the

<sup>1</sup> The portion in brackets should be scored out if no notice is to issue to the fallow defendant

Given under my hand and the seal of the Court this

day of Judge 10

Palas

To

Ī.

For Form No. 11 substitute the following -

Form No 11.

NOTICE TO THE MINOR DEFENDANT AND GUARDIAN OF APPLICATION FOR APPOINTMENT OF THE GUARDIAN TO BE GUARDIAN FOR THE SUIT (O 32 R 3)

(Tatle)

Umor defendant

Guardian (appointed by authority or natural or the person in whose circ the minor is as the case may be !

Whereas an apply ation has been presented on the part of the plaintiff in the above suit as guardian for the suit to the minor defendant for the appointment of youl are hereby required to take you the said minor and you!

note a that unle a within 21 day from the cervice upon you of this notice you? give your consent to be appointed to act as guardian the Court will proceed subject to the deal ion of any objection that may be ruled to appoint an officer of the Court to act as guardian to you the minor for the said suit

Given under my hand and the seal of the Court this

day of 19 Julae

All the following as Form Nos 11 4 and 11 B -

Form No 11 A Notice to the minor defendant and guardian of application for appointment of another person to to guardian for the suit

To

1)

(O 32 R 3) Minor defendant

minor is) he above suit

Judge

are hereby

Given under my hand and the seal of this Court this

day of 19

Form No 11 B

(O 32 R 4) (Tatte )

10F514S

District In the Court of

at

Suit No

of 19 Plaintiff

Defenaant

<sup>1</sup> Here insert name of guardian

<sup>2</sup> Here insert name and description of proposed guardian 3 Here insert name of guardian upon whom the notice is to be served

Proposed Guardian

Whereas an applicat appointment of youl suit to the minor defendant days from the service upon v your consent to act as guardi

to act as a guardian to the minor for the purposes of the said suit

Given under my hand and the seal of this Court this day of

Judge

No 12

Notice to opposite Party of day fixed for hearing systence of pauperism

(O 33 R 6)

(Tatle )

To

has W heress applied to this Court for permission to institute a suit against
forma paipers under 0 33 of the Code of Civil Procedure 1908 and whereas the Court sees no reason to reject the application and whereas the

19 has been fixed for receiving such evidence as the applicant may

adduce in proof of his pauperism and for hearing any evidence which may be adduced in disproof thereof Notice is hereby given to you under R 6 of O 33 that in case you may vish to

offer any swidence to disprove the pauperism of the applicant you may do so on appear of day of in this Court on the said

Given under my hand and the seal of the Court this day of

Judge

No 13

Notice to Surety of his Liability under a Decree

(Section 145) (Title )

To

Whereas you liable as surety for the performance of any decree which might be passed against the defendant in the above suit and whereas a decree was said agrinst the ald

passed on the day of and whereas applicat on has defendant for the payment of

been made for execution of the said decree against you

to show cause why the said decree should Take notice that you are hereby required on or before the not be executed against you and if no sufficient cause shall be within the time see shown to the satisfactor of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfactors of the satisfacto shown to the satisfaction of the Court an order for its execution will be forthwith issued in the terms of the said application

Given under my hand and the seal of the Court this day of

Judge

<sup>1</sup> Here insert the name of the proposed gnardian

Arrested Amount paid into Court Amount of costs For what and amount

yearnet a pom

Date of order Date of application

> Lot u pom Date

Delendant

lraggrant in appeal

For what or amount

Dyte of decision of appeal

Day for parties to appear рэццээв L' pen tpe canse of scrop.

> sulty to tanoma Particulars Place of residence

Description Name Place of residence

Describtron owe<sub>N</sub> June lo redmaN Date of presentation of plaint

Unute of other Return Vrrest and date of th un Pryment or every return

Zelurn of I recution

I xecution

h Mil

Judgment

(p) carance

CLam

Defendint

Phintiff

67 9 RECESTR OF CIVIL SUITS No 11

Court of the

RIGISTIA OF CIVIL SUITS IN 1111 11 VI 19

NOTE - Where there are numerous plantiffs or numerous defendints the name of the first plantiff only or the first defedant only as the case may be need be entered an the register

MADRAS—(FORMS NOS 14 TO 25 OMITTED)

CALCUTTA-[See page 2909]

Local Amendments

Remarks

stea substitute the following form for Form No 14

|       |                         |              |                                     | Relief or amount still due                                         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |     |   |
|-------|-------------------------|--------------|-------------------------------------|--------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|---|
|       |                         |              |                                     | par strp qq                                                        | Orders at appeals revised<br>S 144 O. P. Code 141<br>James of court                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | 53  | 1 |
|       |                         |              |                                     |                                                                    | Muzar realto of other result                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | 22  |   |
|       |                         |              |                                     | Rosult of<br>Exceution                                             | Unr it norsed to entry of the first of the following lives of the following the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the first of the fir | 56  |   |
|       |                         |              |                                     | r fi                                                               | Amon of at based JanoenA                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | 53  |   |
|       |                         |              |                                     |                                                                    | Amount of costs                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 22  |   |
|       |                         |              |                                     |                                                                    | For whit and amount                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | 23  |   |
|       |                         |              |                                     | Evecution                                                          | Against whom                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | 22  |   |
|       |                         |              |                                     | á                                                                  | rate of final order                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | 21  |   |
|       | _                       | aţ           | 6                                   |                                                                    | Tumber and date of ap                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | 30  |   |
|       | 13                      | æ            | 3AB 119                             | tragat<br>ttis<br>on of<br>other<br>nan by                         | bird                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | 2   |   |
|       | (O 4 B                  |              | IE YE                               | Adjustment or sates faction of docrees other was than by execution | erelication l                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | 18  |   |
|       |                         | oţ           | REGISTER OF CIVIL SUITS IN THE YEAR |                                                                    | Order on appeal "1th<br>date and name of ap<br>1 ellate Court                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | Ħ   |   |
| No 14 | Sa                      |              | TE                                  | Appoal                                                             | Unmber & year of appeal                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | 16  |   |
| ž     | IVI                     |              | ı, St                               |                                                                    | For what or smount                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | 21  |   |
|       | E C                     |              | 12.                                 | Jadgment                                                           | For whom                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | 7   |   |
|       | EH.                     | the          | 0.<br>0.                            | Jud                                                                | Date                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | 13  |   |
|       | S                       | 3            | æ                                   |                                                                    | peu1228                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | 12  |   |
|       | REGISTER OF CIVIL SUITS | Court of the | IST                                 | Clarm                                                              | Amount or value                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | =   |   |
|       |                         | •            | REG                                 | ਰੰ                                                                 | Partnenlars                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | or  |   |
|       |                         |              |                                     | # #                                                                | Place of residence                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | - C |   |
|       |                         |              |                                     | Dofondrut                                                          | Description                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | œ   |   |
|       |                         |              |                                     | Dec                                                                | Улто                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | t-  |   |
| 2     |                         |              |                                     | E:                                                                 | Place of residence                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | 0   |   |
|       |                         |              |                                     | Plysutes                                                           | Description                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | 10  |   |
|       |                         |              |                                     | i ii                                                               | ott a A                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | 7   |   |
|       |                         |              |                                     | Number<br>of suit                                                  | dealt with under the B                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | ຄ   |   |
|       |                         |              |                                     | Nar                                                                | Serial number of suit                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | 61  |   |
|       |                         |              |                                     |                                                                    |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |     |   |

fined I to notirelated of the Struct

Note 1 -Where there are numerous plaintiffs or numerous defendants, the name of the

first plaintiff only, or the first defendant only, as the case may be need be entered in the register Note 2 - Cases remauded by appellate Courts to lower Courts under O 41, R 23, Civil Procedure Code, will be re admitted and entered in the general register of suits under their

original numbers. In each case the letter R will be affixed to the number to be entered in column 2 Note 3 -- In column 14 should be indicated whether the decision was exparte on com promise or on contest against all or any of the defendants

Note 4 -When the Court of execution is other than the Court which passed the decree, the name of the executing Court should be given in column 26 "

> Hurst adt or H ban not bberg it un? sesinst order in execu what extent er pitt 5qm suonsonsjut notitiod if of F vecutions pesoto st dotteted notinate sub litte fettet still due 61 rrest and pri ment 8 dinuite of other return other thin Zoturn ted to jail, the period of stay in it ton raw ton it ling of £ 0 II commit Caneel columns 20 27 and substitute the following Whether judgment debtor committed REGISTED OF CIVIL SUITS t erbons arrested Amount prid into Court 11 #II e td menter and satisfaction reported strong of costs 5 bolets od of fautofas ted a tote Tracution Agunst whom order made reliet not granted whit portion 10 0017100 11 Order and d'tts thereof pouttti CALCUITA 21 II mone Relief sought nortaling of a pplication execution application—register and 104 se gorrouddt gornaas 10 ou

No 15

REGISTER OF APPEALS (O 41, R 9)

COURT (OR HIGH COURT) AT

зипоше ļω JEGW. Koz DSIZET TO Judgment Confirmed, reversed Date quapuodsay dppellant Appearance RLGISTER OF APPEALS FROM DECREES in the year 19 rəlde Day for parties to enfay to sanomA Decree appealed from Particulars lenigino to redmit/ Of what Court oonopison 30 oorga Respondent Describiron ошьу Place of residence Appollant Describtion матис Unimber of appeal

Date of memorandum

# Local Amendment. Form No 16.

Allahahad

Add the following Nos 16 to 18 -

The security to be furnished under O 25, R 1, shall be, as nearly as may be by bond to the following form

In the Court of at Suit No. of 19

Plaintiff

ter<sub>s</sub>us

Defendant.

Whereas a suit has been instituted in the said Court by the said plaintiff
to recover from the said defendant the sum

of rupees and the sud plaintiff is residing out of British India (or is a woman) and does not possess any sufficient immostible property within British India independent of the property in the suit

Therefore I inhibitant of do hereby bind myself my here and executors to Court and to his successors in office that the said plaintiff his here and executors, shall whenever cated on by the said Ecourt, pay all co-its that my have been or may be incarried by the said lefedout the said court, pay all co-its that my have been or may be incarried by the said lefedout the said suit, and in default of sach payment I bind my-elf my here suid executors to pry all such costs to the said Court on its order.

Witness my hand at

this day of 1

\\ 1to€≈ses

(signed)

(17100000

Form No 17

.iddress for scruce

Under O 7 Rr 19 26 O 8 Rr 11 and 12, O 41 R 39, O 46 R 8, O 47, R 10, O 52, R 1

, 16 1 In the Court of the

of suit

of 19 .

08£2 TO

Plaintiff.

\ersus

Defendant

Surctu.

This address shall be within the local limits of the District Court within which the suit is filed or of the District Court within which the party ordinately resides it within the limits of the United Provinces of Agra and Oudh but not within the limits of any other revoluce—

| Name, parentage<br>and caste | Residence | Pargana or Tabsil | Post Office | District |
|------------------------------|-----------|-------------------|-------------|----------|
|                              |           |                   |             | . –      |
|                              |           | 1 1               |             |          |
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x

(0 41, B 9) REGISTI R OF APPEALS

amoune For чиная Deitev 10 Judgmont Confirmed, reversed Drie Respondent Appellant Appearance REGISTER OF APPLAES FROM DECREES in the year 19 arəddə Day for parties to COURT (OR HIGH COURT) AT Amount or valoe Decree appealed from sar[notare.] Number of Original Of what Court Place of residence Respondent Description уэто Place of residence Appellant Description

> Name Rumber of appeal Dete of memoraudum

#### Local Amendment

Form No 16.

| A | 11. | ь. | J. |  |
|---|-----|----|----|--|

Add the following Nos 16 to 15 -

The sammity to be furnished under O 25, R 1 shall be as nearly as may be by bond in the following form -

19

In the Court of

at Suit No αŧ

Plaintiff

versos

Defendant

Whereas a suit has been instituted in the said Court by the said plaintiff to recover from the sail defendant the sum as residing out of British of rupees and the said plaintiff

India (or is a womau) and does not possess any sufficient immosible property within British India independent of the property in the suit

Therefore I inhabitant of have voluntarily become security and do hereny bind myself my heirs and executors to as Judge of the said Court and to his successors in office that the said plaintiff his heirs and

executors shall whenever called on by the said Court par all costs that may have been or may be incurred by the said defendant

, to the said suit and in default of such payment I buil my all my heirs and executors to pay all such costs to the said Court on

its order Watness my hand at

this

day of 19 (signed)

Witnesses

Form No 17

Stretu

Address for scruce

Under O 7 Rr 1926 O 8 Rr 11 and 12 O 41 R 39 O 46 R 8 O 47 R 10 O 57 R 1

In the Court of the

οſ <unt Original----

of 19 .

or case versus Plaintiff

Defendant

This address shall be within the local limits of the District Court within which the suit is filed or of the District Court within which the party ordinarily resides if within the limits of the United Provinces of Agra and Ondh but not within the limits of any other province -

| Name parentage<br>and caste | Residence | Pargana or Tahsıl | Post Office | District |
|-----------------------------|-----------|-------------------|-------------|----------|
|                             |           |                   |             |          |
|                             |           | l i               |             |          |
|                             |           |                   |             |          |
|                             |           |                   |             |          |

ix

Any summons, notice, or process in the case may, henceforward, be issued to me at the above address until I file notice of change If this address is changed I shall forthwith file a notice of change containing all the new particulars

Signature of party { Plaintiff Defendant Appellant Respondent

O٠

I file the above address according to the instructions given by my client (name) (and capacity)

Stanature of Pleader

N B -This form when received by the Court must be stamped with the date of its receipt and filed with the record of the pending suit or matter

Form No 18

Notice of change of address for service

Under O 7, Rr 1926, O 8 Rr 11 and 12, O 41, R 38, O 46 R 8, O 47 R 10, O 52 R 1

In the Court of the яt suit Original--No 10 or case

Plaintiff. versus Defendant

This address shall be within the local limits of the District Court within which the suit is filed or of the District Court within which the party ordinarily resides, if within the limits of the United Provinces of Agra and Oudh but not within the limits of any other province -

| Name parentage<br>and caste | Residence | Parguna or Tabsil | PostOffice | District |
|-----------------------------|-----------|-------------------|------------|----------|
|                             |           |                   |            |          |
| }                           |           |                   |            |          |
|                             |           |                   |            |          |
|                             |           |                   |            |          |

Dated

Any summone, notice, or process in the case may, henceforward be issued to me at the above address until I file notice of change. If this address is again changed I shall forthwith dis a notice of change containing all the me. a notice of change containing all the new particulars

Signature of party { Plaintiff Defendant Appellant Respondent

Or

(and capacity )

I file the above address according to the matructions given by my client (name)

Signature of Pleaser

N B -This form when received by the Court must be stamped with the date of its reality and filed with the record of the pending sust or matter,

### THE SECOND SCHEDULE

### ARBITRATION

### ARBITRATION IN SUITS

P. 1. [S 500] (1) Where in any suit all the parties interested agree? that any matter in difference beapty for order of tween them shall be referred to arbitation, they reference may, at any time hefore judgment is pronounced. 13 apply to the Court to for an order of reference

(2) Every such application shall be in writing 12 and shall state the matter sought to be referred

[1877—S 506, 1859—Ss 312, 313]

### Synopsis

| \ote                                     | ١,  | , Note No                               | , |
|------------------------------------------|-----|-----------------------------------------|---|
| Legislative changes                      | 1   | Reference in respect of matters outside |   |
| Scope of the Schedule                    | 2   | sust 1                                  | 1 |
| Applicability of the Schedule to insol   | _   | Application shall be in writing See     | • |
| vency proceedings                        | 3   | Note 21 below 1:                        | • |
|                                          | •   |                                         | 6 |
| Applicability of the Schedule to execu   |     | At any time before judgment is pro      | _ |
| tion proceedings                         | - 4 | nounced 1;                              |   |
| Applicability of the Schedulo to probate |     | Revocation of submission I              | 4 |
| proceedings                              | 5   | Withdrawal of suit after reference to   |   |
| Applicability of the Schedule to suits   |     | arbetration 15                          | 5 |
| for restitution of conjugal rights       | 6   | Court -Appellate Court 16               | 6 |
| Arbitration in proceedings under other   |     | Death of party of operates as revoca    |   |
| Acts                                     | 6a  | tion of reference 17                    | 1 |
| All parties interested must agree to re  |     | Authority of pleader to refer IS        |   |
| ference                                  | 7   | Authority of agent to refer 15          |   |
| All the parties if should apply          | 8   | Authority of guardian or manager of a   | • |
| Effect of omission to sign or verify the |     | nomit Hinda lamily 20                   |   |
|                                          |     |                                         |   |
| application See Vote 21 1 fra            | 9   | Form 21                                 | 1 |
| Matter in difference                     | 10  | Agreement to abide by the decision of   |   |
|                                          |     | the Court 22                            | 2 |
|                                          |     |                                         |   |

#### Other Tomes

Authority of guardian of minor to refer See Authority of partner to refer Sec \ote 19
Note 20 Pts (1) and (2) Pts (4) to (6)

1 Legislative changes The word agree basheen submitted for the vague vord de ire as being a more definite and legal expression.<sup>1</sup> 2 Scape of the Schedule

The law of arbitration in British India is to be found in this. Code and in the Arbitration Act, 1899. The Code deals both with arbitrations pending high tion, and with arbitrations without recourse to litigation. The Arbitration ict, on the other hand, applies only to arbitrations by agreement unthout the interaction of the Court of justice, and only in cases where, if the subject matter submitted to arbitration were the subject of a suit, the suit could be instituted in a Presidency Town or other local area to which the Act is made applicable by the Local Government. Where the Act applies, Parigraphs 17 to 23 of the Second Schedule (dealing with references to arbitration without the intervention of the Court) do not apply?

The Act was passed to remedy two defects that were supposed to exist in the provisions as to arbitration enacted in the old Code, 212 —

- (1) That the Code did not apply to cases where the dispute which was the subject of reference did not arise at the date of the agreement to refer. In other words where an agreement was entered into to settle differences that may arise in future by arbitration, and a dispute subsequently arose between the parties, the agreement to refer could not be filed in Court under the provisions of the Code.
- (2) That the Code applied only to cases where the agreement to refer named the arbitrator or stated that he should be appointed by the Court

The first of these defects was, however, removed by a Full Bench decision of the High Court of Bomhay in Fazulbhoy Mehral Chinoy v The Bombay and Persia Steam Natigation Company, Ltd, <sup>18</sup> in which it was held that on a correct interpretation of the Code, it applied also to agreements to refer future disputes to arbitration. The second defect also has now been removed by the omission from Paragraph I7 of this Schedule, of the procisions requiring the arbitrator to be usined At present, therefore, there is no material difference between the provisions of the Code and those of the Arbitration Act as regards references without the interrent tion of the Court, except that the latter applies to particular local areas, and the former applies to other parts of British India.

In Ghulam Khan v Muhammad Hassan, h their Lordships of the Priv. Council had occasion to consider the true construction and effect of the provision of the Code relating to arbitration and they observed that those provisions deal with arhitrations under three heads—

(1) Where the parties to a litigation desire to refer to arbitration and matter in difference between them in the suit. In that case all proceedings from first to last are under the supervision of the Court. (Paragraphs 1 to 16 deal with such matters).

- (2) Where the parties, without recourse to litigation, agree to refer their differences to arbitiation and it is desired that the agreement of reference should have the sanction of the Court In that case all further proceedings are under the supervision of the Court (Paragraphs 17 to 19 of the Schedule deal with such matters)
- (3) Where the agreement of reference is made and the arbitration itself takes place without the interiention of the Court, and the assistance of the Court is only sought to give effect to the award (Paragraphs 20 to 23 of the schedule deal with these matters )

3 Applicability of the Schedule to insolvency proceedings

The previsions of this Schedule do not apply to proceedings under the Provincial Insolvency Act 1920 by virtue of S 5 of that Act An Insolvency Court has therefore no power to refer the whole proceedings to arbitrators to decide whether the petitioner for insolvency or (in the case of a petition by a creditor) the debtor should or should not be declared an insolvent. The proceedings require the exercise of judicial discretion and it would be acting contrary to the whole spirit of the Act for a Court which has special jurisdiction thereunder to delogate its powers and duties to the arbitrator 1

### 4 Applicability of the Schedule to execution proceedings

This Schedule does not apply to execution proceedings and a Court executing a decree cannot refer the matter in the execution proceedings to arbitration 1

5 Applicability of the Schedule to probate proceedings

A dispute relating to the genuineness of a will in a probate proceeding pending before Court cannot be referred to arbitration 1 So also an application for revocation of the grant of a probate cannot be referred to arbitration 2 This is based on the view that a decision on such questions is not morely one inter partes but is a judgment in rem against the whole world and therefore cannot be allowed to be decided by arbitrators selected at the instance of merely the parties to the proceeding

6 Applicability of the Schedule to suits for restitution of conjugal rights

The factum or validity of a marriage may in a suit for the restitution of conjugal rights be referred to arbitration 1 but the whole suit cannot be referred to arbitration masmuch as the question whether a decree for restitution should be made or not is a matter entirely in the discretion of the Court and cannot be delegated to arbitiators 2

6a Arbitration in proceedings under other Acts

1 Section 52 of the Bengal Estates Partition Act (V of 1897) provides that when a partition has been referred to arbitration the proceedings shall be

Note 3 1 (1916) 1916 Lah 170 (171) 1916 Pun Re No 50

Note 4 1 (1925) 1925 Cal 812 (814) 32 Cal 559 (1935) 1935 All 125 (125) A reference made in execution is invalid Note 5

<sup>1 (1930) 1980</sup> All 610 (841)

<sup>2 (1894) 1694</sup> Pun Re No "2 page 240 Note 6

<sup>1 (1929) 1929</sup> Lah 394 (395) (1916) 1918 Lah 357 (358) (1920) 1929 Lah 177 (178) 2 (1918) 1919 Lah 357 (358) Following 1895 Pan Re No 37

<sup>(1933) 1933</sup> Lah 532 (532)

conducted in accordance with the provisions of Paragraphs 1 to 16 of this Schedule so far as they are applicable

- 2 The provisions if this Code relating to arbitration have been made applicable, by S 265, Sub S (3) of the Chut-Nagpur Tenancy Act (VI of 1908) to all suits, appeals and proceedings under that Act before the Deputy Commissioner, so far as they may apply
- 3 Under S 43 of the Beugal Survey Act (V of 1875) and S 16 of the Burma Boundaries Act (V of 1880), the Collector or the Boundary Officer may, with the consent of the parties concerned, lefer to arbitration any dispute 18 to a boundary
- 4 In cases of reforence the arbitration under S 203 of the U P Land Revenue Act (III of 1901) the provisions of Paragraphs 2 to 16 of this Schedule shall apply, so far as they are not inconsistent with maything in that Act (See S 204 of the Act)

7 All parties interested must agree to reference

The agreement to refer the matter in dispute in a pending suit must have the concurrence of all the parties concerned. In other words the foundation of the jurisdiction of the Court in make an order of reference is en agreement between all thin persons interested. An order of reference made by the Court where all the parties interested have not agreed, is thue without jurisdiction and invalidation of only against thin absent party, but against all parties, i.e., even these who have joined in the reference. As subsequent consent by one of the parties who did not join in the reference at the time, it was made, cannot make the precedings valid.

Note 7

51

of reference on the ground of non

(1868) 1868 Pun Re No 28 Consent should be voluntary

(1869) 1863 Pun Re No 52 t submission to arbitration may be recommended

to Court is illegal

3

- Application for reference to ur bitration by decree holder and only ome of them-Order of reference (1927) 1927 Mad 1154 (1155) (1873) 19 Suth W R 311 (321) (1863) 10 Suth W R 171 (171) Related 4 must be by all the parties who are

[1926] JG Ind Cas 273 (273) (Mad). O retinal

and an award made on such reference is void and need not be set aside <sup>4</sup> An objection to the validity of the reference on the ground of the non-agreement of all the puttes can be mised at any stage. The decision cited below <sup>9</sup> where it was held that a party may be estopped by his conduct from contesting a reference to which he was no matter cannot be accepted on principle as confect.

Section 306 of the old Code provided that all the parties to the sun may apply for a reference to irbitiation. But it was held by the High Court of All-habad that the words "all the parties to is sun!" would not necessarily include parties between whom and any of the parties to the submission there was, in fact, no matter in difference in the sun!? The word "interested" was added in the present Code to give effect to the above view.

The expression "all pirites interested" means parties interested in the sp.c.i/ie dispute referred to arbitration and not in the subject matter of the whole surt" Where parties have distinct and severable interests, a party interested only in one such portion need not join in a reference with respect to the other portions  $^{10}$ 

The question whether a party is interested within the menning of this Palty graph depends upon the facts of each case  $^{11}$ . One important test is to see whether he is a necessary party or a person who could be poined as a proper party under the provisions of O 1, R 10 of the Code  $^{12}$ . An unnecessary or proper may party, as or a party who had been evenerated at the time of the reference  $^{16}$  cannot be suit to be a person interested within the meaning of the Palyagaph. A person who is cx parte in the suit  $^{18}$  or even a person against whom no lefter is claimed  $^{18}$  is not

executed by 4 in favour of B and assigned to C — Relief claimed against 4 and in the alternative against B—B is interested person can be taken by any party [But see (1930) 1930 Sind 2.6 (209) 24 Sind L R 470 Person who is party to reference cannot object to ward on the ground that mother (1934) 1374 Pat 19 (21) The test is to see for on was a note says party when the latter himself does not object the nature of the snit and not the possibility of the omitted parties having any interest in a future liti (1888) 1883 Pun Re No 130 (1929) 115 Ind Cas 6-0 (682) (Pat) 4 (1920) 1929 Mad 621 (623) gation which may allee as result of a decree in the suit 5 (1916) 1319 Cal 936 (836) (1917) 1917 Pat 136 (137) 12 (1929) 1929 VII 768 (76a) 13 (1913) 18 Ind Cas 609 (610) 35 All 107 Unnecessary party (1934) 1934 All 658 (660) (1931) 1931 Pat 19 (21) Pro forma defen dant (1926) 1926 All 238 (239) 48 All 239 Pro forma defendant (1917) 1917 All 183 (186) 39 All 489 (1J28) 1928 Bom 248 (249) 52 Bom 408 2 Hay 553 (1924) 1924 Pat 33 (34, 36) 2 Pat 777 (1912) 14 Ind Cas 562 (562) (Mad) 53 411 669 (1917) 1917 Pat 136 (138) 10 (1931) 1931 411 453 (454) (1931) 1334 411 639 (660) Suit on pronote PP executed by I in favour of B and assigned by B to C-No relief asked for igamst B-Reference to arbitration without B is not invalid 11 (192s) 1928 Bom 248 (249, 250) 16 (1925) 1925 Mad 62. (522, 623) (1933) 1933 All 739 (740) Suit on projete

necessarily a person not interested. Whether he is so interested or not depends upon the facts of the particular case 17 including the conduct of the party up to the end of the proceedings 18 But the mere fact that the award that was passed is not in fact against him cannot be taken to show that he was not interested at the time of the reference 184 Where there is in fact no matter in difference between the !! parte defeedant and the parties to the submission, his not joining the reference will eot affect the validity of the reference 19 If en the other hand he is interested and does not agree to the reference, the order of reference is ultra vires and in valid 20

A defeedant who makes a complete admission of the plaintiff's claim en titling the latter to a judgment under O 12, R 6 of the Code is no longer interest ed and need not join in the reference by the plaintiff and the other defendants "

8 All the parties if should apply

All the parties interested must eot only agree to the reference, but must apply to the Court If before the application is made to the Court one of the parties resiled from the agreement so order of reference can be passed on the ground that he previously agreed to a reference being made before the application was prosented 1

See also the undermontioned case 3

9 Effect of omission to sign or verify the application -See Note 21 : ifra

10 Matter in difference

The matter in difference is the matter is dispute between the parties 1 A dispute implies an assertioe of a light by one party and the repudiation thereof by another 2 It is not however occessary that the question should be one which the Court one legally enquire into Thus a dispute as to an uscertified payment or adjustment which the Court cannot take eotice of, can be a matter in difference between the parties which can be referred to arbitration

The matter in difference must be one which has actually arisen at the time of the reference though it eeed not have arisen at the time of the agreement to refer There can be no reference to arbitration under this Schodule of existing

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17 See cases cited in foot note 11 above
18 (1930) 1930 Sind 256 (258) 24 Sind L R
         470
185(1927) 1927 Sind 239 (240)
   (1911) 10 In I Cas 559 (550) (MI)
```

|See however (1910) 7 Ind Cas 63 (68) 32 411 657 ]

19 (1902) 24 All 229 (230) 20 (1920) 1920 Mad 852 (854) 42 Mad 632 (1925) 1925 Mad 621 (623)

(1929) 1929 Lah 477 (478) (1917) 1917 Cal 481 (483)

(See also (1925) 1925 Oudh 201

No 17 (1933) 142 Ind C ts 678 (6"9) (Lab) [See also (1909) 1 Ind C 1s 140 (140) (See also (1935) 1935 Bom 1.5 (155 156) \greement to refer made to

fore suit-During pendency of suit one party alone applying for relatence—Court will not make reference If there are difficult points of law or if the award is likely to be a nulliir or if the agreed arbitrator is dispus lified from acting ]

21 Note 8 1 (1)11) 9 Ind Cas 195 (196) 1311 Pun Re 1 (1931) 1931 Bom 164 (166) 2 (1931) 1913 Bom 164 (166) 3 (1925) 1925 Cal 812 (513) 52 Cal 533 4 (1931) 1931 Bom 164 (160)

differences as well as disjutes that may arise in the future 5 A dispute may exist even where the hability is fully admitted and only the payment is withheld facts of each case must be examined to see whether there is a dispute 6

Further the matter in difference must be one arising in the suit and between the parties to the suit The Court has no power to refer to arbitration any questions between the parties to the suit other than those in question in the suit, or any questions in which any person, not a party to the suit is concerned 7

A reference is competent on a question of law as well as a question of fact 8 Consequently, an error made by the arbitrators on a point of law referred to them does not vitiate the award and cannot be questioned on the ground that it is not in accordance with the received interpretation of the law but the matter in difference must relate only to the private rights of the parties to the litigation A suit under S 92 of the Code is not one for the determination of the private rights of the parties to the hitigation, and matters in such a suit cannot be referred to arbitration 10 Similarly the selection of a guardian for a minor in a proceeding under the Guardians and Wards Act, 1890 is not a matter of private interest and cannot be settled by reference to arbitratioe 11 It has been held that a criminal complaint cannot be referred to arbitration 12

Where a question arises as to what the matter was that was referred to arbitration, it is for the Court to say on a construction of the reference The arbitrator's belief about it is immaterial 18 Where a whole case is referred to arbitration the question of costs also must be taken to have been referred and the arbitrators can give a decision thereon 16 (See also Paragraph 13 below)

### 11 Reference in respect of matters outside suit

Matters outside the suit cannot be referred to arbitration under this Para graph and the award made on such a reference is invalid 1 Ac agreement to recognise an award made on matters beyond the scope of the disputes mentioned

(1±03) 20 Cal 831 (839 840) (1914) 1.114 Eom 1.23 (124) 38 Bom 638 (1920) 1±20 Cal 143 (143) 64 Ind Cas 285 (266 288) 46 Cal 534

5 (1920) 1930 411 319 (320) 6 (1920) 1920 41 319 (320) 6 (1920) 1920 Cal 143 (143) 54 Ind Cas 285 (26) 289 46 Cal 541 7 (1925) 1925 P O 293 (297) 53 Ind App 1 53

Cal 258 (P C) Confirming 1924 Cal

8 (1902) 29 Cai 167 (186) 29 Ind App 51 1902 Puu Re No 25 (P C) (1933) 1933 Oudh 521 (522) 9 Luck 203 Commission appointed to take evi dence—Application addressed to

(1901) 11 Mad L Jour 337 (839)

[See howover (1 03) 26 Mad 361 (361) Under S 16 of the Religious Lindow ments Act a Court may uter aux matter in difference in the suit for decision by an arbitrator but not the whole suit 1

[See (1934) 1934 All 368 (3 o) 6 vil 721 Parties litigating for title possession of muttin their own right

-Mutt not of nature of 1 ublic cl rity-Disputes infer se cau be it

Note 11 1 (1921) 1921 Mad 709 ( 09) (1870) 14 Suth W R 469 (4 0) (1925) 1925 P C 293 (294) 53 Ind Apr 1 53 Cal 258 (P C) (1911) 12 Ind Cas (57 (658) 36 Pom 105

in the reference is void 2 Where, however, an application for reference includes matters outside the suit but the Court erders a reference only as to matters in difference in the suit, the order of reforence is not illegal 3 Again where on the same day parties apply for reforence to arbitration of matters in difference bet ween them in the suit and also separatoly make a reference as to matters outside the suit, the order of reference made by the Court with regard to the subject matter of the suit cannot be questioned on the ground of allegality or anyalidity

12 Application shall be in writing-See Note 21, below,

#### 13 At any time before judgment is pronounced The parties are entitled to have the matter in difference between them

submitted to arbitration, at any time before judgment is pronounced. The Court has no discretion to reject the application made by the parties for a reference to arbitiation 1

### 14 Revocation of submission

Where an order of reference to arbitration is made through Court, all subsequent proceedings are, as has been seen in Note 2 abovo, under the supervision of the Court Consequently a party to the agreement to refer is not entitled to terminate the reference by any revocation on his part. He is bound by it and the arbitiation must proceed according to the provisions of the law 1 The Court may, however supersede the ribitration on the application of the parties in the cases specified in Purigraphs 5 and 8 of the Schodule There is a conflict of opinion whether even the Court can reveke the arbitration in cases not falling within the sud Paragriphs According to the decisions cited below the Churt has no power to deal with the matter in difference between the parties until the award is made Thus the Court could not even allow the withdrawal of the suit after an order of reference has been made, though if there is any partiality or misconduct on the part of the arbitrator, the Court could, after the award is made, set it aside on the other hand it has been held in the undermentioned cases that there is an

2 (1928) 1928 Sind S1 (82) 21 Sind L R 253

3 (1927) 1927 Cal 52 (54) 4 (1927) 1927 Cal 52 (54)

[See 11-0 (1865) 3 Suth W R (Mr c) 27 (28) They should be distinctly separated and not maxel up toge ther 1

Note 13 1 (191a) 1915 C il 70 (70)

[See also (1911) 11 In 1 Cas 935 (935) 83 411 G45 ]

Note 14 1 (1872) 17 Suth W R 516 (517) (1874 7a) 8 Mrd H C R 46 (55)

[See also (1885) 7 AH 273 [276) ] (1914) 1914 Oudh 327 (325) 17 Ondh Cas 336

(1 J'0) 1920 Pat 731 (7°5) 5 Pat L J 672

2 (1856) 10 bom 3s1 (354) (1334) 1934 Cal 255 (256) (1923) 1923 C 11 410 (411 416) (1914) 1314 All 314 (316) 36 All 354 (1927) 1927 Mad 910 (911) (1J12) 16 Ind Cas 1.7 (177) (All)

[See also (1906) 3 411 LJ 180 (167)]

3 See cases cited in foot notes (1) and (1) to Note 15 tn/ra 4 (1929) 1929 All 743 (741, 710) 51 All 1010

This decision purports to follow ! Ind Cas 14 which was a case under S 5 of the Arbitration Actuader which the Court can grant leve to revole a submission

(1933) 1933 Sind 65 (70)

(1934) 1934 Bom 389 (389) But this juits diction should be exercised with

great care and crution (1935) 1935 Mad 349 (950)

(1925) 1925 Pat 720 (723) [See also (1934) 1934 All 95 (37)

Parties and arbitrator agreeing to withdraw reference - Arbitration should be superseded - Reference can be revived only by fresh abree ment not by resiling from previous resolve by one of the parties -Apy award under such circumstances la not valid?

inherent jurisdiction to intervoin and supersedn the arbitration in cases not falling within Paragraphs 5 and 8 where such an order is necessary for the ends of justice or to prevent an abuse of the process of the Court

Where an agreement to refer has been entered into without recourse to htigation it may be filed in Court under Paragraph 17 where no sufficient cause is shown against its being filed On an interpretation of S 326 of the Code of 1859 corresponding to Paragraph 17 of this Schedule it was held by thoir Lordships of the Privy Council in Pestonis \ussernangee \ D Manechiec and Co. 12 Moore's Indian Appeals 112 that where parties have agreed to subjust the matter in difference between them to arbitration of one or more certain specified persons, no party to submission can revoke the submission to arbitration unless for good cause. and that a mere arbitrary revocation of the authority is not permitted. And this has been followed in numerous cases See notes to Paragraph 17, infia In cases falling within the Arbitration let 1899, a submission to arbitration-may be revoked by leave of the Court As to the circumstances under which such leave may be given, we the underments ned cases 5

#### 15 Withdrawal of suit after reference to arbitration

As has been seen in Note 14 above the Court his no jurisdiction to allow a withdrawal of the suit after reference or after an award has been made on such reference 2 An application to file in tward under Paragraph 20 of the Code can however be allowed to be withdrawn as if it were a suit "

### 16 Court -Appellate Court

As has been seen in Note 8 to O 41, R 22 ante where the appellate Court remits a case under that Rule the lower Court has no power to refer the case to arbitration 1 Nor can the appellate Court by its order of remand direct the lower Court to do so 2 By virtue of sub section (2) of S 107 ante the appellate Court has the same powers of acting under this Schedule as the Court of first instance Thus the appellate Court can refer, with the consent of parties, matters in dispute in appeal to arbitration 3 Where the Court of first instance passes a decree not in accordance with the award, but the appellate Court holding that the award is not open to any objections passes a decree in accordance with this award. it is final under Paragraph 16 of the Schednle \*

#### 17 Death of party if operates as revocation of reference

Under the English Common Law the death of a party to a reference operates as a revocation of the authority of the arbitrator unless the submission contained either expressly or by necessary implication a provision to the contrary

- Note 15 1 (1887) 9 111 168 (172)
  - (1919) 1919 Cal 1030 (1031) Portion of the claim under reference to an aimitra tion cannot be withdrawn without the consent of the other party
- 2 (1903) 7 Cil W N 186 (197) (1884) G All 211 (213)
- (1916) 1916 Oudh 141 (141) 3 (1901) 31 Cut 516 (517)

- Note 16 1 (1835) 7 All 523 (526 527)
- 2 (18"4) 22 Suth W R 336 (394) 3 (1911) 11 Ind C1s 985 (986) 33 411 645
- (1875) 7 N W P H C R 243 (247 249) (F B) (1882) 18 Cal 507 (509) (1586) 12 Cal 173 (177)
  - (18.2) 17 Suth W R 31 (32) (1874) 91 Suth W R 210 (211) (1950) 3 Mad To (79)
- 4 (1834) 10 111 9 (11 12)

<sup>5 (1925) 1</sup>J25 111 202 (202) (1909) 1 Ind Cas 14 (16 17) 34 Bom 1

This view proceeded on the principle that an arbitrator was, in the contemplation of the law, merely an agent appointed by the parties to decide the matter in dis pute between them 1 Tho law in this country is however quito the reverse, and the death of a party pending arbitration proceedings through Court does not necessarily revoke the reference 2 If on the death of the party the right to sue survives to his representatives, they should be brought on record under the provisions of O 22 3 Where no application is made within time for hringing the legal representatives on the record, and the suit abates, the award made by the arbitrators subsequent thereto cannot be filed in Court 4

In a proceeding before the arbitrator on a reference made without the inter cention of the Court, there is no provision of law enabling the arbitrator to bring the legal representatives of a deceased party, to the submission on record, and the fact that the arbitrator failed to do se does not make the award illegal and not hinding on the representatives especially where the party dies after the hearing is termiouted and nothing remains for the arbitrators to do but to deliver their award 6

18 Authority of pleader to refer

Section 506 of the old Code required a special authority for a pleader to make a reference to arbitration on behalf of his client 1 In the present Para graph the words as to special authority have been omitted. It has been held by the Sind Judicial Commissioner's Court that the effect of the omis sion is to coable a pleader to make a reference to arbitration oven though the vakulatnama does not specifically authorise into does of The general trend of opinion is, however, that a pleader has no such authority. A counsel as distinguished from a pleader who derives his authority only from the valulatnama, has implied authority even to make a reference to arbitration 4 But ooither a counsel nor a pleader expressly authorised to refer to arbitration can delegate his power to roles to arbitration to another pleader without express authorisation to that effect 8 Nor will the reference to arbitration by the counsel of a party be binding on the party where he had given the couesel express costructions against making any such reference 6 A pleader has no authority to revoke the appointment of an

Note 17 1 Halsbury's Lans of England Vol 1, pp 448 to 450

2 (1910) 7 Ind Cas 590 (591) 4 Sand L R 14 A case under the Arbitration Act (1933) 1933 Sind 68 (70) (Quaere)

(1911) 11 Jud Cas 481 (495) (Cal) (1911) 11 Ind Cas 935 (936) (Cal) 33 AH 645

Death after application, but before order of reference - Arbitrator's authority not resoked 3 (1904) 27 Mad 112 (116)

(1924) 1924 Lab 725 (726) If they are not brought on the record the sward is not binding on them

4 (1911) 12 Ind Cas 687 (688) 56 Bom 100

5 (1922) 1929 Cal 226 (228)

6 (1912) 13 Ind Cas 161 (166 167) (Cal) It was however observed that if the death occurred before the heiring was

concluded, it would have been neces sary to bring the representatives on the record-How this could be done is not clear

#### Note 18

1 (1907) 29 All 429 (480) (1899) 23 Bom 699 (634) (1864) 1 Suth W R 80 (81) (1905) 7 Cal W N 343 (344)

5 (1320) 1825 CALOID (M

arbitrator by the party himself, without the latter's knowledge or instructions 7

#### 19 Authority of agent to refer,

The authorised agent of a party within the meaning of O. 3, Rr. 1 and 2, can make a reference on behalf of his principal. No special power of authorisation is, however, necessary to enable him to do so. The principal can also subsequently ratify the agent's act in referring to arbitration, even where the agent had originally no authorist to do so. A partner is an agent of the firm only for the purpose of the business of the firm. It is out part of the business of the firm to refer matters in dispute to arbitration and therefore one partner cannot, as such, make or authorise a reference to arbitration on behalf of the firm. But the managing partner of the firm curvalidly make a reference to arbitration so as to bind the firm.

### 20 Authority of guardian or manager of a joint Hindu family

The next friend or natural guardian of a minor is entitled to refer disputes to arbitration, where there is no pending suit in respect of it, if the same is for the benefit of the minor and the ward passed on such a reference will be binding on the minor. It to the powers of a guardian ad litem to agree to refer the subject-matter of the suit to arbitration, see Note 15 to O 3.2, R 7 and the undermentioned case. The manager of a joint Hoody family represents the other members of the family and can refer the family disputes to arbitration.

## 21 Form

The agreement to refer should clearly set forth in the form of issues, what

(1926) 1926 Lah 91 (93) Reference made by one partner on behalf of firm is invalid—All partners must join

(1,332) 1932 Bom 516 (519) (1932) 1932 Cal 343 (344)

6 (1930) 1930 Sind 40 (41) (1923) 1923 Lah 212 (213)

[See also [1933] 1933 All 924 (925) Defendant's on managing the bust ness agreeing to reference—Parties appearing before arbitralor—Substantial justice done—High Court will not interfere in revision in such

a c 166] [But see (1932) 1932 Lah 291 (292)] Note 20

1 (1920) 1920 Eom 32 (33) 44 Born 202 (1903) 27 Bom 257 (291) (1915) 1915 L B 110 (111) (1692) 19 C 1 334 (335) (1864 Ga) 2 M 1 H C R 47 (4J) (1864) 1 Suth W R 280 (281)

(1864) 1 Suth W R 280 (281) If injurious to the muor the award will be set aside
[See (1932) 1932 P C 76 (80) 7 Luck 1
63 Ind App 26 (P C) But the mother of 1 manor. Who bound due cunot as

de facto guardian agree to refer to

arbitration on behalf of the minor]
2 (1865) 1865 Pun Re No 92 page 204
(1933) 142 Ind Cas 189 (Rang) But if a
person agreeing to refer on behalf of
a minor has not been appointed his

muoor has not been appointed his guardian ad litem the reference and ward are invalid and not binding on the minor (1930) 1930 All 646 (646)

3 (1911) 11 Ind Cas 481 (488) (Cal) Arbitration without recourse to litigation

(1894) 16 All 231 (233) Award out of Court (1919) 1919 Mad 878 (879) (110.)

(1919) 1919 Mad 878 (679) (Do ) (1927) 1927 Lah 362 (364) 8 Lah 693 Arbitration pending suit [See also (1935) 1935 Lah 667 (669)

Kerla of joint Hindig family authonating co parcener who is also managing member of joint family firm to make reference to arbitration —Such member can make valid reference so also bind other members!. This view proceeded on the principle that an arbitrator was, in the contemplation of the law, merely an agent appointed by the parties to decide the matter in dis puto between them 1 The law in this country is however quite the reverse and the death of a party ponding arbitration proceedings through Court does not neces sarrly nevoke the reference 2 If on the death of the party the right to sue survives to his representatives, they should be brought on record under the provisions of O 22 3 Where no application is made within time for bringing the legal represen tatives on the record, and the suit abates, the award made by the arbitrators sub sequent thereto cannot be filed in Court 4

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Note 17 1 Halsbury & Laws of England \ol 1 pp 448 to 450

concluded, it would have been neces sary to bring the representative, on the record-How this could be done 13 not clear

Note 18

1 (1907) 29 All 429 (430) (1809) 23 Bom 6°J (634) (1864) 1 Suth W R 80 (81) (1904) 7 Cal W N 313 (311)

- 3 (1904) 27 Mad 112 (116) (1924) 1924 Luh 725 (726) If they are not brought on the record the award is not binding on them
- 4 (1911) 12 Ind Cas 687 (688) 36 Bom 105
- 5 (1922) 1922 Cal 226 (228)
- 6 (1912) 13 Ind Cas 161 (166 167) (Cal) It was however observed that if the death occurred before the hourner was

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The agreement to refer should clearly set forth in the form of issues, what

7 (1924) 1922 Nag 39 (40) 18 Nag L R 140 (1915) 1915 L B 110 (111) (1892) 19 Cal 834 (885) (1864 60) 2 Mad H C R 47 (43) (1664) 1 Suth W R 260 (281) If injurious to the rumor the iward will be set \_o 231 [See (1932) 1932 P C "6 (80) 7 Luck 1 ( ) Ind app 92 (1 ( ) But the mother of a minor Mahommidan cinnot as

2 :: 13.1 1 1 (1900) 22 111 135 (183) (1919) 1919 Mal 1161 (1162) (1926) 1926 Luli 91 (93) Reference made ly one partner on hebalf of firm is garbart ton bus bilirear ers brews

tration

Award out of Court (1919) 1919 Mad 678 (879) (Do ) (1927) 1927 Lah 362 (364) 8 Lah 693 Arbitration pending suit [See also (1935) 1935 Lah 667 (669) Karta of joint Hindu family autho-Lac a formal a case?

(1533) 16 All 231 (238)

(But see (1932) 1932 Lah 291 (292)] Note 20 N ~ -ference so as to buil other members).

1 (1920) 1920 Born 32 (33) 44 Born 202 (1903) 27 Bom 287 (291)

are the matters in difference between the parties on which the arbitrator is required to arbitrate 1 If the agreement is so vague as to make it impossible to ascertain what the dispute was which was referred to arbitration, it is bad for indefiniteness 2 The Paiagraph requires that the agreement to refer shall be in unting Where there is no written reference and there is nothing to show what the parties agreed to refer, the reference and the award will be invalid 3 But the provision as to the requirement of writing is only directory and not mandatory the object thereof being merely to avoid a subsequent controversy as to whether there was or was not any such application . An award is not therefore invalid merely because it was not made in writing if it is clear that the parties did agree to refer 5 In the undermentioned case an application for an adjournment on the ground that the parties had referred the dispute to arbitration was assumed to be an application for an order of reference. It was however held in the case cited below that the requirement as to writing, cannot be said to be directory but that nevertheless the parties were estopped from defeating the arbitration proceedings on the ground of non compliance with the Paragraph The High Court of Bombay has also held that want of writing undermines the foundation of jurisdiction but that it is not sufficient by itself, to set aside the award 8 These two cases cannot it is submitted, he accepted as correct on principle. The breach of a mandatory provision or the want of jurisdiction will render the proceedings void and there can be no question of estoppel

Where the parties have agreed and applied to the Court for a reference the mere fact that one of them has not signed the application does not vitiate the reference Where the pleader of a party duly authorised signs the reference the fact that the party himself does not sign it will not invalidate the award 10 It was

#### Note 21

- 1 (1930) 1930 All 319 (320)
- 2 (1919) 1919 Pat 74 (76)

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- 3 (1917) 1917 Pat 136 (138)
  - (1879) 18/9 Pun Rs No 67 page 182
- 5 (1911) 9 Ind Cas 412 (413) (Oudh) Sub e
- quently the parties appeared in person before the arbitrator and even evidence was taken in their

consent of both parties recorded by Court

(1862 63) 1 Mrd H C R 106(106) Case under the Code of 1559-Reference was agreed to by all the parties pre eat m open Court (1870) 2 N W P H C R 419 (419)

(1925) 1920 Oudh 269 (270) 29 Oudh Cas

- 6 (1922) 1922 Mad 429 (484)
- (1917) 1917 All 71 (78) 89 All 401 [See also (1917) 1917 Mad 650 (6.6)]
- 7 (1924) 1924 Oudh 400 (401) 8 (1911) 12 Ind Cas 687 (688) 36 Bom 105
- 9 (1915) 1915 P C 79 (80) 48 Cal 290 49 Ind App 1 (P C)
  - (1935) 1935 Mad 276 (278) (1924) 1924 411 407 (457)
    - Some of the parties not joining parties appearing before attirter through pleader Defect in ref ren
- curedl 10 (1921) 1927 Lah 362 (864) 8 Lah 693 [See also (1980) 1935 Pt 16 [1] Plender appented m sut on kildle of all defendants—agreement for let signed by pleader as pleader - No objection taken to arbitrati n Fto ceedit gs-Hell all defendatt are

arties to reference]

held by the Prive Council in the undermentioned case<sup>11</sup> that where the guardian ad liter of a minor party is present in Court and assents to the application for reference, the fact that he did not sign the reference did not render it invalid

22 Agreement to abide by the decision of the Court

\$\foatsigned \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot \cdot

Appointment arbitrator

P. 2. [S 507, Para 1.] The arbitrator shall be appointed in such manner as may be agreed upon between the parties

[1877-S 507, Para 1; 1859-S 314]

Synopsis

Appointment of arbitrator 1 trator—See Aota 22 to Paragraph 1
Appointment of Court itself as arbi

1 Appointment of arbitrator

It is essential that the parties should either name the arbitrators or consent to the nomination of the arbitrators by the Court. The Court has no authority to force upon a reluctant party the decision of any question in the cause by an litrators elected at its discretion. A party may however waive such an irregularity but if he appears before the arbitrator under protest, he cannot be held to have forfeited his right to question the validity of the proceedings.

Before the Court refers a case to arbitration it should ascertain whether the persons nominated are willing to accept the office and till then it cannot make a reference?

2 Appaintment of Court steel as arbitrator - See Note 22 to Paragraph 1 above

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11 (1915) 1915 P C 9 (80) 43 C 1 290 43
Ind A<sub>1</sub> p 1 (P C)
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#### Note 22

1 (1919) 1919 Mad 150 (151) Doubting (1903) 26 Mad 76 and approxing (1899) 3 bom 752

(1910) 1915 Wad 1074 (1074)

(10.0) 1920 Mad 800 (801) 42 Mad 625 [But see (1911) 12 Ind Cas 687 (688) of I om 105 where a contrary view vis assumed]

C P C 371 & 375

2 (1919) 1919 Vad 150 (151) (1869) 23 Rom "5" (155) (1906) 10 Crl W "8 835 (839) (1907) 4 All L J 89 (91) (1921) 1921 Val 300 (801) 43 Vad 625 (1920) 1930 Vad 800 (801) 47 Vad 625

Of 1920 that 800 (801) 17 that Sch II Para 2-Note I

1 (186.) 5 Suth W R P C 21 (24) (P C)

2 (1965) 5 Suth W R P C 21 (21) (P C)

[See also (1867) 7 Suth W R 13 (13)]

3 (1864) Suth W R Gap 338 (339)

- P. 3. [S 508] (1) The Comt shall, by order, refer to the arbitrator, the matter in difference which he is Order of reference required to determine, and shall fix such time as it thinks reasonable for the making of the award, and shall specify such time in the order
- (2) Where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this Schedule, deal with such matter in the same suit

[1877—S. 508, 1859—S 315]

### Synopsis

| Note                                                                                                                                                                                                  | No               | Note No                                                                                                                       |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------|-------------------------------------------------------------------------------------------------------------------------------|
| Legislative changes The Court shall by order refer Revocation or withdrawal from arbitra tion—See Notes 14 15 and 17 to Paragraph 1 ante Matter in difference Shall fix such time as it considers rea | 1<br>2<br>3<br>4 | sonable Court if can extend time fixed—See Paragraph 8 : ifra When award is said to be made Effect of order of reference Form |

### Other Topics

Discretion of Court to refuse application for order of reference See Paragraph 1 Note 18

1 Legislative changes The word delivery has been substituted by the word making in sub paragraph (1). See Note 7 below

The Court shall by order refer

As has been seen in Note 13 to Paragraph 1 ante where the parties apply to the Court for an order of reference the Court is bound to make an order of reference and has no discretion in the matter. In the absence of an order of reference by the Court under this Paragraph the arhitration proceedings and the award made therein are illegal 1 Where the parties applied for adjournment of the suit from time to time on the ground that the matters in dispute had been referred to arbitration and the Court granted time it was held that the order granting adjournment on the application of the parties should under the circumstances of the case be construed as an order of reference 2

3 Revocation or withdrawal from arbitration See Notes 14 15 and 17 to Paragraph 1 ante

Matter in difference

See Note 10 to Paragraph 1 Where it is found that one matter in difference agreed to be referred has been omitted from the reference and that consequently the arbitrators have not given any decision thereon the party interested should bring the omission to the notice of the Court so that the Court may send the case

baca to the arbitrators with a fresh reference on the point omitted. If he does not do so, the Court is not wrong in deciding the point itself 1. The decision of the arbitrators on matters not in dispute, nor referred to them is null and youd for want of purisdiction 3

#### Shall fix such time as it considers reasonable

The e words are mandatory and imperative and the Court is bound to fix in its order of reference a time for the making of the award 1 This fixing of a limit of time is in fact the pillar and pivot of the scheme of this Schedule, enabling the Court to have control over the arbitrators, and the power cannot be delegated to the arbitrators themselves But where the order of reference does nx a time but describes it as one fixed for the hearing of the suit instead of for making the award there is only an irregularity which may not vitiate the reference 3 An award made beyond the time fixed is liable to be set aside under Paragraph 15, infra, though an award made within the time fixed but filed after time is not had 6

As to the power of the Court to extend time fixed see Paiagraph 8 below

An award is made when the arbitrators have drawn up executed and

#### 6 Court if can extend time fixed See Paragraph 8 infra

#### 7 When award is said to be made

It is the making of the award that should be within the time fixed The filing thereof into Court after the time fixed will not vitiate the award 1 Under the old Code the word used was delivery and even then it was interpreted to mean only the making of the award as distinguished from its being filed in Court 3

### 8 Effect of order of reference

Where a Court makes an order of reference to arbitration its jurisdiction to deal with the case so long as the proceedings are pending before the arbitrator

### Note 4

1 (15.0) 14 Suth W R 247 (248) 7 (15.1) 15 Suth W R 1"2 (173) 11333 Mad 867 (864) Scope of en that of suit - Arbitrators have n juri di tion to extend it as

regards subje t matter or parties affected by 11 Note 5

1 (1831) 13 All 300 (303) 18 I d App J5 (PC)

(1923) 1J23 Cal 410 (413) [See also (1854) 6 Moo Ind 41p 134 (156 15 ) (I C) Cuse under Bombay Regulation VII of 1827 but on ana

logous 1 tovisions] (1909) 1 Ind Cas 146 (147) (111)

(But see (1895) 18 Mad 22 (22) This decision followed the decision in (18:8) 10 All 137 which was sub sequently reversed by the Privy

(See also (1313) 20 Ind Cas "73 (774) 16 Oudh Cas 935 Time fixed for file q award not making it-Award filed before that date not bad? See Note 7 satra

#### Note 7

- - 1 No 78 page 3.0 Where the date fixed for tiling an award was a holiday it could be filed on the following day! (1899) 22 Mad 22 (24) (1916) 1916 Pat 21 (23)

(1918) 1918 Oudh 14 (15)

(But see (1886) 8 All 543 (544)] 2 (1907) 1907 Pun Re No 89 (1899) 22 Mad 23 (24)

is suspended. It cannot, therefore, deal with the case except as provided in this Schedule 117, Paragraphs 5, 8 and 15. Thus it cannot—

- (1) allow the withdrawal of the suit under O 23, R 12
- (2) dismiss the suit under O 9, R 3,3
- (3) remove the arbitrator or substitute a new one,4
- (4) record a compromise between the parties 5

(5) deal with the case on the ments 6

In the following matters, however it has been held that the Court can piss appropriate orders in the suit -

- (1) It can deal with an application to appoint an interim receiver or to grant an injunction  $^{7}$
- (2) It can deal with application to bring the legal representatives of a deceased party on record \*

As to the powor of the Court to revoke the arbitration except as provided by Paragraphs 5 and 8 see Note 14 to Paragraph 1 above

The Court has no power to direct that money should either be deposted or paid to the arbitrators for their remuneration unless the parties had specifically agreed to such a course of

9 Form -See Form No 2 to the Appendix to this Schedule

Where reference is to two or more arbi trators to provide for difference of opinion

4

P. 4. [S 509] (1) Where the reference is to two or more arbitrators, provision shall be made in the order for a difference of opinion among the arbitrators—

- (a) by the appointment of an umpire, or
- (b) by declaring that, if the majority of the arbitators agree, the decision of the majority shall prevail, or
- (c) by empowering the arbitrators to appoint an umpire, or
- (d) otherwise as may be agreed between the parties or, if they cannot agree, as the Court may determine

Note 8 1 (1926) 1926 Nag 37 (39) (1930) 1930 Lah 26 (30) 11 Lah 342 (1863) 10 Suth W R 393 (400) 2 See Note 15 to Paragraph 1 ante 3 (1899) 1899 Pun Re No 10 page 52

(1910) 8 Ind Cas 224 (224) (Lah) (1923) 1923 Pat 115 (116) (1917) 1917 Lah 379 (381) 1916 Pun Re No 115 Sunt distrissed for default

1917 Lah 379 (381) 1916 Pun Re No 115 Suit dismissed for default jeuding arbitration proceedings— Subsequent restoration and arb trators directed to proceed—lanard filed without objection— Hold ward 4 (1886) 10 Bom 381 (389) 5 (1924) 1924 Cal 722 (724) 51 Cal 43' 6 (1902) 24 All 312 (314)

legal

(1932) 1932 All 153 (184) 54 4ll 177 Que tion of costs referred to arb trit or the need deal with it

[See al o (1933) 1933 Sind 500 t

(2) Where an umpire is appointed, the Court shall fix such time as it thinks reasonable for the making of his award in case he is recurred to act

[1877—S 509; 1859—S 316]

#### Sunovsis

Scope of the Paragraph 1 Decision of majority—Clause (b) 2 Department of umpire by arbitrators 2 Delegation of duty by arbitrators 5

### 1 Scope of the Paragraph

Where two or more arbitrators are appointed, the Court is bound to provide, in its order of reference, for a difference of opinion among the arbitrators, in the manner specified in this Paragraph. Where no such provision was made, and there having been a difference of opinion among the arbitrators the Court decided the case itself on the avidence given before the arbitrators, the High Court reminded the case to the lower Court to make a fresh submission to the arbitrators after complying with the requirements of this Paragraph. Where, however, under similar circumstances the lower Court decided the case on oxidence taken before itself it was held by the High Court that it would not be right to remind the case for a fresh reference? See also Note 2 Pts (4) and (5) infia

An arbitrator cannot bimself be appointed as an umpire under this Paragraph  $^{3}$ 

### 2 Decision of majority-Clause (b)

Unless the order of reference provides that the decision of the majority or the uniprice, if any, shall prevail the award must be by all the arbitrators. An award by only a majority of the arbitrators in such cases is not valid. If however the application for the order of reference provides that the opinion of the majority shall prevail, the fact that the order of reference does not refer to it will not in validate the award by the majority of the arbitrators. The reason is that the authority of the Court to make a reference depends upon the agreement of the parties that if the parties agree that the opinion of the majority shall prevail the only order that the Court could pass is an order of reference to that effect and that it should therefore be deemed to have passed the order that it ought to have passed. Where one of the parties to a reference is a minor, his guardian can consent to abide by the decision of a majority of the arbitrators. But the fact that reither the application for an order of reference nor the order of reference makes any such provision as provided by the Rearapalp will not nullify an anonimous

#### Sch 11 Para 4-Note 1 1a (1934) 1934 411 109 (109) Disputes referred

to three arbitrators and one of them appointed sarjanch—No provision made for difference of opinion—Tho sarjanch cannot be deemed to be an umjiet in case there is a "difference of opinion imong arbitrators

1 (1802) 10 Suth W R. 393 (299)

(1934) 1334 All 109 (109)

(1919) 1319 Pat 74 (77 78) (1912) 17 Ind Cab 320 (377) 16 Oudh Cas

(1874) 22 Suth W R 129 (130) (1865) 4 Suth W R 4 (4) (1865) 1885 All W N 60 (60)

[But see (1918) 1918 Cal 644 (645)]

2 (1914) 1914 Cal 448 (449)

3 (1918) 1919 Cal 644 (645)

31 (1929) 1929 Mad 144 (144)

<sup>1 (1803) 10</sup> Suth W R 398 (399) 2 (1870) 14 Suth W R 150 (151) 3 (1932) 1932 Cal 491 (491)

Note 2 1 (1970) 1920 Vid 180 (180)

is suspended. It cannot, therefore, deal with the case except as provided in this Schedule, viz Pyragraphs 5. 8 and 151 Thus it cannot-

- allow the withdrawal of the suit under O 23, R 1.<sup>2</sup>
  - (2) dismiss the suit under O 9, R 3,3
  - (3) remove the arbitratur or substitute a new one,4
    - (4) record a commonuse between the parties.5
  - (5) deal with the case m the merits "

In the following matters however, it has been held that the Court can pass appropriate orders in the snit -

- (1) It can deal with an application to appoint an interim receiver or to grant an injunction?
- (2) It can deal with application to bring the legal representatives of a deceased party on record 8

As to the power of the Court to revoke the arbitration except as provided by Paragraphs 5 and 8, see Note 14 to Paragraph 1 above

The Court has no power to direct that money should either be deposited or paid to the arbitrators for their remuneration, unless the parties had specifically agreed to such a course 9

9 Form - See Form No 2 to the Appendix to this Schedule

Where reference is to two or more arbi trators to provide for difference of opinion

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- (d) otherwise as may be agreed between the parties or. if they cannot agree, as the Court may determine

Note 8 1 (1926) 1926 Nag 37 (39) (1980) 1930 Lah 26 (30) 11 Lah 342 (1868) 10 Suth W R 398 (400)

2 See Note 15 to Paragraph 1, aute

legal 4 (1886) 10 Bom 381 (389) 5 (1924) 1924 Cal 722 (724) 51 Cal 432

6 (1902) 24 All 312 (314)

(1932) 1932 All 183 (184) 54 All 122 Que tion of costs referred to arbitration anot deal with it

(2) Where an umpare is appointed, the Court shall fix such time as it thinks reasonable for the making of his award in case he is recurred to act.

[1877-S, 509; 1859-S, 316]

#### Sunopsis,

Scope of the Paragraph 1 Decision of majority—Clause (b) 2 Appointment of umpire by arbitrators 3 Delegation of duly by arbitrators 5

#### 1 Scope of the Paragraph

Where two or more arbitrators are appointed, the Court is bound to provide, in its order of reference, for a difference of opinion among the arbitrators, in the manner specified in this Paragraph. Where no such provision was made, and there having been a difference of opinion among the arbitrators the Court decided the case itself on the evidence given before the arbitrators, the Higb Court irimanded the case to the fower Court to make a firsh submission to the arbitrators after complying with the requirements of this Paragraph. Where, however, under similar circumstances the lower Court decided the case on evidence taken before itself it was held by the High Court that it would not be night to remand the case for a fresh reference. See also Note 2, Pts (4) and (5), infia.

An arbitrator cannot bimself be appointed as an umpire under this Paragraph 3

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Sch II Para 4-Note 1

1a (1934) 1294 All 169 (193) Deputtes seferred
at 15 three substrators and one of them
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made for difference of opinion—The
surpainch cannot be deemed to be an
umpre in ease there is a difference
of opinion among arbitrators
1 (1869) 10 but N. R. 348 (209)

2 (1870) 14 Suth W R 150 (151) 3 (1932) 1932 Cal 491 (491)

Note 2 1 (1920) 1920 Vind 130 (130) (1934) 1934 All 100 (109)

(1919) 1919 Pat 74 (77 78) (1912) 17 Ind Cas 320 (327) 16 Oudh Cas

94 (1874) 23 Suth W R 129 (130) (1865) 4 Suth W R 4 (4) (1865) 1885 All W N 60 (60)

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1 (1926) 1976 Nag 37 (39) (1930) 1930 Lah 26 (30) 11 Lah 342 (1865) 10 Suth W R 393 (400)

2 See Note 15 to Paragraph 1, ante 3 (1999) 1899 Pun Re No. 10 page 52 (1910) 8 Ind Cas 224 (224) (Lah)

(1923) 1973 Pat 115 (116)

No 115 Sut dismis ed for default pending arbitration proceedings—subsequent restoration and arbitrators directed to proceed—taurid filed without objection — Held ward

leg 1l. 4. (1556) 10 Born 351 (353) 5 (1924) 1924 Cal 722 (724) 51 Cal 4 3

Court cannot deal with it [1925] 1975 Sind 102 (107) 1875 LS [1978] 1929 Cal 256 (25) 25 Cal 24

(2) Where an umpire is appointed, the Court shall fix such time as it thinks reasonable for the making of his award in case he is required to act.

[1877—S, 509; 1859—S, 316]

Sunonsis.

Note No Note No (a) Extension of time for submission Scope of the Paragraph Decision of majority-Clause (b) by umpire Appointment of umpire by arbitrators 3 Delegation of duty by arbitrators 5

### 1. Scope of the Paragraph

Where two or more arbitrators are appointed, the Court is bound to provide, in its order of reference, for a difference of opinion among the arbitrators, in the manner specified in this Paragraph 12 Where no such provision was made, and there having been a difference of opinion among the arbitrators the Court decided the caso itself on the evidence given before the arbitrators, the High Court remanded the case to the lower Court to make a fresh submission to the arbitrators after complying with the requirements of this Paiagraph 1 Where, however, under similar circumstances the lower Court decided the case on evidence taken before itself it was held by the High Court that it would not be night to remand the case for a fresh reference 2 See also Note 2 Pts (4) and (5), sufra

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Sch ff Para 4-Note 1 1a (1934) 1934 All 109 (109) Disputes referred to three arbitrators and one of them appointed sarpanch - No provision made for difference of opinion-The sarpanch cannot be deemed to be an umpire in case there is a difference

- 1 (1869) 10 Suth W R 398 (399) 2 (1870) 14 Suth W R 150 (151) 3 (1932) 1932 Cul 491 (491)
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- 1. (1920) 1920 Mad 130 (130)

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(1874) 22 Suth W R 129 (130) (1865) 4 Sath W R 4 (4)

(1855) 1885 All W N 60 (60) [But see (1918) 1918 Cal 644 (645)].

- 2 (1914) 1914 Cal 448 (449)
- 3 (1918) 1918 Cal 644 (645)
- 34 (1929) 1929 Mad 144 (144)

award by all the arbitrators Where, in such a case, the aibitrators gave an unanimous award as to part and were divided as to part, the former is binding on the parties though the opinion of the majority as to the latter is not 5

It should be noted that even if a provision is made in the order of reference that the decision of the majority shall prevail it is essential that all the arbitra tors should be present at the deliberations. If they are present at the proceedings but some of them thereafter express their dissent and leave the place, the deci sion of the majority will he perfectly valid 6 But if they are not so present and do not take part in the deliberations, the award is invalid and not binding on the parties? Sec also Note 2 to Paragraph 10. infra

3 Appointment of umpire by arbitrators

When an umpire is appointed he is under no obligation to agree with one or other of the dissenting arbitrators. He is entitled to settle the matter in his own way according to what he thinks proper He need not confer with the arbi trators 1

4 Extension of time for submission by umpire

The umpire has the same powers as the arbitrators and could by application get extension of time for filing his award See Paragraph 8 below

5 Delegation of duty by arbitrators

The arbitrators appointed by Court under this Schedule cannot delegate their authority to a third person12, nor can the parties by their consent confer such a power on the arbitrators in derogation of the Court's older 1

But an arbitrator may delegate to a third person the perfermance of any acts which are merely ministerial in their nature 2

Where the arbitrators are empowered to choose an umpire, they have them selves to make the choice and ought not to delegate it to a third person 3

P. 5. [Ss. 507, 510-511] (1) In any of the following cases, namely:--Power of Court to appoint arbitrator in certain cases

- (a) where the parties cannot agree within a reasonable time with respect to the appointment of an arbitrator, or the person appointed refuses to accept the office of arbitrator, or
- (b) where an arbitrator or umpire -
  - (1) dies, or
  - (11) refuses or neglects to act or becomes incapable of acting, or
  - (111) leaves British India in circumstances showing that he will probably not return at an early date, or

(1932) 1932 Mad 157 (157) 4 (1912) 13 Ind Cas 161 (166) (Cal) (1908) 8 Cal L Jour 475 (476 477) 1 (1915) 1915 Lah 98 (99) 1915 Pun Re No 55 (1872) 17 Suth W R 30 (31) (1933) 1933 Lah 587 (588) (1891) 1891 Pau Re No 6 page 67 5 (1865) 2 Suth W R 32 (33) 6 (1925) 1925 Oudh 712 (712)

Note 5 la (1935) 1935 Lab '13 (114) 1 (1903) 2; All 312 (314), 90

2 (1902) 29 Cal 854 (508) 29 Ind App 163 not 1902 Pun Re No 87 (P C)

affect validity of award 7 (1885) 7 111 523 (528)

3 (1993) 17 Bom 129 (142)

- (c) where the arbitrators are empowered by the order of reference to appoint an umprise and fail to do so any puty may serve the other party or the arbitrators, as the case may be, with a written notice to appoint an arbitrator or umnne
- (2) If, within seven clear days after such notice has been served or such further time as the Court may in each case allow, no arbitrator or no umprio is appointed, as the case may be, the Court may on application by the party who gave the notice, and after giving the other party an opportunity of being heard, appoint an arbitrator or umpiro or make an order superseding the arbitration and in such easo shall proceed with the suit

[1877—Ss 507 510-511, 1859—Ss 314, 319]

Sunonsis \ote Vo Nota No Legislative changes ıng Appointment of new arbitrator or um Appointment of new arbitrator Appointment of an umpire Arbitrator refusing to act Order superseding arbitration Arbitrator becoming incapable of act Revision Other Tomes

Duty of Court under this Paragraph See Notice to appoint new arbitrator | See Note 5 ote 3 Pts (2) and (9) Lts (1) and (2)

11

1 Legislative changes The words and the parties des e that the nomin ation shall be made by the Court which occarred in S .07 of the old Code have been omitted

### 2 Appointment of new arbitrator or umpire

Under Ss 507 and 510 of the old Codo where the arbitrator nominated refuse I to accept the office the Court could not appoint a new arbitrator unless all the narties desired the Court to do so but that where the arbitrator after accepting the office refused to act the Court may appoint an arbitrator on the application of some only of the parties 1 In Sadik Hussain v Kaniz Zhora Begam 2 the Judicial Committee pointed out on a true construction of S 510 that there is no room for such a distinction and that the expression refuses to act in S 510 included also a case where an arbitrator relused to accept the office inasmuch as the acceptance of the office was the first essential act of an arbitrator The omis sion of the words and the parties desire etc has brought the present Paragraph in conformity with the decision of the Privy Council The Court can under the present Paragraph appoint an arhitrator without the consent of all the parties in both cases 112 where an arbitrator refuses to accept the office as well as where he refuses to act though this can be done only on application by either party and after notice to the opposite party

#### 3 Arbitrator refusing to act

It is one of the most essential principles of the law of arbitration that the (1864) 1864 Suth W R Gap 338 (339) Sch II Para 5-Note 2

<sup>1 (1883)</sup> G Mad 414 (416) (1891) 18 Cal 324 (327) (1909) 1 Ind Cas 354 (3.6) (All) (1900) 1900 Pun Re No 110 12ge 431

<sup>2 (1911) 12</sup> Ind Cas 15 (11) 38 AH 743 38 Ind App 181 14 Oudh Cas 283 (PC)

adjudication of disputes by arbitrators should be the result of their free con entito undertake the duties of arbitrating between the contending parties. The finality of an award is based on the principle that the arhitrators are judges chosen by the parties themselves and are willing to settle the disputes referred to them Hepce where an arbitrator refuses to act the Court bas no power to compel him to arbitrate against his will 1 The duty of the Court in such a case is either to appoint a new arbitrator or supersede the reference and proceed with the suit If the Court does neither of these two things the further proceedings in arbitra tion and the resulting award thereon are initial's But an arbitrator has full power to retract his resignation before it is accepted and acted upon by the Court and an award made subsequent to such retraction is not invalid by reason of the original refusal to act \* Similarly if the Court asks the arbitrator to reconsider his refusal or resignation and he thereupon agrees to act and proceeds to arbitrate the award will not be invalid 3

A refusal on the part of the arbitrator to act can be implied from his conduct as for instance where he fails to submit the award within the tme fixed 6

### 4 Arbitrator becoming incapable of acting

When an arbitrator becomes meapable of acting by reason, for example of illness the Court can supersede the reference or appoint a new arbitrator 1 The Court can act similarly when an umpire leaves British India and there is no evidence to show his intention to return at an early date \*

### 5 Appointment of new arbitrator

Before the Court proceeds to make a new appointment under this Palagiaph not only should one of the conditions mentioned in Cls (a) and (b) happen but the requirement as to the notice to the opposite party should also be fulfilled 1 If the Court proceeds to make an appointment without such notice it acts with material irregularity 2

Where however the parties by mutual agreement make a change in the personnel of the arbitrators without the intervention of the Court and carry on the irbitration proceedings the award is not invalid by reason of the omission to follo v the procedure prescribed by this Paragraph The reason is that the very found ution of arbitration proceedings is the consent of the parties and such consent will cure any defect in the matter of procedure 3

After notice is given to the opposito party as required by sub pair (1) it is open to the parties themselves to appoint an arbitrator provided all the lattes Note 4

- 1 (1870) 1870 Pan Re No 66 Bourke O C 359
- 2 (18 0) 4 Beng L R 89 (90) Note 5
- 1 (1928) 1928 All G74 (675) (1933) 1933 Gudb 540 (549) 9 Luck 2 5 (1925) 1925 Lah 374 (375)

(See also cases cited us posit (1)

(1925) 1925 Oudh ... 61 (364) Ti e regu te ment as to notice held fulfilled having regard to the circin tauces a\_ree \* (Cf the provisions of Para 2, supra and S 8 of the Indian Arbitration Act IN of 1899) If the parties fail to make such appointment, the Court can appoint the arbitrator after hearing the parties. But it is not bound to do so in all cases. It has a discretion either to appoint the arbitrator of to supersede the reference 5 In making a new appointment the Court has no power to compel an unwilling party to pay remineration to the arbitrator chosen by it especially wl ere there is no provision for the same in the original reference of

If a party does not object to the appointment by the Court of the nomines of the opposite party as arbitrator, but acquiesces in it by taking part in proceed ings before him he will be estormed from questioning the validity of the appoint ment liter on when the award goes a\_ainst him 7

#### 6 Appointment of an umpire

The power of the Court to appoint an umpue under this Para is not unlimited but is controlled and limited by the terms of the agreement between the parties as to what course is to be adopted if there is a difference of opinion among the arbitrators. Thus where the terms of the submission to arbitration were that an umpire should be selected from out of seven persons named therein and the unique first chosen declined to act it was held that the Court could not ignore the remaining six persons and appoint a strugger is an umpire and that the (ward in such a case was not valid 1

# 7 Order superseding arbitration

The Court cannot supersede the reference under this Paragraph unless the conditions prescribed herein are fulfilled 1 Thus an accusation of partiality against the arhitrator or an allegation that an umpire has been tampered with or the fact that one of the parties fails to pay his share of the remuneration fixed for the arbitrator are not grounds for superseding the reference under this Paragraph

The Court cannot suo motu supersede the reference without there being any application by the parties and without the procedure as to notice being complied with. Nor can a mere agreement of the parties to refer the matter to a nerson other than the arbitrator already chosen have the effect of super seding the reference

Where the Court decides to supersede the reference it is bound to proceed with the suit. Where there is no suit pending and the Court has dis charged itself of the I is by passing a final decice it cannot supersede the reference. Thus, where the parties to a suit settled their disputes as to partition but agreed that the shares should be worked out and properties allotted by certain arbitrators and the Court passed a decree in pursuance of the settlement under S 375 (now O 23 R 3) and subsequently one of the substra tors declined to act as an arlutrator the Judicial Committee held that the Court could not supersede the reference and allot the shares. Their Lordships

4 (1918) 1918 Lah 151(152) 1918 P R No 112 (1866) 1 Agra H C R 109 (109 110) Refusal on the part of a party to nominate an arbitrator in the place of one

who refused to act does not amount to a withdrawal from the agreement

(See also (1867) 7 Suth W R 13 (13) 1

Note 6 1 (1871 74) 7 Mad H C R 72 (76)

Note 7

1 (1907) 4 1)1 L J 691 (694) 30 All 39 2 (1901) 11 Wad L Jour 128 (129) 3 (1874) 18.4 Pun Re No 98 page 135

4 (1908) 30 411 32 (35) 5 (1932) 1932 Oudh 151 (152) 6 (1902) 21 411 312 (314)

observed "To proceed with the suit (to use the language of S 510) was in this case, in their Lordships view, impossible, and referring to the decree they proceeded to sav

It put an end to the suit and that was the very object of the compromise The alternative in S 510 is impossible because there is no suit now pending with which the Court can proceed All that the Courts in India could do was to take advantage of the sections of the Code which enabled them to keep the machinery of arbitration going

Where an arbitration fails and the Court decides to supersede the reference, it ought not to dispose of the suit at once without fixing a date for its hearing and giving due notice thereof to the parties 8 But the Court need not consider a second reference to arbitration when it decides to go on with the case 9

An order superseding an arbitration can be implied as where the arbitrators refuse to act and the Court proceeds to try the suit 10

#### 8 Revision

An order passed under this Paragraph is not appealable. But an omission to comply with the formalities prescribed by this Paragraph as to notice amounts to a material irregularity and can be revised I An order superseding the arbi tration or appointing a fresh arbitrator is an order deciding a 'case' within the meaning of S 115 of the Code 2

Powers of arbitra tor or umpire ap 4 or 5

P. 6. [S 512] Every arbitrator or umput appointed under Paragraph 4 or Paragraph 5 shall have the like powers as if his name had been inserted in the order of reference

[1877-S 512; 1859-S 319] Sunonsis

Powers of an arbitrator Note No. 1

#### 1 Powers of an arbitrator

An arbitrator is not bound by the technical Rules of the Court but should act in accordance with the Rules of equity, justice and good conscience. This it has been beld that he is not bound to follow the technical provisions of the Evidence Act and his decision cannot be challenged on the ground that he sched upon a document not admissible under that Act 3 He can administer oath to a witness or party and a party can agree before him to be bound by the oath of the opposite party or witnesss

> (.69.) 56 411 721 ]

Where the arbitrator does not file his award on the day fixed, and the plaintiff applies to withdraw the suit with liberty to bring another suit and the Court grants the apple cation ]

(1912) 17 Ind Cas 23 (30) (Mad) An atta trator need not give reasons for his

Seb H Para 6 -Note 1 1 (1864) 1 Suth W R 12 (13)

Note 8 1, (1929) 1929 All 144 (145) 51 All 501 (1933) 1933 Oudh 540 (542) 9 Luck 225 (1931) 1931 All 761 (763) 53 All 778

In arbitrator cannot however delegate his functions as for instance, the appointment of an umpute when the older of reference does not authorize him to do so But there is nothing objectionable in his delegating functions which are purely of a ministerial character 6

Summoning witnes ses and default

P. 7. [S 513] (1) The Court shall issue the same processes to the parties and witness whom the arbitrator or impire desires to examine, as the Court may assue in suits tried before it

(2) Persons not attending in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arhitrator or umpire during the investigation of the matters referred, shall be subject to the like disadvantages, penalties and punishments, by order of the Court on the representation of the arbitrator or umpire, as they would incur for the like offences in suits tried before the Court

[1877-5 513, 1859-S 317]

Scope of the Paragraph Note No 1

Other Torics

Refusing to give evidence See Note (1) Pt (5)

1 Scope of the Paragraph

This Paragraph empowers the arbitrator to seek the assistance of the Court in the matter of summoning witnesses and enforcing their attendance. An arbitrator should notify the date of the hearing to the parties and he cannot take evidence in the absence of the parties and without their knowledge 1 But where after notice either party fulls to appear or notifies his withdrawal from the submission2 be can proceed ex parte An award passed ex parte cannot be set aside unless sufficient cause is shown for the non appearance of the party 3

An arbitrator should take only such evidence as is required by the terms of

the agreement referring the question in dispute to arbitration \*

The words refusing to give evidence in Cl 2 refer to the case of a person who refuses to give evidence when placed on oath and is required to answer any question put to him and not to a case where a person elects not to produce any evidence 6

Extension of time for making award

P. 8. [S 514] Where the arbitrators or the umpire cannot complete the award within

the period specified in the Order, the Court may, if it thinks fit, either allow further time, and from time to time.

bound by the oath of a third person not assented to by all the parties— Held award on oath not valid 5 (1893) 17 Bom 129 (145)

(186 ) 7 Suth W R 269 (2 0) 6 (1907) 99 Cal 854 (568) 29 Ind. App 168 1902 1 un Re No 87 (P C) (1916) 1916 Cal 806 (807)

Sch II Para 7-Note 1 1 (19°5) 1925 Mad 1056 (1057)

(See (1933) 1933 Sind 260 (761) Sand LR 96 At the time of reference date of hearing before arbitrator fixed by Court-No fresh notice by arbitrator is nece sary 1

2 (1906) 29 Mad 44 (45) 3 (1J25) 1925 Stud 150 (157) 19 S nd L R

4 (1809) 2 Beng L R App 2n (26) 5 (1911) 11 Ind Cas 259 (760) (411)

either before or after the expiration of the period fixed for the making of the award, enlarge such period; or may make an order superseding the arbitration, and in such case shall proceed with the suit

### Sunopsis

30012 Note No 1 Legislative changes Estoppef Or may make any order superseding the Award made out of time-See Notes to Paragraph 3 ante reference Extension of time Appeal

1 Legislative changes

- 1 The words where the arbitrators or the umpire cannot complete the awail have been substituted for the words 'if from the want of necessary eviden's in information or from any other cause, which occurred in the corresponding 5 " of the old Code The effect of the alteration is that the scope of this Park, 12 has been enlarged
  - 2. The words either before or after the expiration of the period fixed have less newly added after the words from time to time. They give effect to the undermentioned decisions under the old Codel which held that the Court had power to extend the time for the making of an award even after the extent the time originally fixed
- 2 Award made out of time See Notes to Para 3, onle

3 Extension of time

The Court cau extend the time fixed for making an award at any time defore the award is actually made even though the time originally fixed mis have expired at the time of such further extension 1 But when once an award is minds. the power of the Court to grant further time under the Paragraph broad-spent and cannot be exercised thereafter. Nor has the Court power under S 1 at of the Code to extend the time in such a case, for that section does not enable the Court to extend the time for the doing of any particular act when in trath and in fact the act has already been done Where, however, an award : mpif signed but not announced to the parties or sent to Court, the award cannot be said to be finally made and complete, and an order of extension of time sub street to such signing is not invalid. On an application for extension of time under this Paragraph, the Court should, as has been seen in Noto 5 to Para 3 above, itself, bx the further time and cannot delegate the power to do to the arbitrators

An order of extension of time can be implied from the proceeding of the

Sch Il Para 8-Note 1 1 (1000) 10 411 137 (143) (1856) 1556 All W N 151 (152)

(1555) 11 Vad So (87) (1892) 15 Mad 384 (3-6) (1565) 2 Suth W R 297 (29-)

1 (1551) 10 411 197 (143)

(1934) 1934 Lom 393 (399) Court has purisdiction to extend time even in a e where there is an umpire who may be entitled to enter on the refe ence under Clause (a) of Pura J ınfra

(1921) 1921 Bom 419 (421) 45 E - 10 1 (1916) 1916 Lah 80 (53) (1592) 14 All 343 (345)

(1552) 4 Mad 311 (315) 2. (1631) 13 411 300 (204) 13 Ind 419 25

(PC) (1931) 1931 Bom 373 (039)

(1906) 2 Nag L R 81 (35) (1886) 9 Mad 475 (476)

(1854) 6 Moo Ind App 134 (161) (P C) (But see (1910) 4 Sind L R - 9 [See also (1910) 4 Sind L R \* 5 (1) [See also (1919) 1919 Pat 3 (1) 4 Pat L Jour 260 ]
3 (1911) 12 Ind Cas 13 (14) 33 Cal 5 - 4 (192a) 1920 T a 2 (2007)

4 (192-) 1928 Lah 753 (7.55)

Court " In the case cited below it was held that an oral application for extension of time was not incompetent

#### 4 Estoppel

As will be seen from the Notes to Para 15, infra, an award passed out of time is not a nullity under the present Code Consequently the parties may, in such cases, be estopped by their conduct from disputing the validity thereof 1

5 Or may make an order superseding the reference

The Court has a discretion under this Paragraph oither to extend the time fixed for the award or to supersede the reference 14. Thus, where the arbitrators are quilty of neglect in submitting their award in spite of several extensions of time the Court can supersede the reference and proceed with the suit 1 But the Court has no jurisdiction to deal with the suit and cannot dismiss it for default until and unless it supersedes the reference 2 An order superseding the releience need not, however be express. It can be implied from the procedure adopted by the Court 3

As already seen in Note 5 to Para 3 above an award made within time but filed into Court later is not invalid and the Court cannot supersede the reference in such a case \*

Where the Court supersedes the reference it cannot straightaway dispose of the suit on the same day It should by a date for the hearing and give duo notice of the same to the parties 5 As to whether the Court has power to set aside an order superseding the reference, see the case cited below a

6 Appeal.

An order superseding in arbitration where the award has not been com pleted within the period allowed by the Court is appealable under S 104, sub S (1), Cl (a) P. 9. [S 515] Where an umpire has been

Where umpire may appointed, he may enter on the reference in the arbitrate in lieu of place of the arbitrators.arbitrators

(a) if they have allowed the appointed time to expire without making an award, or

(b) if they have delivered to the Court or to the umpire a notice in writing stating that they cannot agree [1877—S 515; 1859—S 318.]

5 (1920) 1920 Cil 470 (4"6) Ou the date fixed for filing the award the Court ordered- The arlitrators have not submitted their award Issue Takid it once fixing the 10th November for hearing -So held that the order may le taken as an order ex tending the time for filing the award

6 (1974) 1924 Bom 380 (380) Distinguish mg (1890) 3 Vad 59 Note 4

1 (1919) 1919 Pat 93 (98) 4 Pat L Jour 265 (1919) 1919 Lah 27 (29) Parties acquies cing in Court's order of extension cannot question the same Note 5

1a (19°3) 1933 Pat 566 (568) Application for extension of time—Court can take all circumstances into consideration including allegation of misconduct of artitrator

1 (1920) 1920 Cal 524 (524) (1902) 24 All 312 (314)

2 See Note 8 to Paragraph 3 3 (1913) 21 Ind Cas 558 (559) (Vad)

(1920) 1920 Pat 731 (734) 5 Pat L Jour

1 (1912) 17 Ind Cas 320 (321) 16 Oudh Cas

(1934) 1934 Bom 398 (899) Court his power to extend the time for filing the award which is only a minis ternal act

5 (1910) 8 Ind Cas 870 (877 8:8) 13 Oudh Cas 311 (1910) 8 Ind Cas 1107 (1108) (Cal)

(1929) 1929 111 259 (259)

6 (1937) 1932 All 656 (657) Held the Court cunnot set aside the order-S 1o1 does not apply

Ю

- ata 30

#### Sunovsis

Umpire when empowered to arbitrate in lieu of arbitrators Note No 1

1 Umpire when empowered to arbitrate in lieu of arbitrators

An umpire can enter on the reference and himself make the award only in two cases

- Where the arhitrators have allowed the appointed time to expire without making an award
- (2) When they have delivered to the Court or to the umpire a notice in writing stating that they cannot agree 1

Thus where one of several arbitrators absented himself from the arbitrat on proceedings and after the expiry of the time fixed for the award the umpre approached the Court for direction it was beld that Cl (a) applied to this ca s and the umpire was himself entitled to make an award 2 An umpire is under po obligation to agree with one or others of the dissenting arbitrators or to confer with them but is entitled to settle the matter in his own way according to what he thinks proper 3 But where the agreement of reference provides that the umpire should agree with one or other of the sets of the dissenting arbitrators an award by the umpire which agrees with neither of the two sets of arbitrators is not valid 4

Even in a case where an umpire has been appointed and the arbitrators have allowed the appointed time to expire without making an award the Court has jurisdiction to extend the time under Para 8 ante See also Note 3 to Para 8 ante

P. 10. [S 516] Where an award in a suit has been made, the persons who made it shall sign it and cause it to be filed in Court, together with any deposi Award to be signed and filed tions and documents which have been tiken and proved before them , and notice of the filing shall be given to the parties

## Synopsis

| Note 1                                                                                       | No 1 | 100                                                                          |  |
|----------------------------------------------------------------------------------------------|------|------------------------------------------------------------------------------|--|
| Award to be signed                                                                           | 1    | Notice of the filing shall be given                                          |  |
| Necessity of presence of arbitrators at meetings Together with any depositions and documents | 2    | Delivery of the award<br>Form of award<br>Registration of award if necessary |  |

## Other Topics

See Note 2 see also Note 1 Pt () Addition or alteration of award See Note 1 Filing of award by arbitrator See Note 5 Oral award See Note 1 Pt (15) Pts (11) to (13) Determination by some of the arbitrators

## 1 Award to be signed

An award embodies the decision of an arbitrator and must be signed by him1 before it is filed into Court 2 Where there are several arbitrators it 5 (1934) 1934 Bom 398 (399)

- Sch II Para 9-Note 1 1 (1904) 1 All L J 29 (32) 2 (1928) 1928 All 674 (675) 3 (1915) 1915 Lah 93 (99) 1915 Pun Re No
- 4 (168 ) 7 All W N 197 (197)

- Sch II Para 10-Note I
- 1 (1928) 1928 Pat 981 (932)
- (1929) 1909 Mad 31 (31) 0 (1916) 1916 Pat 1J0 (193) 1 Pat LJ

escential that all of them should sign the award. Where however, the parties agree to be bound by the decision of the majority, it is enough if the award is signed by the majority of the arbitrators. An award made by more persons than those amounted is invalid, unless the parties acquiesce in the same.

It is not necessary in the case of several arbitrators that all of them—should sign the award at the same time, and in the same place? Where an award is duly signed the fact that it is not stumped or that the fair copy of the award is not signed by all of them? would not affect the validity of the award. But where an arbitrator signs a blank paper before the decision is embedded in it—the award is not properly signed?

When once an award is made the substrators become functus officie and they have no power to alter 10 or review 12 the award, unless the Court or the parties by consent remit the matter to them for reconsideration 13. In the case cited below 11 twas held that an arhitrator was justified in refusing to sign the award before it was engrossed on stamp paper although he had signed the increaserandium of award on the ground that owing to some misunderstanding in the language his opinion had to be chained

The provisions of this Paragiaph apply only to a reference to arbitration through the intertention of the Court and not to an award made on a private reference out of Court. The award in the latter case is not invalid by reason of the want of signituse of the orbitrators. The reason is that a private award can ovom he amoral one and an award in ariting will not be less valid because it was not signed by the arbitrators.

The report of arbitrators embodying a compromise arrived at between the parties subsequent to the inference is not an award 15

# 2 Necessity of presence of arbitrators at meetings

Where there are several arbitrators appointed it is essential for the validity of the award that all of them should be present at all the meetings including the last, that variesses should be examined in their presence and all of them should act together and give the award 1 See also Note 2 to Para 4 ante. But the

<sup>3 [</sup>LU 13 U at 00 though you know of D settled from [But see (1917) 1917 Bom 129 (172) 12 Bom 608 Reference to unsubtro of valuers. There is a presumption that parties agree to abade by the majority decision.

4 (1930) 1300 Oudh 359 (1930)

<sup>(1916) 1910</sup> I at 1-6 (157) 1 I at L Jour 90

<sup>8 (1916) 1918</sup> S : d 13 (14) 13 Sind L R 75 3 (1862 63) 1 M d H C R 178 (180) 10 (1911) 11 Ind Cas 898 (893) (Cal)

<sup>(189 ) 2</sup> Cal W N cerciv (corre)

11 (1901) 23 4ll 333 (392) 23 Ind App 111

(P C) Entry made in schedule of p operty after award is no part of the tward

(1934) 1934 Lom 6 (9) Even with consent

of 1 at tes it cannot be done 12 (1918) 1918 Lah 239 (940) 1917 Pun Re

<sup>[</sup>Dut see (1869] 3 Beng LR 1 C 82 (1914) 1.014 Lah 4°G (140) 1913 Pnn Re No 92

Note 2 1 (1919) 1919 Mad 877 (877)

10 absence of one of them at a meeting in which nothing material was done and no enquiry was made will not invalidate the award 2

3 Together with any depositions and documents

Though this Paragraph contemplates the possibility of the depositions of witnesses being reduced to writing by the arbitrators, it does not oblige them to keep such a record 1 The mere fact that an arbitrator has omitted to file along with his award the depositions of the witnesses examined by him or the documentary evidence filed before him will not justify the Court in holding on that ground that the award is invalid though it may lead to the conclusion that the arbitrator has not acted in accordance with law and is guilty of misconduct as stated in Para 152

In arbitrator should not permit the removal of documents entrusted to him and forming part of the record 3 He should return them to the Court The Court can also call upon him to give up the same to the Court when his right to keep them as arbitrator has come to an end \*

4 Notice of the filing shall be given

The provisions of this Paragraph are mandatory and the Court is bound to give notice of the filing of the award to the parties 2 Under Article 153 of the Limitation Act, the parties are entitled to ten days time for filing their objections to the award and such period is to be computed from the date on which the notice is given 2 The omission to give notice is a material irregularity and affords a ground for interference by the High Court in revision 3 If a decree is passed in terms of the award without the notice required by this Paragraph to be given the decree is had and is liable to be set aside

There is a conflict of opinion as to whether a formal notice under this Paragraph is necessary where the parties are made aware of the filing of the award without such formal notice Iu the undermentioned cases it has been held that where the parties are made aware of the filing of the award, the absence of a formal notice would not vitiate the proceedings A contrary view, namely that a formal notice under this Paragraph is necessary and knowledge altende is not

2 (1240) 12-0 2100 200 1000) Note 3

#### Note 4

1 (1912) 17 Ind Cas 430 (430) 15 Oudh Cas 100 (1935) 1935 411 852 (852)

9 (1917) 1917 Nag 211 (212) (1915) 1915 Lah 352 (352) (1916) 1916 Lah 321 (322) (1901) o Cal W N 813 (815) (1912) 17 Ind Cas 431 (431) (Mad) (1914) 1914 Lah 813 (313) Where Parti 5 have accepted the award no t me lor objections need be allowed

3 (1838) 11 Mad 144 (145) (1927) 1927 All 614 (615) (1926) 1926 Cal 1018 (1019) (1921) 63 Ind Cas 243 (243) (Cal) (1877 1901) 2 L B R 24

4 (1921) 1921 Oudh 151 (154) 24 Oudh Cas 263

(1321) 1921 Oudh 148 (148) 21 Oudh Cu (1928) 1J28 Nag 166 (167 168) 107 Ind Cas

5 (1927) 1927 Cal 619 (621)

(1976) 1926 Bom 312 (312) 1 artie, them selves bringing the award into Court Held sufficient notice (1913) 21 Ind Cas 293 (301) (Lab) (1924) 1927 Pat 135 (150) Held th e was

a wanter of the right to not e

sufficient has been taken in the following decisions 6

#### 5 Delivery of the award

An award should be filed into the Court and then only the Court can proceed further and pass a decree 1 But the filing of the award need not be personally made by the arbitrator It can be handed over to the parties who may file it into Court 2 It is, bowever, necessary that the arbitrator should cause the award to be filed into Court Where an award reached the Court mysteriously by post and none of the arbitrators took the responsibility of saving who caused the same to be sent, it was held that the Court could not act upon the award 3

The act of an arbitrator in handing over an award to the proper officer of the Court for the purpose of being filed is not an application within the meaning of Article 178 of the Limitation let Hence the Article does not apply to the delivery of an award by an arbitrator to the Court \*

# 6 Form of award

For form of award see Appendix to this Schedule Form No 5 See also the undermentioned case 1

## 7 Registration of award if necessary

An award made by arbitrators appointed by the Court is not compulsorily registrable under S 17 of the Indian Registration Act 1

[S 517] Upon any reterence by an order of the Court, the arbitrator or umpire may, with the Statement of spe leave of the Court, state the award as to the cial case by arbitra whole or any part thereof in the form of a tors or umpire special case for the opinion of the Court, and the Court shall deliver its opinion thereon, and shall order such opinion to be added to and to form part of the award

[1877-S 517; 1859-S 321]

Note No | Appeal

Note No

Special case 1 Special case

This Paragraph is intended to provide for cases where any difficult and complicated questions of law arise for consideration before the arbitrators and they require the help of the Court to enable them to complete the award 1 Though this Paragraph does not expressly state that the special case should rolate only to a question of law yet sufficient indication as to the scope of this Paragraph is given by the form prescribed (Form No 4 of Appendix to this Schedule) which

6 (1899) 20 All 474 (475) (1325) 1925 Lah 619 (019) (1950) 1330 Lab 2 8 (223)

Note 5

1 (18 0) 13 Suth W R 62 (62) [See 1]so (1334) 1934 Bom 3 8 (399) The more filing of the award into Court is nothing but ministerial

work to be done by the arbitrators]
2 (18°0) 5 Leng L Rep 357 (3 2) The pre coodings and depo itions ought not to be handed over to parties

C P C 376 & 377

3 (1929) 1929 P t 178 (179) 4 (1881) 7 641 433 (337) Note 6

1 (1902 1903) 2 U B R Arbitration P 1 Where arb trators resolve the a vard to be a the form of a document it is only that document which is award

Note 7 1 (1935) 1935 Rang 16 (16) Sch II Para 11-Note 1

1 (1995) 192° Cal 599 (603) 53 Cal 100 (1935) 1°35 Rang 16 (16)

absence of one of them at a meeting in which nothing material was done and mengury was made will not invalidate the award.

3 Together with any depositions and documents '

Though this Paragraph contemplates the possibility of the depositors of witnesses being reduced to writing by the ribhrators, it does not oblige them to keep such a record. The mere fact that an arbitrator has omitted to file alor, with his award the depositions of the writnesses examined by him or the does mentrally evidence filed before him will not justify the Court in holding on this ground that the award is invalid though it may lead to the conclusion that the arbitrator has not acted in accordance with law and is guilty of misconducts stated in Para Lo.<sup>2</sup>

An arbitrator should not permit the removal of documents entrusted to bin and forming part of the record. He should return them to the Court. The Court can also call upon him to give up the same to the Court when his right to ker them as arbitrator has come to an end.

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(1912) 17 Ind Cas 481 (431) (Mad)

The provisions of this Parthraph are mandatory and the Court is bound to give notice of the filing of the award to the parties <sup>2</sup> Under Arthele 188 of the Limitation Act the parties are entitled to ten days time for filing their objection to the award and such period is to be computed from the date on which the solies given <sup>2</sup> The omission to give notice is a material irregularity and affords a ground for interference by the High Court in revision <sup>3</sup> If a decree is passed in terms of the award without the notice required by this Paragraph to be given the decree is had and is liable to be set aside <sup>4</sup>

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(1921) 1921 Bom 32 (32) 45 Bom 882.
  (1939) 1932 Mad 157 (157)
  (1922) 1922 Mad 1,9 (179)
  (1919) 1919 Cal 224 (225) 46 Cal 721
  (1914) 1914 Lah 313 (313) Where Fart
   have accepted the award not melor
   objections need be allowed
   3 (1838) 11 Mad 144 (145)
(1927) 1927 All 614 (615)
   1
  (1915) 1915 Oudh 110 (111)
  (1926) 1926 Cal 1018 (1019)
  (1921) 63 Ind Cas 243 (243) (Cal)
2 (1920) 1920 Mad 283 (289)
  (1877 1901) 2 U B R 21
                     Note 3
   4 (1921) 1921 Oudh 151 (154) 74 Oudh Cas
1 (1929) 1929 Nag 264 (265) 26 N4g L R 168
2 (1926) 1926 Oudh 307 (308 309)
   263
   (1321) 1921 Oudh 148 (148) 24 Oudh C 1
3 (1872) S Beng L R 319n
4 (1890) 17 Cal 832 (839)
   (1928) 1929 Nag 166 (167 168) 10 Ind Car
                     Note 4
1 (1912) 17 Ind Cas 430 (420) 15 Oudh Cas
          294
(1935) 1985 All 8.2 (852)
2 (1917) 1917 Nag 211 (212)
   (1915) 1915 Lah 352 (852)
(1916) 1916 Lah 321 (322)
(1901) 5 Cal W N 813 (815)
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sufficient has been taken in the following decisions 6

#### 5 Delivery of the award

An award should be filed into the Court and then only the Court can proceed further and pass a decree 1 But the filing of the award need not be personally made by the arbitrator It can be handed over to the parties who may file it into Court 2 It is however, necessary that the arbitrator should cause the award to be filed into Court Where an award reached the Court mysteriously by post and none of the arbitrators took the responsibility of saving who caused the same to be sent it was held that the Court could not act upon the award 3

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P 11 [S 517] Upon any reterence by an order of the Court, the arbitrator or umpue may, with the leave of the Court, state the award as to the cial ease by arbitra ters or umpire whole or any part thereof in the form of a special case for the opinion of the Court, and the Court shall deliver its opinion thereon, and shall order such opinion to be added to and to form part of the award

[1877—S 517, 1859—S 521]

Sunopsis

Note No

Special case

I Special case

This Paragraph is intended to provide for cases where any difficult and complicated questions of law arise for consideration before the arbitrators and they require the help of the Court to enable them to complete the award 1 Though this Paragraph does not expressly state that the special case should relate only to a question of law yet sufficient indication as to the scope of this Paragraph is given by the form prescribed (Form No 4 of Appendix to this Schedule) which

6 (1899) 20 All 474 (475) (1J25) 1925 Lah 619 (619) (1950) 1330 Lah 2 8 (22J)

#### Note 5

1 (18 0) 13 Suth W R 62 (62) (See also (1374) 1934 Bom 348 (399] The mere tiling of the award into Court is nothing but m insterial
work to be do e by the arbitrators]
2 (18 0) 5 Ee g L Rep 357 (8.2) The pro

ceedings and depo it one ought not to be handed over to parties.

C P C 376 t 377

3 (1929) 1929 P t 178 (179) 4 (1881) 7 U 1 333 (337)

Note 6 1 (1902 1903) 2 U L R Arbitration P

Wiere whitestors re obe the a varto te in the form of a document is only that document when is award

Note 7

1 (1935) 1935 Rano 16 (16) Sch 11 Para 11—Nota 1 1 (1925) 1925 Cal 499 (103) 52 Cal 100 (1935) 1935 Ras g 16 (16)

expressly mentions only questions of law 2 But there is nothing objectionable in the Court's helping the arbitrators with advice and orders when they come to ıt ın a dıfficulty 3

Where a special case is submitted to the opinion of the Court and the Court completes the award by deciding the special case it is bound to give the parties an opportunity of objecting to the award before a judgment is pronounced upon it 4

A charge of misconduct against the umpire cannot be strengthened from the mere fact that in the exercise of his discretion, he refused to state a special case for the opinion of the Court 5 As to the form of special case in general se O 36 ante

2 Appeal

Under S 104 sub section (1) C! (b) an order on an award stated in the form of a special case is appealable. Where an agreement of reference provided that in case of disagreement between the arhitrators the matter in difference should be referred to the umpire who should make the award and the arbitrators who differed on a question of law without referring the matter to the ump re referred it to the opinion of the Court it was held that the order of the Court was not an order on an award stated in the form of a special case and was not therefore appealable 1

P. 12. [S 518] The Court may, by order, Power to modify modify or correct an award .or correct award

- (a) where it appears that a part of the award is upon n matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter leterred. or
- (b) where the award is imperfect in form of contains any obvious error which can be amended without affecting such decision, or
- (c) where the award contains a clerical mistake of an error arising from an accidental slip or omission

Appeal

[1877-S 518, 1859-S 3221

Note No Power of an arbitrator to set as de s ft deed conditional on payment of Part of the award sa upon a matter 2 compensation ī Award imperfect in form or containing Limitation

Presidency Small Cause Court

not referred to arbitration an obvious error Clause (b) Clerical mistake Clause (1)

Power of Court to modify an award

1 Power of Court to modify an award

The seneral principle is that the parties having by consent substituted a forum domesticum of their own choice they are bound by its decisions on ques 5 (1331) 1931 P C 283 (293) 38 In 1 11p 3 1 2 (1925) 1925 Bom 22 (23 24) 45 Bom 663 3 (1915) 1915 Lah 253 (255) 1916 Pun Re

3

Synopsis

No 28 4 (1995) 1925 Bom 22 (25) 49 Lom 663

Note 2 1 (1910) S Lt d C to 171 (174) 35 Bom 1 A.

8

tions of fact and law, however erroneous they may be, and the Court has no power to alter or vary the award except in the limited manner prescribed by the Paragraph. Where a dispute is referred to arbitration and the arbitrators are empowered to decide upon all the points involved in it, the arbitrators have full power not only to fix the liability between the parties but also the manner in which such liability is to be discharged. Thus the arbitrators can order the amount due to the plaintiff to be paid by instilments, and the Court cannot interfere with such a direction in the award. Nor can the Court add a direction of its own to the award. It is well settled that a Court acts without jurisdiction if it modifies an award because it takes a different view from that held by the arbitrators.

Where the Court modifies an award under this Paiagraph, it is the modified award and not the original award with which the decree should account.

The provisions of this Paragraph apply only to an awaid made through the interiention of the Court the Court has no power under this Puragraph to modify or correct an award made on a private reference out of Court <sup>5</sup>

#### 2 'Part of the award is upon a matter not referred to arhitration

An award should be made with reference to the points in dispute referred to them by the parties. Where the award decides mitters extraneous to the reference the award is not valid unless that portion which is in excess can be separated from the rest and does not affect the decision on the matter referred to. In the latter case, the Court can under Clause (a) give effect to the valid portion of the award ignoing the rest. Where no separation is possible, the Court can remit the award to the arbitrators for reconsideration under Para 14 and if they fail to reconsider it the award becomes void by virtue of Paus 15.

#### Seh II Para 12-Note 1

1 (1930) 1930 Lah 26 (31) 11 Lah 342 (1933) 1J33 Lah 193 (140) Power to modify

award is limited by Cls (a) (b) and (c) of this Paragraph

But see (1863) IS65 Pun Re No 101 ]
(See also (1923) 1020 All 747 (748) of all 1003 Judge constituted arbitrator — Award such that if it was by another person Court would have to remit it for reconsideration —Judge can amend it ]

(See also (1933) 1933 Said 992 (294))

2 (1909) 1 Ind Cas 328 (329) 12 Oudh Cas 23

(1930) 1930 Lah 26 (31) 11 Lah 342 (1686) 8 A11 449 (451) [See also (1930) 1920 Cal 413 (414)

Arbitrator has power to award in terest)
3 (1930) 1930 Lah 26 (32) 11 Lah 342 The

Court cannot give a relief as to ease ment right on the ground that it was emitted in the award

4 (1925) 1925 Cal 332 (333) (1924) 1924 All 800 (800)

(1916) 1916 Lah 4 (6) 1916 Pun Re No 78 (1925) 1925 Sind 89 (90)

5 (1933) 1933 Lah 189 (189)

(1930) 1930 Lah 219 (220) (1906) 1906 Pun Re No. 18 page 47 (1913) 19 Ind Cas 49f (496) (Mad)

6 (1912) 14 Ind Cas 9/8 (978) (LB) (1932) 1922 Oudh 189 (190 191) 29 Oudh Cus 213 (1937 1901) 2 t B R 297

(1925) 1325 Lah 570 (570) (1893) 17 Bom 657 (661) (1913) 1919 Vlad 731 (782) (F B) (See however (1914) 19

[See however (1914) 1914 Lah 477 (477) A cletical error in the award can be set right by amending the decree on the award under S 191 ?

Note 2

1 (1914) 1914 P C 105 (106) 56 All 336 17

Oudh C1s 120 (I C) (1902) 1902 Pun Re No 57 page 364 29

Ind App 106 29 Cal 854 (P C) (1900) 23 All 494 (404 405) 28 Ind App 190 (P C)

(1870) 2 N W P H C R 150 (153) (1916) 1916 Cal 506 (807) (1922) 1922 Cal 399 (400) (1932) 1932 Cal 713 (714) (1868) 9 Fayer L R App 25 (76)

11863) 2 Beng L R App 25 (26) (1871) 15 Suth W R 172 (173) (1865) 3 Suth W R Mis 27 (27) (1928) 1929 Lah 915 (916) (1892) 1893 Puu Re No 18 page 85

(1892) 1892 Puu Re No 18 page 8 (1924) 1924 Pat 33 (30) 2 Pat 777 3 Award imperfect in form or containing an obvious error Clause (b)

The Court can rectify an obvious error to the award. Thus where an issue as to whether a particular property was endowed property and whether it was partible or not was referred to arbitration and the arbitrators decided that the property was not an endowed one hot novertheless declared that it should not be partitioned it was held that there was an obvious error in the award and that the Court could amend the direction that the property should remain impartible 1

The provisions of this chuse can be lovoked only if the imperfection in form exists in the award at the time when it is filed in Court and not where it comes into existence at a subsequent stige on the happening of an anticipated event

4 Clerical mistake Cl (c)

As in the case of decrees the Court has power under this Paragraph to cor rect clerical mistakes and errors in an award arising from accidental slips or omissions 1 But the Court has no power to go into the n crits and award a sum different from that awarded by the arbitrators on the ground that the calculation then made was wrong 3 The Chief Court of Oudh has held that the Court can under this Paragraph as elso under its inherent powers amend a clerical slip in the award even after a decree is passed in terms of the award

5 Power of an arbitrator to set aside gift deed conditional on payment of com

Where the parties to a suit agree to refer their disputes in relation to a deed of gift to arbitration and the terms of the reference do not contain any limitation as regards the powers of the arbitrators an award by the arbitrators se ting as de the dood of gift upon payment of compensation to the plaintiff and d recting the defendant to remain in possession until the amount is paid is par feetly valid The Court has so power under this Paragraph to interfere with the direction so contained in the award 1

6 Limitation

No specific Provision is made in the Limitation Act for en application to modify or correct an award onder this Paragraph. The ten days period pres cribed by Article 158 of the Limitation let does not apply to an application under this Paragraph 1

In the undermentioned case3 it has been held that even a formal application by a party is not necessary

7 Appeal

By virtue of S 104 sub S (1) Cl (a) an appeal lies from an order modifying or correcting an award

8 Presidency Small Cause Courts

An order of a single Judge of the Presidency Small Cause Court modifying an award under this Paragraph is not a decree pass d on an award and an applica-

Note 3 (19°) 19 7 Mad "20 ( 21) 1 (1909) 2 Ind C s S 9 (3-8) (411) 2. (19.0) 19.0 Lah 2. (31) 11 Lah 312

Note 4

2 (1921) 1921 Lom 191 (193) 45 Bom 512

1 (1913) 19 Ind Cas 49, (49,) (Mad) (1921) 1321 Eom 131 (193) 45 Bom 512 (1921) 1 21 All 62 (62) 45 All 699 Appa rent meons steneres such as a flat co tradiction in measurement can be amendal

1 [1929] 1929 Oudh 1 ( ) 3 Luck 1 (F B). Note 5 Note 6

au cod t - ( - -)

tion to the Full Bench under S 38 of the Presidency Small Cause Courts  $\mbox{Act}$  is competent  $^1$ 

P. 13. [S 519] The Court may also make such order as at thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the award contains no sufficient provision concerning them.

Sunovsis

Power of an arbitrator to award costs 1 Award of costs by the Court.

Note No

#### 1 Power of an arhitestor to award costs

An arbitrator is empowered to deal with the question of costs when it is occluded in the reference or where all the questions involved to this suit are referred to bim. But where only some of the issues arising in the case are the subject of a reference and the question of costs is not one of them, the arbitrator has on power to award costs. In he nevertheless makes an order as to costs the award is not invalid if the remainder of the award remains unsificated by the nider as to costs. In such a case the Court can proceed under Cl. (a) of the last Paragraph.

As to the remuceration of the arbitrators see the cases cited below 5

#### 2 Award of costs by the Court

Where the award does not make provision for costs it is open to the Court to make an order as to essets under this Paragraph! In the modermeotioned cases where all the matters in dispute in a suit were referred to arbitration and the award did not deal with the question of costs, the High Court of Allahabad has held that the Court could oot, under this Paragraph, award costs incurred up to the dato of the reference but could only award the costs incurred subsequent thereto

The words 'cost of the arbitration in this Paragraph are not limited to such costs as might be represented by travelling expenses and the summoning of witcesses. The Court has, therefore jurisdiction to award noder this Paragraph remuneration to the grintariors for their sorvices 'd

Note 8

Note 8 1 (1926) 1976 Mad 8 8 (879)

Sch II Para 13-Note I 1 (1898) Equike O C 7

2 (1918) 1318 Nag 108 (109)

(1868) 1 Beng L R O C 114 (145) (165) 2 Ind Jur N S 12 3 (1688) 1888 Pun Rs No 91, page 243

3 (1588) 1888 Pun Rs No 91, page 243 4 (1318) 1318 Cal p23 (530)

(1318) 1318 Cal 523 (530) (1885) 3 Pom 82 (86) (1314) 1314 Sind (2 (62) 8 Sind L R 136

Held the direction as to costs is nothing more than a recommendation to 1930 1330 Sind 140 (192) Fore fixed not forming mut of the award Award

forming put of the award Award not invalid But Court may reduce amount

(1897) 1537 Pun Re No 22, page 92 Arbi

until his charges are paid

(1881) 6 Cal 500 (810) But the Court has no power to sanction an order passed by the arthurators to whom a matter has been referred making the pryment of their fe sa count non proceedent to their heating the rence

#### Note 2

1 (1970) 1930 Oadh 89 (89)

(1916) 19 Ind Cas 611 (611) 6 Sind L R 226 Court can award rubitration for a as costs where it is silent

(1912) 1.319 All 155 (185) Omission of Court to fix the fee before preparation of the decree do s not prevent tha

Court from fixing it later 2 (1932) 1J32 All 153 (154) 54 All 122

3 (1.34) 1.34 Nag 199 (900) 51 Nag L R 85

3 Award imperfect in form or containing an obvious error, Clause (b)

The Court can rectify an obvious error in the award as to whether a particular property was endowed property and whether it was partible or not, was referred to arbitration, and the arbitrators decided that the property was not an endowed one, but novertheless declared that it should not be partitioned, it was held that there was an obvious error in the award and that the Court could amend the direction that the property should remain impurible.1

The provisions of this clause can be invoked only if the imperfection in form exists in the award at the time when it is filed in Court, and not where it comes into existence at a subsequent stage on the happening of an anticipated event

4 Clerical mistake Cl (c)

As in the case of decrees the Court has power under this Paragraph to cor rect clerical mistakes and errors in an award arising from accidental slips or omissions 1 But the Court has no power to go into the merits and award a sum different from that awarded by the arbitrators, on the ground that the calculation then made was wrong 2 The Chief Court of Oudh3 has held that the Court can, under this Paragraph, as also under its inherent powers, amend a clerical slip in the award oven after a decree is passed in terms of the award

5 Power of an arbitrator to set aside gift deed conditional on payment of com pensation

Where the parties to a suit agree to refer their disputes in relation to a deed of gift to arhitration, and the terms of the reference do not contain any limitation as regards the powers of the arbitrators, an award by the arbitrators setting uside the doed of gift upon payment of compensation to the plaintiff and directing the defendant to romain in possession until the amount is paid is par-The Court has no power under this Paragraph to interfere with the direction so contained in the award 1

6 Limitation

No specific provision is made in the Limitation Act for an application to modify or correct an award under this Paragraph. The ten days period prescribed by Article 158 of the Lamitation Act does not apply to an application under this Palagraph 1

In the undermentioned cases it has been held that even a formal application by a party is not necessary

By virtue of S 104, sub S (1) Cl (a) an appeal lies from an order modifying or correcting an award

8 Presidency Small Cause Courts

An order of a single Judge of the Presidency Small Cause Court modifying an award under this Paragraph is not a decree passed on an award, and an applica-

#### Note 3 1 (1909) 2 Ind Cas 858 (Ros) (All)

2. (19.0) 1930 Lah 2. (31) 11 Lah 312

Note 4

1 (1913) 19 Ind Cas 495 (495) (Mad) (1921) 1.721 Dom 191 (193) 45 Bom 512 (1921) 1 21 All 62 (62) 45 All 629 Appa rent inconsistencies such as a flat . contradiction in measurement can be

3 1 (1928) 1923 Oudh 1 (7) 3 Luck 1 (F B). Note 6

Labrama 2 (1921) 1921 Bom 191 (193) 45 Fam 512 tion to the Full Bench under S 38 of the Presidency Small Causo Courts Act is competent.1

P. 13. [S. 519.] The Court may also make such order as it thinks fit respecting the costs of the arbitra-Order as to costs tion where any question arises respecting such of arbitration costs and the award contains no sufficient provi-

sion concerning them.

Sunovsis

Note No. 1 Award of costs by the Court. Power of an arbitrator to award costs

Note No

1 Power of an arbitrator to award costs

An arbitrator is empowered to deal with the question of costs when it is included in the reference or where all the questions involved in the suit are referred to him 2 But where only some of the issues arising in the case are the subject of a reference and the question of costs is not one of them, the arbitrator has no power to award costs 3 If he nevertholess makes an order as to costs the award is not invalid if the remainder of the award remains unaffected by the prider as to costs. In such a case the Court can proceed under Cl (a) of the last Paragraph 4

As to the remuneration of the arbitrators, see the eases cited below 5

2. Award of costs by the Court

Where the award does not make provision for costs it is open to the Court to make an order as to costs under this Paragraph 1 In the undermentioned case2 where all the matters in dispute in a suit were referred to arbitration, and the award did not deal with the question of costs, the High Court of Allahabad has held that the Court could not, under this Paragraph, award costs incurred up to the date of the reference but could only award the costs incurred subsequent thereto

The words "cost of the arbitration 'in this Paragraph are not limited to such costs as might be represented by travelling expenses and the summoning of witnesses The Court has, therefore, jurisdiction to award under this Paragraph remuneration to the arbitrators for their services 4

Held, the direction as to costs in

Note 8 1 (1926) 1926 Wad 8/5 (579)

Sch II, Para 13-Note 1

1 (1808) Loucks O C 7 2 (1118) 1118 Nag 108 (109) (1808) 1 Long L R O C 144 (115)

(1651) 2 Ind Jur N S 12 3 (1888) 1888 Pue Rs No 91, page 243

4 (1918) 1J18 Cal 223 (530) (1685) J Bom 82 (85) (1914) 1914 Sind 62 (62) 8 Sind L R 136

nothing more than a recommenda 5 (1930) 1930 Sind 100 (192) Fees fixed not

forming part of the award-Award not invalid But Court may reduce amount

(1807) 1637 Pun Re No 22, page 92 Arbs trator can refuse to deliver award

until his charges 410 141d (1881) 6 Cal 600 (810) But the Court has no power to sauction an order presed by the arbitrators to whom a matter has been referred, making the payment of their fees a condition

procedent to their hearing the refe

rence

Note 2

1 (19"0) 1930 Ondb 89 (89) (1914) 19 Ind Cas 611 (611) G Sted L R 226 Court can award arbitration fees as

costs where it is silent (1919) 1919 All 185 (185) Omission of Court to fix the fee before preparation ' of

the decree does not prevent the Coart from fixing it later 2 (1932) 1932 All 153 (184) 54 All 122

3 (1934) 1934 Nag 199 (260) 31 Nag L R 35.

Where award or matter referred to arbitration may be remitted

P. 14. [S. 520] The Court may remit the award or any matter referred to arbitration to the reconsideration of the same arbitrator or umpire, upon such terms as it thinks fit,-

- (a) where the award has left undetermined any of the matters referred to arbitration,3 or where it determines any matter not referred to arbitration.4 unless such matter can be separated without affecting the determination of the matters referred:
- (b) where the award is so indefinite as to be incapable of execution:5
- (c) where an objection to the legality of the award 18 apparent upon the face of it.6

[1877—S. 520; 1859—S. 323.]

Synopsis

| Where an objection to the legality of |   |  |
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## Other Tomes

## Remittal of award in part See Note 2, Pts (3) to (5)

1 Legislative Changes The words "unless such matter can be separated without affecting the determination of the matters referred in Cl (a) have been newly added

2 Score of the Paragraph

Paragraph 12, ante, enables the Court to modify or correct an award under certain circumstances This Paragraph empowers the Court to remit the award to the arbitrator himself for reconsideration where there are omissions or defects therein which are such as cannot be modified or corrected by the Court itself under Paragraph 12 1 The Court is, however, confined to the specific grounds mentioned in this Paragraph and has no power to remit an award on other grounds 2

There is a difference of opinion as to whether the Court can remit the award in part only and treat the award as to the

to the High Court of Allahabad there is no Sch H. Para 14-Note 2. (191

1 (1867) 7 Suth W R 406 (406, 407)

2 (1881) 3 All 636 (642)

(1935) 1935 Lah 113 (114) Court remitting award when none of the grounds mentioned in this section existed-Court acts without jurisdiction

(1912) 13 Ind Cas 520 (523) 14 Oudh Cas 309

award is no ground for remitting (1863) 13 Cal L Rep 171 (175) An objection by a party that he did not agree to

the terms of the reference is not a ground under this Paragraph (1917) 1917 Mad 312 (313) The fact that

the obligations imposed under the award have been performed between portion of an award only may be remitted 3 "It is impossible to say for any person who is not the arbitrator, how the arbitrator proceeded to frame his award. It may be that the portion objected to has an intimate connection with the portion which is not objected to The arbitrators, therefore, must be given a free hand to recast the award" . The Judicial Commissioner's Court of Sind has held that where an award is bad as to a part only and is sent back as to that alone, the arbitrator is functus officeo as to the good parts and cannot after his judgment as to them 5 It is submitted, that the former view is correct. When the Court decides to remit the award under this Paragraph, it is not final6 and so long as it is not final and is in the hands of the arbitrator, it can be altered by him 68

The Court has a discretion to remit or not to remit an award 7 Thus, where there is any circumstance in the position of the arbitrator such as tends to produce a hias in his mind, the Court will in its discretion, refuse to remit the award to the arbitrator for reconsideration 8

#### 3 Award leaving undetermined any of the matters referred to arbitration

Where the arbitrators have not, in their award, decided any matter referred to them, the Court may, under Cl (a), temit the award for reconsideration 1 "The ground upon which an award which does not dispose of all the matters referred has been held to be invalid appears to be that there is an implied condition that it shall do so 3 But it is open to the parties to waive this condition 3 Thus, where all the parties agree before the arbitrator that an incomplete award may be made or where they all represent that there is no longer any controversy between them upon a particular point, the fact that the award is incomplete or silent on such point will not vitiate it 4 An award cannot be said to be incomplete because,

the date of the award and the date of the application to file it is no

ground (1912) 15 Ind Cas 573 (573) (Mad) The pas sing of a conditional award is no

(Compare S 10 of the English Arbi tration 4ct 1869 which runs thus - In all cares of references to asks tration the Court or a Judge may from time to time remit the matters referred, or any part of them to the umpire ]

7 (1931) 1931 Lah 215 (216) [See also (1933) 1933 Mad 697 (699) In the absence of objection by party, Court is not bound suo molu to remit

Note 3 1 (1881) 3 411 286 (291, 292) (1933) 1933 Lah 530 (532) Question re-

ferred to arbitration - Arbitrators giving only provisional order leaving certain question to be decided by Court -- Award should be remitted for reconsideration

(1925) 1925 All 893 (894) (1918) 1918 Cal 247 (247) Reference autho rising to proceed er parte if a party absent-One party absent-Arbitra tor s award without evidence-Held he should have heard the evidence of the other side and therefore re-

[See (1870) 14 Suth W R 247 (248)]

(See also (1925) 1925 All 103 (106) Omission to partition one item of property on account of mapossibility does not vitiate award]

(1919) 1919 Cal 1030 (1031) Where some of the matters referred to have not been decided, the Court cannot allow a party without the consent of the

to a suit involving a number of issues, the arbitrators have not give a decision on each of them It is enough if they give a docusion on the whole matter in issue between the parties 5

#### 4 Award determining matter not referred to arbitration

It is a fundamental priociple of the Law of Arbitration that the submission furnishes the source and prescribes the limits of the arbitrators authority and that therefore the award must conform to the submission both in substance and in form 1 Consequently if the award decides matters out within the scope of the submission it is void as regards the portion in excess of the submission. It such portion is however, separable from and independent of the remainder effect can be given to the rest of the award 18 but if the extraneous matters cannot be so separated without affecting the determination of the matters referred the Court may remit the award for reconsideration 3

# Where the award is so indefinite as to be meapable of execution

An award to be capable of execution ought to be certain so that no reason able doubt can arise upon the face of it as to the arbitrators meaning or as to the nature and extent of the right and duties imposed by it upon the parties 1 The fact that a particular expression used in an award is capable of more than one interpretation does not show, that it is so indefinite as to be incapable of execu tion Where the arbitrators give the method for calculating the amount awarded without specifying the actual amount due the award can be considered as suffici ently certain masmuch as the actual result can be worked out 3

6 Where an objection to the legality of the award is apparent upon the face of it. It has been seen to Note 10 to Paragraph 1 ante that parties are entitled to

aubmit quastions of law as well as questions of fact for arbitration and that the arbitrators have jurisdiction to decide the same Where they so decide a question apecifically submitted to thom for decision but such decision happens to be erro neous in law it cannot nevertheless be said that there is any error apparent on the face of the award, and the Court has no right to sit in judgment over the views of the arbitrator 2 Illustration

S sued V and others for a share in the family properties V contended in defence that S was born blind and that therefore he was set entitled to any slare under the Hindu Law The suit was then referred to arbitration and the arbitrates swarded S a life it terest in a fourth share of the properties subject to its lecom ing an absolute interest in case he married lt was held that the award was not

Note 6

(16°8 86) 2 All 181 (157 191) (t 25) 1.25 Sind 165 (188) 19 S ad L B 54 (1916) 1916 Oudh 255 (255) 11 Ondh Cas among Burmana (151)1 (S e also (1931) 1931 Oudh 6 (7) 6 Lack 424) 2 (1602) 29 Gal 167 (153) 29 Ind App 51

5311) ما يمساد س

1902 1 un Ro No 25 (P C) (1918) 1918 Mad 236 (29 ) 41 Mad 1022 3 (1918) 1918 Mad 235 (29 ) 41 Mad 1022 1 (1916) 1916 Oudh 160 (161)

But where a question of law is not specifically submitted to the arbitrators for decision and they state a wrong legal proposition and base their award on the matters referred to them on such proposition, there is an error of law on the face of the award. In Chamsey Bhara and Co., Lid., v Juray Baloo Spinning and Versing Co., Lid., they Ludships of the Prive Council observed as follows —

An error in law on the face of the award means, in their Lordshirs view that you can find in the award or a document setually incorporated the etc, as for unstance a note a justice by the artistator stating the reasons for his purpment some ligal projection which is the Laus of the award and which you can say is errorsons

#### Illusir aisons

- 1 d, an arthrator states a special case ord gets an opinion of the Court. In making the awrit he states that opinion and tasee his award upon it. The appellate Court finds that the opinion as given is error-court. There is, an error in law on the face of the award which will entitle the appellate Court to term! the award for reconsideration?
- 2 A reference was made to artistators to divide family properties between a Hinda father and his sons. The elders toom had seriated the father to attain nucescan his business ard thus to acquire the property. In consideration of that the artistrators awarded him Rs 11 (CO or access of his phase describinging as Jysekha Bhagam. It was held that though ne sule of Jysekha Bhagam is to also and allegal the more use of the term in the award did not make it illegal when the Court is satisfed that the exits amount was really given to the eldest sou for structs rendered?

See also the undermentioned cases as to what is and what is not illegality apparent on the face of the award

An arithmetical error in the award made by the arbitrator in arriving at the
4 (1925) 1925 Sind 186 (188) 19 Sind L R 54. required statement on onth-There

5 (1923) 1923 P C 66 (69) 47 Pom 5:6 LO Ind App 3º4 (P C) Revaling 1920 Pom 256 44 Lom "to Threase has been followed in the following

66 Drein gracked J

6 (1912) 1912 A C 6°3 Entish Westingbone Compuny v Underground Llectuo Railway Company

7 (1930) 19 0 Mad 28 (41) (1925) 1925 Mad 201 (201, 202)

8 (1869) 1869 Pun Re No 12 Oren disregard by arbitrators of proved lawor custom 15 a good ground for remitting the award

(1903) 1° 3 All °56 (°5°) Belerence of dispute to artituation—Lefendant a subsequent statement that if plantiff made certain statement on eath decice might to payed so prayed for in plant.—Plantiff making required statement on oath—There is no complexitie as defined in O 23,

(1938) 1.438 Stud 2 O (.63) 27 Stud L R CO
Puttion sutr - Question whether
marriage expenses of plaintiff about
the provided for was referred to all
tration - Arthitator awarding for
plaintiff—ho error agravent on the
free of the record

(1868) 1868 Pun Re No 101 Award allowing set off founded on magning transaction is illegal

(1919) 1-19 had 8 7 (6 ) Anard when

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rd ven ly artificators along with some

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(16.2) 18 2 lun Re Ao 3 page 3 llun
tiff and one defendant agreed to
reference—tward against all defen

dants is illegal
(1923) 1923 Cal 125 (128) Piwate award
made after institution of suit is
illegal

(1915) 1915 Cal 745 (74°) (1884) 1884 All W N 43 (44) (1508) 50 All 505 (504) (1524) 1924 Cal 1581 (1658) sums due by one party to another is not an illegality apparent on the face of the award 9

It has been already mentioned above that an error of law, in order to vitate an award, must be apparent on the face of the award or some other document attached to the award. Thus where a dispute arising out of a contract is metered to arbitrators and a reference is made in the award to a contention of one party, it does not open the door to seeing first what the contention is and then going to the contract on which the rights of parties depend to see if that contention is sound <sup>10</sup> Similarly, where an award makes an allusion to the contract tery guardedly and for the purpose only of ear marking the origin of the dispute in question it does not enable a party to contend that the contract was incorporated into the award by the reference mentioned above and them to say that the award discloses an error in law in construing the terms of the contract.

## 7 Remillal of private awards

Where an awaid is made without the intervention of a Court and as application is made under Para 20, nufra to file the award, the Court may under Para 21, file the award it oo seek ground as is mentioned in Paras 14 and 15 is proved. But the fact that there are any of the grounds specified in this Paragraph does not empower the Court to remit the award for reconsideration of the arbitrations as in the case of an award made through the intervention of the Court. Therefore, if the award leaves undetermined any of the matters referred to arbitration or is so indefinite as to be incapable of execution; the award is intalled and the application under Para 20 must be dismissed. But where the award determines any matter not referred to arbitration and such matter can be separated without affecting the determination of the matters referred, the whole award is not invalid and the decisioos on the portions in excess of the authority of the arbitrators can be treated as null and void.

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9 (1923) 1925 LAh 86 (86)
9 (1924) 1924 S nd 117 (110) 17 Sind L R 86
[See also croses cited in Points (5)
and [6] alseptial
10 (1923) 1923 P C 66 (69) 47 Bom 578 50
Ind App 324 (PC)
11 (1927) 1927 P O 164 (165) 54 Ind App 487
21 Sind L R 101 55 Call 126 (PC)
21 Sind L R 101 55 Call 126 (PC)
31 Sind L R 101 55 Call 126 (PC)
32 Fat Ind Cas 650 (Pat)
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Note 7

1 (1927) 1927 Lah 317 (348)
(1928) 1928 Lah 86 (480)
(1928) 1928 Lah 86 (480)
(1914) 1914 Lah 436 (440)
1913 Pun Re
No 92
(1881 82) 6 Home 633 (663)
(1916) 1316 Oudh 160 (161)
(1912) 14 Ind Cras J78 (978) (L. B)

2 (1911) 10 Ind Cas 450 (453) (Cal) (1881 1882) 6 Bom 663 (668) (1914) 1914 Lah 436 (440) 1913 Pun Ra No 92 (1914) 1014 L B 40 (41) 8 L B R 58

(1916) 1316 Mt 113 (113) 38 Mt 350 \$ (1316) 1916 Oudh 160 (161) 4 (1902) 23 Cut 854 (863) 29 and app 168

1002 I un Re No 87 (P C) (1918) 1916 Cal 529 (530) (1914) 1914 P C 100 (106) 36 All 336 17 Oudh Cas 120 (P C) (1 32) 1132 Ml 154 (155) (1915) 1315 Lan 105 (105) No 66 (1914) 1914 Lah 471 (47-) 1314 1 un 1 6

(1318) 1918 Lat 83(86) 4 Lat 11 30 334 (1323) 1373 Rang 130 (131) 4 Lip bur R 1.7 ]

## 8 Limitation

Article 158 of the Limitation Act does not apply to proceedings under this Paragraph and, therefore, there is no period of limitation for making an application under this Palagraph to remit an awaid for the reconsideration of the arbitrators 1

## 9 Appeal

An order remitting or refusing to remit an award for the reconsideration of the arbitiators is not appealable. Where an award is remitted under this Paragraph and the arbitrators refuse to reconsider the award which consequently hecomes void under Para 15, infra and the Court ultimately passes a decree on the merits, the legality of the order remitting the award may be challenged in an appeal against the decree 3 See also S 105. Note 6, Pt 3 But where after remittal, the arbitrators submit a fresh award and the Court passes a decree in accordance with the revised award no appeal will he from such decree on the ground that the order of remutal under this Paragraph was wrong and that the original award ought to have been accepted and acted upon a See also notes to Para 16 infra

#### 10 Revision

The High Court cannot interfere in revision with an order of the Court remitting an award for reconsideration of the arbitrators 1

#### 11 Arbitration under other Acts-See Note 6 a to Para 1

In an arbitration proceeding regarding boundary disputes under S 120 of the Bomhay Land Revenue Code (V of 1879) the Superintendent of Survey or the Boundary Officer is empowered to remit an award for the reconsideration of the arbitration committee for any of the causes set forth in this Paragraph

# Grounds for set ting aside award

P. 15. [S 521.] (1) An award remitted under Paragraph 14 becomes void on failure of the arhitrator or umpire to reconsider it But no award shall he set aside except on one of the following grounds

# namely :—

- (a) corruption or misconduct5 of the aihitrator or umpure:
- (b) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed.10 or of wilfully misleading or deceiving the arbitrator or umpire;
- (c) the award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit of after the expiration of the period allowed by the Count<sup>12</sup> or being otherwise invalid 13

<sup>1 (1933) 1933 411 648 (649)</sup> 

<sup>(1919) 191</sup>J Mad 877 (817)

Note 9 1 (1881) 3 All 636 (639)

<sup>2 (1914) 1914</sup> Cal 497 (498)

<sup>(1912) 15</sup> Ind Cas 573 (573) (Mad) (1881) 7 Cal 490 (493)

<sup>3 (1893) 22</sup> Mad 202 (204) (1881) 3 All 636 (642) Per Oldfield J [But see (1933) 1933 Lah 530 (531)] 4 (1908) 31 Mad 479 (481)

<sup>(1925) 1925</sup> Lah 207 (267)

<sup>(1870) 15 0</sup> Pun Re No 64 (F B) Note 10

<sup>1 (1858) 1858</sup> All W. N 123 (123)

(2) Where an award becomes void or is set aside under clause (1), the Court shall make an order superseding the arbita tion and in such case shall proceed with the suit

[1877—S 521; 1859—S 324]

## Synopsis

Note No Legislative changes Procedure in inquiry under this Para Refusal to reconsider award remitted Grounds for setting aside award 4 (a) 'Corruption or misconduct (1) Acts amounting to misconduct 6

(ii) Acquiescence in acts amounting to m; conduct

(iii) Acts not amounting to miscon duct

(1v) Evidence of artifrator (b) 'Fraudulent concealment of any matter which he ought to have disclo ed ' (c) Award made after order superseding

arbitration (d) Award made after the expiry of the period allowed by the Court. 13 (e) "Being otherwise myalid" 14

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Apreal Revision

## Other Topics

Limitation for application to set aside avaid Appeal from decree based on award See Notes to Para 16 infra See Notes to Para 10 snfra.

1 Legislative changes

1 The words and no award shall be valid unless made within the period allowed by the Court' which occurred at the ond of S 521 of the old Code have been aunt ted and the words or after the expiration of the period allowed by the Court or being otherwise invalid have been newly added at the end of CL (c) of sub-S (1) See Notes 12 and 13 anfra.

2 Sub section (2) is new

2 Procedure in enquiry under this Paragraph

Where an application is made to set aside an award on any of the grounds mentioned in this Paragraph, the Court is bound to allow the applicant an opportunity to produce evidence to substantiate his objections and to enquire into the allegations made by him 2 The burden of proving such allegations is on the person seeking to have the award set aside 3

A party in whose fatour an award has been passed cannot object thereto on the ground that the arbitrators exceeded their jurisdiction \*

An order deciding objections to an award under this Paragraph should comply with the provisions of O 20, R 5, ante and the Court should state its finding or decision on each separate issue with reasons therefor 5

3 Refusat to reconsider award remitted

If an award has been remitted to the arbitrators for their reconsideration under Para 14 ante and the arbitrators decline to submit a fresh award, award hecomes void and the Court has no alternative but to try the case itself It is not necessary in such a c.se for the Court to find corruption or misconduct

[1918] 1918 Smd 13 [14] 13 Smd L B 75. Sch II Pata 15-Note 2 4 (1927) 1927 Sind 206 (205) 1 (1917) to Ind Cas 57 (03) (Lab) 5 (1.35) 1935 All 519 (519). (100J) 4 Ind Cas oos (254) (Lah) 2 (1859) 185J I un Ro No 12 Note 3 (15 C) 2 N W P H C R 241 (243) - (1.14) 1.114 P C 105 (10) 26 4H 336 17

1. (1889) 16 Cal E08 (808 810). (1865) 3 Suth W R 168 (164) (1893) 1843 All W N 45 (45) Oudh C14 120 (P C) (1J\_4) 1924 All "68 (7SJ) 4G All 686. (1J 1) 64 Ind Cas 706 (407) (111) 2 (1867) 7 Suth W It 100 (101) But where the arbitrators after remittal reconsider the matter to the best of their ability and come to the same conclusion, the award does not become youd.

#### 4. Grounds for setting aside award

An award can he set aside only on one or more of the grounds mentioned in this Paragraph. Therefore a provision in the agreement of reference that any of the parties might object to the award on any account is ultra vires and contrary to the procedure prescribed by this Paragraph.

As to the several grounds on which an award may be set aside see Notes 5 to 13, infra.

#### 5 "Corruption or misconduct"

The word "misconduct" when applied to the proceedings of arbitrators does not necessarily imply moral tauptude, it is used in the sense of breach or neglect of such duties and responsibilities as decoive on the arbitrators acting judicially and as the Courts of Justice expect from them before allowing finality to their awards. In other words it comprehends action on the part of the arbitrator which, upon the face of it, is opposed to all rational and reasonable principles that should govern the procedure of any person who is called upon to decide questions in difference referred to him by the prites.

The word "corruption necessarily implies misconduct but "misconduct" does not of necessity imply corruption. Thus an award may be set aside on the ground of misconduct which does not amount to corruption."

Where it is proved that an arbitrator has been guilty of misoonduct, it is not necessary to prove prejudice in order that the award may be set aside, but the irregularity may be cured by waiver.

# 6 Acts amounting to misconduct

We now proceed to discuss some instances of misconduct justifying the setting aside of an award under Clause (a) of this Paragraph —

(1) Where more than one arbitrator is appointed, the pieseuce of all of them at all meetings and, above all at the last meeting when the final act of arbitration is done, is essential to the validity of the award Therefore the absence of some of the arbitrators at some of the meetings is misconduct within the meaning of this Paragraph The reason is that in such cases the parties

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2 (185J) 1839 All W N 124 (125)
3 (1831) 1891 All W N 25 (26)
   3 (1903) 30 Cal 337 (400)
                       Note 4.
   4 (1931) 1931 Wad 613 (621)
1 (1924) 1924 Cal 635 (666)
   Note 6
2 (1916) 1916 Pat 190 (192) 1 Pat L Joar 306
   1 (1895) 7 All 523 (524)
                       Nate 5
  (LJ32) 1932 Vad 157 (157)
  (1J81) 1931 Rang 24 (16) 12 Rang 128
1 (1897) 9 411 253 (236)
   (183J) 12 Mai 113 (113)
  Award signed by four - Mesting of
   (192 ) 1923 Bom 49 (50) 52 Bom 116
  only three - 1 ifth not given notice
   (1925) 1925 Outh 307 (300) 1 Lu-k 139
  of proposed meeting - Award is not
           [San also (1935) 1935 Bom 127 (190)
  valid - Refusil to sign by fifth at
           5. bom 233 If opportunity is allou
  place where arbitrators had assem-
bled for some other purpose does not
           ded to one sale to get sivantage
  affect question
(1939) 12 Wad 113 (114)
            with arbitrator over another, and if
           with artifrator over anomal, as it it
there is possibilty of such alvan-
tigs influencing mind of arbitrator,
probestings are vittate!—Arbitrator
sending for one of parties merely to
sort papers, held did not amount to
  (1919) 1319 Mad 877 (877)
(1915) 1915 Cal 863 (863)
  (1911) 11 Ind Cas 838 (699) (Cal)
  (1905) 2 Cal L Jour 61 (61)
           misconducel
  (1902) 23 Cal 35 (38, 40)
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intend that all the persons to whom the reference is made shall meet and discuss together all the matters referred and that the award should be the result of their united deliberations This conference and dehiberation in the presence of all the arbitra tors are the very essence of the arbitration and the sole reason why the award is made binding. The facts that the agreement of reference provided for a valid award by the majority of the arhitrators and that a majority of them were present at all the meetings will not make the award valid 2 Similarly where a reference was made to three persons and the award purported to be made hy four persons, it was set aside on the ground that the association of the fourth person might have influenced the decision of the others 3 The absence of an arhitrator at some of the meetings does not however amount to misconduct if the act done at such meetings is not of a judicial nature, but merely ministerial in its charicter

As to the vulidity of an award made by a majority of arbitrators, see Note 2 to Para 4

(2) "If irregularities in procedure can be proved which would amount to no proper bearing of the matters in dispute there would be misconduct sufficient to vitite the awaid without on the honesty or impartiality of the arbitrator."

(3) The ordinary rule is that an enquiry before the arbitrator is assimilated as near as may be to the proceedings on a trial in the Courts Therefore if the parties are not given notice of, any meeting at which they should appear and represent their case or are not given a fair and reasonable opportunity to prove their case, that would amount to misconduct on the part of the arbitrators <sup>6</sup> But the omission to give notice of a meeting to a party who had, prior to such meeting, natified to the arbitrator his withdrawal from the submission, does not in-

(1874) 22 Suth W R 418 (419) (1890) 14 Suth W R 211 (212) (1867) 8 Suth W R 171 (172) (1882) 1882 Pun Re No 55 page 158 (1992) 1922 Oudh 276 (277) 26 Oudh Cas 1 (1995) 1915 Oudh 110 (111)

(1922) 1922 Oudh 246 (277) 26 Oud (1915) 1915 Oudh 110 (111) (1898) 1 Oudh Cas 181 (182) (1919) 1919 Put 74 (77)

(See (1918) 1918 411 426 (427) 411 arbitrators acting—I adure of one to sign does not make award invalid 1 (1920) 1920 Lab 223 (232) 1 Lab 481 Awaid not signed at some time on

Award not signed at same time on the same day by all the arbitrators —It is not invalid (1622) 9 Cal 90 (907) 2 out of 5 arbitrators

(1833) 9 Cal 905 (907) 2 out of 5 arbitrators ceased with consent of parties — Award valid

(1930) 1330 Sind 190 (192) Both arbitrators plaudors—Doe appearing for another in other cases—Award valid (See also (1934) 1934 Bom 6 (9) It is not however necessary that all the arbitrators should sign the award in the pricence of each other)

(See (1935) 1935 All 90 (91) Arbitrators arriving at decision but waiting for signing tward — One of them chaoging his mind and not app as

2 (1918) 1918 Cal 860 (860) (1932) 1932 Yi d 157 (154) (1921) 1924 Rung 153 (154)

(1918) 1918 All 274 (275) 3 (1875) 7 N W P H C R 307 (371) 4 (1924) 1924 Vad 274 (277) Received writt u statement and documents — H is

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out taking evidence and mithout giving apportunity to a party to prove his case — Held amounts to

validate the award? The arbitrators can make an ex parte award if the parties do not attend the hearing after receipt of sufficient notice 8

- (4) The refusal of an arbitrator to examine witnesses produced by cither party is misconduct within the meaning of this Paiagraph 9 In order to impeach an award on this ground it must be shown that a witness was distinctly tendered to the arbitrator.10 But it is not misconduct to refuse to admit evidence which was unnecessary and which would not have in any way helped or affected the decision 11
- (5) An arbitrator ought not to hear or receive evidence, oral or documentary, from one side in the absence of the other 12 It has, however, been held by the High Court of Madias that there is no misconduct where an opportunity was given to the other side of meeting and answering such evidence 124 Similarly if the arbitrator tikes evidence in the absence of the parties with their consent13 or where one of the parties deliberately absents himself from the bearing14 the award made thereafter is not bad for misconduct
- (6) It is misconduct on the part of an arbitrator when he examines no witnesses where the nature of the dispute is such that it could not

(See (1933) 1933 Sind 300 (301) misconduct (1699) 3 Cal W N 261 (369) Parties given opportunity to pro-duce evidence - Evidence not proof (1927) 1927 Lah 847 (34a) (1922) 65 Ind Cas 577 (578) (Lab) duced-Arbitrators are not guilty of (1927) 1927 Mad W N 917 (1924) 1924 Sind 27 (28, 29) 17 Sind L R misconduct in deciding on the evi-172

12 :

(1920) 1920 Cal 386 (957, 358) 47 Cal 29 [See (1919) 1919 Mad 1929 (1933) In the case of ammor arbitrator cannot protect millior s interest by

removing a defaulting guardian but idjourn proceedings for securing proper representation of minor ] (1918) 1918 Cul 52J (529) Oral notice is

sufficient (1916) 1916 All 278 (253) Absence of notice of a meeting at which no evidence is

arbitrators that they were prepared to receive evidence does not render ward invalid 7 (1906) 29 Mad 44 (45)

. . . . .

(1914) 1914 U B 53 (54) (1916) 1916 All 278 (282) 10 (1912) 13 Jud Cas 161 (160) (Cal)

(1917) 1917 L B C8 (71) 11 (1909) 4 Ind Cas 1161 (1152) 3 Sind L R

164 (1918) 1918 Cal 39J (400) Arbitrator can decline to summon witnesses in the 1

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3, 93 read in the absence of one party-No mis be determined without evidence 16

- (7) An arbitrator who makes private inquiries and bases his award or such information which the parties had no opportunity to etch is guilty of legal misconduct. But when the parties agree to be bound by the decision of an arbitrator in whatsoever manner is might see fit to arrive thereat, the award will not be had if based on private onquiries of the arbitrator?
- (8) Ordinarily, an arbitrator has oo right to decide a matter referred to him on his personal knowledge and an award hased on set knowledge canoed be mantianed <sup>18</sup> But where the submission to arbitration gives him power to decide a case upon his one personal knowledge<sup>19</sup> or where a particular arbitrator has been selected only because of his personal knowledge of the matters in dispute, <sup>29</sup> it is not misconduct on the part of the arbitrator to import into the consideration of the case his own personal knowledge.
- (9) An arbitrator has oo authority to delegate his functions to a stranger<sup>11</sup> except the performance of acts of a merely ministerial character <sup>22</sup>

21

been substantially affected by such knowledge (1926) 1920 Mad 752 (751) (1927) 1925 Mad 1083 (1987) (1920) 1920 Nag 123 (188)

(1915) 1915 C:1 713 (714) An arbitrator acts illegally in not disclosing to the parties the documents on

which he acts [See (1921) 1921 Med 271 (272) Such knowledge communicated to coorbitrators in the presence of parties—tward is valid]

(1922) 1J22 Lah 480 (180) Inquiry made in the presence of parties — Is not objectionable

(1925) 1925 Ring 383 (354) 3 Ring 387
Artitrators not meting upon such
knowledge—tward is not viriated
(S-o (1935) 1935 Vesh 60 (71)
Though private enquires made by
arbitrator, award based ineroly on
documentary oxidence is not

iSee (1923) 1923 Mad 301 (302, 304) 47 Mrd 30 But guardian of a minor cannot so agree, though an adult can do sol

18 (1919) 1 113 Alf 93 (99) 42 All 185 (1935) 1935 Mad 152 (155, 159) Hat Court will not inteller unless award has (1925) 1923 Mad 33 (50 52) Guardian of a minor can consent to aristrator a decision on personal knowledge.

(1923) 1929 Mad 144 (143) Arbitrators selected on account of present Lnowledges—Used the only an extra standing and appreciating ordices—Piteld award not bid [Pro- (1931) 1931 Cal 53 (57) 57

Gal 260] (1916) 1916 Bom 4 (7) 41 Bom 518.

(Son (1910) 5 Ind Cas Day 1 (Son G18 Arbitettor eramining a witness who wis asked to civing and graduate—Held no delegate a first whenty?

of authority]
22 (1902) 29 Cal 854 (807) 29 Ind App 163
1902 Pun Re to 87 (PC)
1935) 1355 Oadh 349 (353) Wn re of s

part of award to the dictation of the artistrator is a ministerial act (1800) 1803 Pun Re No. C.5, Page 57,

TF

(10) Where an arbitrator is indebted to one of the parties at the time of reference on becomes indebted after the reference25 or has a personal interest in the subject matter of the dispute's or where he has come to know of the facts of the case in the capacity of an advisor of one of the parties27 and where such fact is not disclosed to the other parts the award is vitiated by misconduct But a pleader is not incompetent to be an arbitrator simply because he was engaged by one of the parties as his plender on some former occasions 25

(11) Where an award is made after a delay of five years it will amount to misconduct unless the delay is properly explained 20 The reason is that it is the duty of the arbitrator to see that the proceedings are conducted with reasonable diligence and not doinso is a failure in his ordinary duties as an arbitrator. But where delay in making an award is caused by the voluntary absence of one of the parties that party cannot impugn the validity of the award on the ground of delay 30

(12) Where the decision of an arbitrator is perverse it amounts to misconduct on the part of the arbitrator 31

(13) Where one of the arbitrators is guilty of misconduct in laying accepted an illegal gratification from one of the parties the award ought to be set uside in its entirety inasmuch as it is difficult to say how far the other arbitrators were influenced by the biased and interested opinion of one of them "

See also Note 8 12 fra and the undermentioned cases 43

Affirmed in 2J Cal 8-4 (PC) on at 23 (1931) 1.331 P C 289 (293) 58 Ind App 391 (1845) 1875 Pun Re No 41 page 119 Delay owing merely to matter ton and failure to attend on 2 or 3 successi a

(I C) (1925) 1925 Pat 465 (466) p 168

trary to all the evidence which they

p 168

29 (1928) 1928 Dom 49 (50) 52 Bom 116 [See [1912] 13 Ind Cas 48 (49) (All) Delay waved by parties objecting] C P C 378 & 379

Reference of dispute as regards management-Scheme- Arbitrators appointing themselves as managers -Award is bad

7 Acquiescence in acts amounting to misconduct

The principles mentioned in Note 6, ante in relation to the vinos instances of misconduct must be indestood subject to the quadification the the parties may agree that a reference may be conducted in a princular wal. It is also well settled that an objection to the niceular or improper conduct an arbitrator may be warved by the parties either expressly or by conductive principle that Courts will not permit a puty to he by or act in an indees manner so as to obtain the benefit of the award it it is in his favour all endeviour to set it aside if it is not. Thus where one of several arbitrators absent at some of their meetings and a party principates in subsequent proceedings without objecting to the irregularity or where the arbitrators eximine the plaintiff switnesses in the absence of the parties and the defendant who is a new of this makes no protest at that time or later on. The party will be deemed to have warred his right to object to the award.

(1935) 1935 Vid 184 (188) Important est doneo improperly admitted by as bitratos—It must have influenced the arbitrator and the award will therefore be set saide

(1933) 1933 Sind 295 (296) 27 S. L.R. 2,27
Arbitrator authorized to deal with
costs as they would be dealt with
by Court — Dismissal of suit by
arbitrators but planning awayded
Re. 200 court — Or oldnary costs
product — Or oldnary costs
not claimed in suit or even before
thin tator—Award must be set ande

(1928) 1923 Nag 70 (71) Reference to ar bitrators to inula partition—Aibit rators can make allotment subject to conditions affecting its tenure of devolution

(1978) 5 Cil 8"5 (379) 4 chitrators them selves doubting the correctness of their decision—tward not valid

(1876) 1876 Pun Re No 5 1age 8 Reference to examite accounts—Award mide without examination of te

d not issite

Nate 7

1 (1894) 14 1 am 209 (312) Such agreement may be express or mapked from the conduct of the parties during the sintration for such unstances is note 6 a ste

2. (1930) 1330 Sand 79 (81 82) 24 Sand L R

(1935) 1935 Lom 1.7 (131) 59 Bom 269 (1930) 1930 Oudh 349 (352) but water must be an intentional act with ing award and asking 3 arkit ato , to complete it - Estol pel

(1921) 1924 Cal (65 (66)) 3 art itate a appointed — One refused to act—Chringe up the personnel of themset itors made with con ent of d / i inta

quiescence in objection to jurish

A stipulation in in igreement of reference precluding the parties from impeaching the validity of the iward is within the mischief of S 2S of the Indian Contract let and will not therefore prevent be Court from setting aside the award on my of the grounds mentioned in this Priagraph 6 The reason is that the grounds mentioned in this Parigraph so gest the requisites of a valid agreement as well as of a valid award

8 Acts not amounting to misconduct

In Indicus v Mitchell Lord Halsbury observed as follows We must not used upon too minute observance of the regularity of forms among persons who naturally by their education or by their opportunities cannot be supposed to he very familiar with legal procedure and may accordingly make slips in what is mere matter of form without any interference with the substance of their deci Courts will not therefore set aside un award for misconduct of the arbi trators unless there has been something radically wrong and victous in the proceedings before the arbitiators 3

The following ue some instances of acts that do not amount to miscon

- (i) It is not a valid objection to an award that the arbitrators have not acted in strict conformity with the rules of evidence d Thus the honest though mistal en a lmission by in aibitiator of a document in violation of a rule of evidence introduced pro has vice (for the occasion) would not be a stound for setting aside on award " Communications between parties in the course of negotiations between them are madmissible in evidence. This rule of law based upon grounds of public policy and convenience is as binding on arbitrators as on Courts But if a raity does not object to such evidence being received on this ground it ennot later on be made a ground for setting asido the award "
- (2) If a party offers to abide by the oath of the or posite party the arbi trator can male his award accordingly 6
- (9) It is generally desirable that an inbitiation should in it e and set up for sub-equent use if neces iry notes of the proceedings before him But the absence of such notes is not a ground for setting iside the award and especially if the puty objecting did not mile any rio test until after the award was made

(4) Until an award is finally published the arbitrator has a right to reconsider the award be has already made 8. But once it is published

6 (1893) 6 VI td "69 (3FJ 3 0)

(1316) 1916 Lah 89 (91) 1 HC 1 B No 11" (See (1J22) 1)22 Wall 1 9 (160) Ca have a vard set aside on il a ground of the thirty on the f ce of it [l'ut co (1)10) 1916 Lah vo vo Dis out 1 from 1 1916 Lal 891 7 (1953) 6 Mad 369 (370)

Note 8

1 11 t **53 (353)** 

4 (1314) 1914 1 om 274 (77 ) 19 In 1 Cas 934

(9 ) 39 Bo 1 to Reversa g (1912)

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(a) 5 h

(19 a 8) 1 411 a35 (5 J) I S<sub>1</sub> k

7 (1914) 1.014 1 C 105 (10 ) 36 All 5 6 17 Ou lh Cus 120 (P C) Affining (1911)

13 In l Cas 270 [See (1926) 1320 Ondh "O: ("Os) 1 Luck 139 Pencil rote transcribed and file !- Suspicions circum tinces

-1Iell to be misco idnet? 8 (19, 1) 4 Cal 2a1 (235)

1 Ind C s 636

15ce (19 9) 13 5 Bo

(19 1) 4 Cul 31 ( 36)

(1493) Lth 431 (199)

(1910) 6 Ind Crs 963 (968)(Lah) (1919) 1919 Pat 74 (76) 9 (1911) 11 Ind Crs 481 (487) (Cal) (1912) 1918 Lah 233 (210) 1917 Pun Re

(1889) 9 C41 575 (579)

No 99

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(1925) 1925 Oudh 269 (270) 23 Oudh Cas 74 (1912) 15 Ind Cas 321 (325) (Oudh)

his authority is exhausted. He is functus offices and has so power thereafter to correct or modify the award?

- (5) When a cause or matter in difference is referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and fadjudge of all questions both of law and of fact. 10 Therefore, Courts will not sit as Courts of appeal to consider the correctness of an award on the ments in respect of matters of fact or even of law? An error in calculation in the award, unless so palpable and goes as to be strong evidence of misconduct, is no ground for interference by the Court. 12 But the committing of a mistake in law and is ting it visible on the face of the award is a form of judicial misconduct. 13 See also Note 6 to Paia 14
- (6) An award need not be a reasoned judicial decision and the arbitrators need not even give their reasons for their conclusion 14
- (7) An award made by the arbitrators which merely embodies a compromise arrived at before them by the parties is not invalid. It is reason is that such a proceeding is as much an adjudication of the case as a decree of a Court founded on a compromise

(1924) 1924 Pat 488 (491) 3 Pat 443

of property is opposed to Hindu law (See (1967) Lun Re No 47, in award

5 111

14007 40 40

cannot be set aside on the ground that the arbitrators were unleitered (1897) 17 All W N 162 (163) men not versed in law (1928) 1928 Oudh 1 (7) 3 Luck 1 tward setting aside deed of gift ou coldi 153 of to be e Court tion of donor's paying to donee com ponsation to the extent of benefits he arbt (1924) 1924 Oudh 54 (55) Reference for | artition-Arbitrators can make for vision for maintenance of finishmenbers of the family [See also (1934) 1934 Pat 10e (10). Arbisrators lightly discarding d of into the question of reasonableness of award (1921) 1921 Lah 34 (34, 35) 2 Lah 114 The arbitrator is not controlled in his decision by the rules of Hindu law (1923) 75 Ind Cas 198 (199) (Pesh) The fact 21 Sand L R 101 55 Cal 1-6 (1 S al (1934) 1924 Sand 75 (53, 84 57) 17 S al that the award seemed to be an un Solo Z

d App 51

(3) Where the arbitrators accept a fee as remuneration for their services at the suggestion and with the consent of all the parties such acceptance of a fee does not involve any misconduct on their part 10.

See also the undermentioned cases and other instances mentioned in

#### 9 Evidence of arbitrator

II.

In arbitrator selected by the parties comes within the general obligation of being bound to give evidence when called as a witness in proceedings to enforce or set aside an award. Ho may be evinenced upon the course of procedure which he has adopted, the interril which he has utilised in arriving at his decision and as to every matter of feet with reference to the making of the award, so as to put the Court in possession of the history of the hitigation up to the time of his proceeding to make the award. But a party can go no further and cannot examine him as to why and how he arrived at a particular decision and serutions his decision on matters within his jurisdiction and on which his decision is final.

10 Fraudulent concealment of any matter which he ought to have disclosed

In cases of arbitration where a person is appointed by two parties to exercise judicial duties, there should be uberrina fides on the part of all the parties concerned in regard to his selection and appointment and every disclosure which might in the least affect the mods of those who are proposing to submit their dispute to the arbitration of any particular individual, as regards his selection and litness for the post ought to be made, so that each party may have every opportunity of considering whether the reference to arbitration to that particular individual should or should not be made <sup>12</sup> Thus, where the arbitrator is the retained pleader of one of the parties 2 or is related to him or is interested in the

(10°8) 1928 Lah 015 (916) Drepute between partners referred—Two partners compromising and others consenting— Abstrator can go into the question of commission and pass award in the commission of the commission of the [See also (1931) 1033 Mad 662 (663)] Latition star travered to architecture

isee and (1953) 1955 Man 852 [804]
Laritton suit referred to arbitration
—Compromise without Court's same
tion consented to by gardians on
behalf of minors and recepted by
arthiritors—Such guardans cannot
sub equently plend that consent
will not affect minors rights)

16. (1906) 29 Nad 44446)
((197) 1935 Cl 326 (1855) Arbitrators taking mouse for charges or as fee from one of patters may be sufficient to set risks award—But where one of patter have paid to by mutual arrange trick have paid to by mutual arrange with the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the contr

17 (1925) 1925 Oudh 927 (228) Arbitrators everly divided in their opinion—

showing that arbitrator took the party into his confidence, no mis

conduct
(1885) 7 All 273 (276) Award cannot be set
aside on the mere surmise that arbi
trator might have been partial be

leng related to a party (1921) 1924 Col 1051 (1053) (1909) 2 Ind Cas 02 (93) (Mad) May be exa mined to ascertain whether a proceeding of his is an award (See (1872) 17 Suth W R 516 (517) Can be eximised to prove admission mads before him in proceeding after

setting aside of award]
Note 9

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(1924) 1924 Sind 51 (54) 19 Sind L R 152 Note 10 1 4bundant confidence

14 (1696) 25 Cal 141 (144) (1933) 1933 Sind 68 (69 70)

(1933) 1933 Sind 68 (69 70) 2 (1893) 25 Cal 141 (144)

3 (1925) 1925 Sind 1.0 (151, 152) 19 Sind L R 251

(1933) 1935 Oudh 349 (352) Arbitrator related to one defendant and having monetary dealings with another

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15, subject-matter of the dispute and such fact is not disclosed by that party to the strong other side, the award made by the arbitrator is hable to be set aside under Cl (!) of this Panagrub;

# 11 Award made after order superseding arbitration

If the power of the arbitiatin is revoked by the Court passing an order superseding the ubitrition, "the arbitiators have no longer session of the reference, and they are function officers and cease to have any more power to make an award than the mun in the strent."

Where in award was not made in time and consequently the reference to arbitution wis cincelled, the Court has no pawer to look at the award seb sequently made and hase its judgment in it, as if it were the report of a commissioner.

# 12 Award made after the expiry of the period allowed by the Court

It has been already mentioned in Note 1 ants that S 531 of the old Code after setting out the grounds on which an award could be set aside an elawester (b) and (c) provided that "no award shall be valid unless made, within the time allowed by the Court" It was, therefore, held under that Code that an award made after the expiry of the period allowed was null and soid, that is to sy, there was no award on which the Court could make a deepec.

The effect of the alteration made in this Paragraph is that an award made out of time is not per see a multity, but only aside the award if the parties so desine to a made to set aside the award on that ground, and the set aside the ward on that ground, and the set aside the ward on that ground, and the set aside the ward on that ground, and the set aside the ward on that ground, and the set aside the ward on that ground, and the set aside the ward on that ground, and the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as the set as

made to see aside the usual on that ground, or long to the about of time see notes the Par 16 out of time see notes to Par 16.

## 13 Being otherwise invalid

Section 521 of the old Code did not cent un the word. "or being otherwise minished. It was held under that Code that an objection to an award could not be taken under S 521 on this ground that the award was invalid for any reason other than these mentioned in that section." The effect of the charge mades this Paragraph is that in objection to an award on the ground that its invalid for any cause whatever must be taken in the Court in which the award is field and if no objection is there taken or lift is made and disallowed, the award becomes final and cannot be challenged subsequently. See also notes to Para 16

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4 (1926) 1926 Oudh 307 (309) 1 Luck 139
Note 11
1 (1896) 18 411 422 (497)
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Note 12

terting to the afterations are it is subsettled

(191°) 10 Ind Cas 223 (\*24) (Cal) (190) 1920 Lah 107 (107)

(See also (1933) 1933 Lah 173 (177)], 3 (1916) 1916 Lah 80 (82) (1933) 1933 Oudh 563 (564)

(1933) 1933 Oudh 563 (564) (1919) 1919 Pat 93 (95) 4 Pat L Jour %

Note 13 1 (1914) 1914 VII 446 (149) 21 Ind Cas 9 3 (932) -6 All 69

(932) .6 All 60 (1905) 11 Crl W N 1152 (1153) (1908) 5 All L J 644 (646) (1908) 5 All L J 644 (646) (1908) 6 All L J 644 (646)

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<sup>2 (1932) 1932</sup> Lah 134 (130)

An award made otherwise than in accordance with the authority conferred he the order upon the arbitrators is an award which is 'otherwise invalid' and which may accordingly be set aside by the Court under this Paragraph 3 Thus where the irbitiators treat a person who is not a party to the suit which has been referred to them as a party to it and decide disputes between parties to the suit or any of them and such person the arbitrators exceed their jurisdiction and the award is invalid within the meaning of this Paragraph . Similarly where the arbitrators on beyond the scope of the submission and decide matters outside the cope of the suit, the Court will be justified in setting aside the award as invalide It has been held in the undermentioned cases that such an award cannot be treated putly as one made on a reference through Court and partly as an award by private agreement. But where simultaneously with the order of reference, the parties agree to refer to the same arbitrators matters outside the suit and separato awards are made and it appears that the view of the arbitrators in the latter award could not have influenced their minds in deciding the former, the award is not vitiated?

There is a conflict of opinion on the question whether an award can be challenged under this Paragraph on the ground that the olds of reference is itself invalid. The High Court of Calentia has held that the words "being otherwise invalid" in clause (d) of sub-section (1) of this Paragraph refer to the invalidity of the kind mentioned in the preceding sentences of the said clauses and, that therefore, a ground of objection which challenges the validity of the order of reference is not a ground which may be put forward under this Paragraph. The High Court of Allahabad, while expressing conflicting opinions as to whether the words should be construed explaint generic with those previously stated, has held that in objection as to the valuity of the reference is not in objection within this Paragraph. But the High Court of Lahou has held that the doctime of equadem enerits cannot be invoked to restrict the full and natural meaning of the phrise for being otherwise invalid. And that an award can be challenged on the ground that the reference is anythed so not invine been agreed to by all the paties?

Cis

(1919) 1.1 Ind C to 248 (351, 352) 6 Sind L R 169

(1º 0) 1930 Nom 431 (488) 51 Ren 696 Objections to the viddat of the varid—A separate surf for that par pose will not be—The remedy has under Para 15 (i) (c) [See (1938) 1933 Mod W Mar(5) (1476) Apart referring to abstration with out withouts—Permishal Secondary

(See (1933) 1933 Mad W N475 (1476) Nent referring to subtriving with out authority — Principal becoming aware long after proceedings are over—He has sight to n-string a suit to set aside award] [See al o [1926] 1926 Mud 306 (366) Arbitritors aching beyond scope of reference and giving award on a matter to which all pirries agreed—twind on this part is enforceable by out?

8 (1931) 1931 Cal 109 (110) (1931) 1931 Cal 109 (110)

(1931) 1931 Cal 211 (216 218) o8 Cal 628 9 (1921) 1921 All 16 (17) 43 All 305 Must

not be construed ejustien generis (1934) 1934 All 95 (95) Must not be construed ejustien generis

(1920) 1920 All 45 (48) 42 All 277 Must be

The High Court of Madras has also held that the words are not equipment generis with the other cases mentioned in this Paragraph but are meant to include all cases of invalidity on grounds other than those mentioned and that therefore an award is invalid if a minor who is a party to the arbitration is not properly represented in the proceedings 1º

#### 14 Appeal

No appeal lies from an order overruling objections to an award 1 Nor does an appeal he from an order setting aside an award under this Paragragh except in the case provided for in S 104 sub s (1) Clause (a)

Where a Court sets aside an awaid under this Paragraph and there after decides the suit on the merits the Court of appeal can on appeal from the decree in the suit inquire into the propriety or otherwise of the order setting aside the award 3 See S 105 ante But where an order supersedue, in award is confirmed in appeal in a case coming under S 104 Clause (a) the Court hearing the appeal from the decree in the suit is precluded from re opening the question of supersession of the award 4

It has been held by the High Court of Calcutta that an order made by a Judge of the High Court in the exercise of original purisdiction refusing to set aside an award is a judgment within the meaning of Clause 15 of the Letters Patent and that an appeal hes therefrom to the High Court in is appellate jurisdiction 5 See notes to S 104

# 15 Revision

(1916) 1916 Pat 21 (23) (1912) 15 Ind Cas 928 (930) (Lah) [See (1876) 1876 Pun Re No 117

No revision hes to the High Court under S 115 against the order of the lower Court refusing to set aside an award on any of the grounds mentioned in this Paragraph merely because the lower Court has proceeded on an erroneous view 1 Nor is an order setting aside an award under this Paragraph open to revision 2 The reason is that the order is not the decision of a case within the meaning of S 115 and moreover the applicant has got another remedy of challenging the order in an appeal against the decree in the suit if ultimately the suit is decided against him See Note 14 ante But where the ground for

12 (1919) 1919 Mad 1029 (1031 1032) page 243 Acquescence in proceed [See also (1920) 1920 Mad 195 (196)] ings after setting aside an ard-0 der cannot be challenged in appeal mader S 1051 [But see (1906) 28 All 408 (410) ] 4 (1920) 10°0 Pat 600 (606) 5 (1698) 26 Cal 361 (368 3 8 380) ab 715 (1878) 4 Cal 231 (234) 916 Note 15 456 1 (1911) 9 Ind Cas 355 (385) (Lal.) (1908) 5 All L J G44 (G47) (1933) 1933 Lah 692 (694) 14 Lah 15 Order refus ng to set as de award s (1883) 11 Cal 172 (174) [Contra (18 0) 14 Suth W R 327 (327)] only interlocutory (1919) 1919 1 at 93 (98 99) 4 Pat L Jour (1928) 1928 Luh 753 (754) (1881) 1881 Pun Re No "2 page 162 (191°) 15 Ind Cas 62 (63) 1912 Pun Re No (1908) 31 Mad 345 (346) (1913) 20 Ind Cas "73 ( "5) 16 Oudh Cas (1925) 1925 All 566 (567) 47 VII 916. (1922) 1922 All 64 (65) 233 (1921) 1924 An 761 ( 61) (1883) 5 All 293 (294) (1932) 1932 Bom 232 (283)

(1923) 1923 Bom 402 (403) 47 Bom 7.1

revision is the misinterpretation by the Court of the agreement of reference3 or where an award is set aside on very madequite grounds4 or "where the Court refuses to hear a valid objection properly raised before at,5 the order is open to revision under S 115.

The High Court of Allahabad has held in the undermentioned case that where an award is set aside on the ground that the reference to arbitration ought not to have been made, the order setting aside the award is without jurisdiction and that therefore a revision lies to the High Court

P. 16. [S 522] (1) Where the Court sees no eause to nemit the award or any of the matters referred Judgment to be ac to arbitration for re-consideration in manner cording to award atoresaid, and no application has been made to

set aside the award, or the Court has refused such application, the Court shall, after the time for making such application has expired,3 proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall he from such decree except in so far as the decree is in excess of, or not in accordance with, the award

[1877-S 522; 1859-S 325.] Sunopsis

Note No. Legislative changes Judgment without hearing objections Pronounce judgment according to the to award - Appeal if lies against decree ' After the time for making such apple Second appeal 8 cation has expired Revision 9 Finality of decree in accordance with Binding effect of award 10 Enforcement of the award 11 Finality of decrees not in accordance with the award Suit to set aside award 12 Appeal against decree based upon in Court acting as arbitrator 13 valid award Valuer and arbitrator 14

### Cther Tomes

Decree lased upon a judgment pronounced in contravention of this Paragraph before the period for filing objections-Whether appealable See Note 4 Pts (7) to (16)

Decree in accordance with award submitted after remittal-Whether appealable See Para 14 ante Note 9 Pt (4)

Decree on award in the absence of the

(1902) 26 Bom 551 (552)

(1903) 30 Cal 337 (401) (1926) 1926 Lah 191 (192)

(1916) 1916 Lah 89 (91) 1916 Pun Re No.

(1929) 1929 Oudh 493 (494)

3 (192-) 1928 Lah 200 (551) In this case Court considered that reference gave power to arbitrator to decide upon private enquiry while as a matter of fact it did not so provide

defendant-Whether in ex parte decree See Note 2 Pt (3)

No apreal shall he from such decree except in so fir as the decree is in excess of or not in accordance with the award

See Note 5 Pt (1) Objection to validity of award - Whether entertaurable in appeal for the first time See Note 6 F N (1)

(See (1922) 1922 411 69 (69)]

4 (1916) 1916 Oudh 137 (138) (See also [1935] 1935 All 519 (519)

Lower Court not carrying out directions of High Court in deciding obsections High Court has surrediction to set aside order setting aside award under S 107 of the Government of India Act]

5 (1921) 1924 All 788 (789) 46 All 660 6 (1921) 1921 All 16 (IS) 43 All 305

The High Court of Madras has also held that the words are not equiden generis with the other cases mentioned in this Paragraph, but are meant to include all cases of invalidity on grounds other than those mentioned and that, therefore an award is invalid if a minor who is a party to the arbitration is not properly represented in the proceedings 13

## 14 Appeal

No appeal lies from an order overruling phjections to an award 1 Nor does an appeal he from an order setting aside an award under this Paragragh' except in the case provided for in S 104, sub s (1), Clause (a)

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15 Revision

No revision lies to the High Court under S 115, against the order of the lower Court refusing to set aside an award on any of the grounds mentioned in this Paragraph merely because the lower Court has proceeded on an erroneous view 1 Nor is an order setting aside an award under this Paragraph open to revision 2 The reason is that the mider is not the decision of a case within the meaning of S 115, and, moreover, the applicant has got another remedy of challenging the order in an appeal against the decree in the suit if ultimately the See Nate 14 ante But where the ground for suit is decided against him

12 (1919) 1919 Mad 1029 (1031 1032) [See also (1920) 1920 Mad 195 (196)] page 243 Acquiescence in proceed ings after setting aside award Order cannot be challenged in appeal under S 105] (But see (1906) 28 All 408 (110) ]

4 (1920) 1920 Pat 605 (606) 5 (1898) 26 Cal 361 (368, 378 380) (1578) 4 Cal 231 (234)

Note 15

1 (1911) 9 Ind Cas 385 (385) (Lah) (1933) 1933 Lah 692 (694) 14 Lah 15. Order refusing to set aside award is only interlocutory (1919) 1919 Pat 93 (98 99) 4 Pat L Jour

FB it see [1999] 1929 Lah 869 (870)]

\_ 327 Re No

(1908) 31 Mad 345 (346) (1918) 20 Ind Cas 773 (775) 16 Oudh Cas (1916) 1916 Pat 21 (28)

/aa= 1

(1912) 15 Ind Cas 928 (930) (Lah) [See (1876) 1876 Pun Re No 117.

(1923) 1923 Bom 402 (403) 47 Bom 1 L

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P. 16. [S 522] (1) Where the Court sees no cause to icmit the award or any of the matters referred Judgment to be ac to arbitration for reconsideration in manner cording to award afore-aid and no application has been made to set aside the award, or the Court has refused such application. the Court shall, after the time for making such application has expired.3 proceed to pronounce judgment according to the award

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall be from such decree except in so far as the decree is in excess of oi not in accordance with, the award

[1877-\$ 522, 1859-\$ 325]

Suionsis

Note No Legisletive changes Pronounce judgment according to the award After the time for making such apple cation has expired Finality of decree in accordance with the award Finality of decrees not in accordance with the award

Appeal against decree based upon in valid award

Note No Judgment without bearing objections to award - Appeal of lies against 2 decree Second appeal 8 9 3 Revision Binding effect of award 10 Enforcement of the award 11 12 Suit to set aside award 13 Court acting as arbitrator Valuer and arbitrator 14

#### Cther Topics

Decree is ed upon a judgment pronounced in contravention of this Paragraph before the period for filing of jections-Whether appealable See Note 1 Pt. (7) to (16)

Decree in acc rdance with award submitted after remittal-Whether appealable See lara 14 ante Note J Pt (4)

Decree on award n tic alsence of the

(1902) 26 Bom 551 (552) (1903) 30 Cal 397 (401) (1926) 1926 Lah 191 (192)

(1916) 1916 Lah 89 (91) 1916 Pun Re No

defendant-Whether an ex parte decree hee Note 2 It (3)

No appeal shall be from such decree except in o far as the decree is in excess of or not in accordance with the award

See Note 5 It (1) Objection to validity of award - Whether entertunable in appeal for the fir t time See Note 6 F N (1)

[See (1922) 1922 All 69 (69)]

4 (1916) 1916 Oudh 137 (138)

to set aside order setting aside award under S 107 of the Goveri. ment of India Act]

5 (1924) 1924 All 768 (789) 46 All 656 6 (1921) 1921 All 16 (18) 43 All 305

#### 1 Legislative changes

- 1 The words or if the award has been submitted to it in the form of a special case according to its own opinion on such case, which occurred after the word tward at the end of sub S (1) have been omitted S 104, Cl (b) now gives a right of a peal against an order on an award stated in the form of a special ca cl See also Notes to Para 11
- 2 The words ' and shall be enforced in manner provided in this Code for the execution of decrees ' which occurred in S 522 of the old Co le after the word followed in sub S (2) have been omitted

## 2 'Pronounce judgment according to the award

Where the Court sees no ground to remit the award under Para 14 and where no application has been made to set aside the award or where such applica tion has been relused, the Court has no option but to pronounce judgment accord ing to the award 1 Where, however, any portion of the award deals with matters outside the scope of the suit, the Court should not embody such portion of the award in its decree 2

It is not necessary that the judgment should be pronounced in the presence of the parties Where, therefore, the defendant does not file any application to set aside the award, and the Court thereupen pronounces judgment in accordance with the award as it is bound to do, the decree which follows thereon is not an ex parte decree oven though the defendant is absent at the time the decree is passed 3 Where an application to set aside such a decree is refused the order is not appealable under O 43, R 1, Cl (d) 4

Where an application to set aside an award is dismissed for default an application to restore the same is maintainable notwithstanding that a decree is passed in the meanwhile "

# 3 After the time for making such application has expired

In application to set aside an award must, under Art 158 of the Limitation Act, he made within ten days of the time when notice of the filing of the award is given to the parties "I notice is given to the parties where the parties neturally receive the same." I mere direction to issue notice is not equivalent to the "giving" of notice within the meining of the uticle \$ 5 of the

3 (1921) 19 H Pat 603 (604) 3 Pat 839

page 393] 4 (1921) 1921 Pit 603 (604) 31 it 839

a (1920) 1920 All 215 (21a)

1919 ---(1015) 1915 Lab 352 (35°)

[See also (1000) 1900 Pun Ke 10 07

Note 3 is amen led by let Al III of 1919

Same thew held even before fet Al III of

Schedule II Para 16-Note 1 1 See Statements of Objects and I easons Note 2

<sup>1 (1924) 1924</sup> Pat 603 (604) 3 Pat 839 (1924) 1924 All 788 (789) 4G All 656 (1870) 2 N W P H C R 150 (153)

<sup>(</sup>See also (1933) 1933 Oudh 547 (548) J Luck 219 Transfer of case to mother Court after order of refer euce but before award-tward file l before Court to which cale traus ferred-Latter Court has musdie tion to pass decree in terms of Thiswr

<sup>(</sup>See (1935) 1935 All 372 (372) Arbi trator's function is to come to a decision and it is the Court that should decide soit. It is not for the urbitrator to decree or dismiss the suit]

<sup>(1930) 1930 111 477 (478)</sup> Ques on 4 (1930) 1930 511 477 (477)

<sup>2 (1,20) 1920</sup> Mad 615 (617)

Limitation let deer ret apply to such applications and the Court cannot excuse the delay in the presentation thereof " & 12 of the I mutation Act will, however, pply, and, in computing the period of ten days the time requisite for obtaining a cory of the award can be deducted 6

3027

4 Finality of decree in accordance with the award

(1918) 1318 Nag 191 (19 )

11

In award on a reference made through the intervention of the Court becomes final where the Comt sees no cause to make a remittal under Pula 14 and where no utilization has been made to set aside the award under Para 15 or where such application has been refused. Objections relating to matters antece gent and leading up to the ward cannot, therefore be raised after the award becomes final In fact the Court is lound to pronounce and ment in accordance with the award and pass a decree following it In order to give effect to the -eneral principle of finality of awards," it is declared by sub Para (2) of this Para 121 h, that no appeal shall be from such decree a e, a decree following a judgment which is in accordance with the award Where therefore a decree is in accordance with the iward no appeal will be against it on the ground that the Court his circucously remitted or refused to remit the award under Pari 14 or on the ground that the abitators were guilty of misconduct 6

But the prohibition is to appeal will apply only where the decree though

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(1914) 1914 Oudh 37 (328) 17 Oudh Cas
o (1027) 1327 Lah _ (3 (2"4) | b Lah 274
   (1917) 1" In I C 15 7 (5) (Cal)
(101.) 1.117 \ 1. 211 (212) \ 12 \ \ag 1 R 1^2 \
6 (10 3) 1.33 Rai \ 35 (3\)
(1032) 1032 \ 1 1d 555 (a\)
   (19%) 1927 Pat 135 (18J)
  (19 6) 19_6 1 at 164 (165)
(1916) 1916 I at 403 (403)
  (1916) 1916 I at 190 (194) 1 Pat L Jour
   (1,10") 79 411 494 (5%6)
   (131 ) 1913 Lal 224 (126) 4F Cal 721
           [Fut co (1914) 1 114 Sn 1 141 (143)
  (1913) 13 h d Ca 348 (351) 6 Su d L R
  (1916) 1916 Vad 660 (601 662)
                        Note 4
   4 (1309) 31 Mrd 479 (181)
   5 (18J2) 16J2 111 W N Lul (157)
      501
                 2 ab te
1 (130°) 9 Cd 167 (183) 23 Ed V<sub>1</sub> 1 130° i in Re \ (i c)
  (1913) 19 Ind t + 400 (400) (Call
  (18 3) 90 5 11h W R 9 6 (996)
   (1507) D Cal 16 (180) D I 1 111
1907 I un Re N 25 (1 C)
(15 ) 3 Surth W R 4 D (151) (1 C
   (1905) 150 ) 1 ur Re No il 1 t. 118
C (1905) J C 116 (185) 9 L 1 App of
130° Uur Re 95 (P C)
  (1.10~) 35 (11 649 (65) ((0) 1 09 I un he
    (191 ) 1317 (11 71 (72) 39 (11 301 (1910) 191 (1910) (191) (191) (1910) 182 (1910) (1910)
  1130 ] 9 111 45" (469) (1 1)
    (15 6) 1550 VII W N 151 (1 1)
  (1530) 18 AH 414 (417)
(1907) 1902 AH W \ 1 + (1 r)
     (1595) 155, 111 W A .0 ( )
     (1987) 4 All 83 (985 988)
(1551) 1631 All W N 1 (15)
  (1989) 4 411 W N 181 (111)
  (130a) 23 1 cm Sa (2 0)
     (1905) 2 Cal L Jour 14 (1)
(1900) 7 Cil G1 (6)
  (1913) 19 1: d C to 405 (405) (C 1
   (190a) 2 C 1 L Jour 142 (14
     (1591) 7 Cal 166 (16a)
  (1901) 5 Cil W N 916 (919)
     (1575) 24 Sith W R 168 (18
(1573) 20 Suth W R 2 6 ( 1)
  (1862) 8 Suth W R 171 (1 )
(187 ) S t) W R 900 ( 00)
   (1902) 1 02 1 un Re No 65 p e -71 /F E)
(1809) 15 9 I un Re No 16 1 ige 573
     (1972) 17 Suth W R 357 (357)
     (1872) 17 Suth W R 30 (31)
   (1%0) 16 9 1 un Re N 30 1 1ge 190
     41916) 1316 L h "01 ( 02) 1915 Inn Re
              0 00
   (1583) 1503 I un Re % 17
(1907) 12 M d L Jon 431 (437)
   (1593) 2 31-1 1 2 (171 175)
(1-3) 2 31-1 1 2 (406)
   (1-69) J Vad H C R 404 (405)
      (132°) 1322 Mrd 429 (430)
   (1929) 19_9 Nag 264 (265)
      (1316) 1916 M 1 963 (963)
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(1912) 10 In 1 Cas 505 (595) (Oudb)

(1302) a Oadh Las 13 (16)

in accordance with the award, follows upon a judgment "so pronounced' ie, propounced after the expiry of the period of limitation for making an application under Para 15 It has accordingly been held by the High Courts of Allahabad, Calcuttas and Rangoon and by the Chief Court of the Puniab that where a decree is passed before the expiry of such period, an appeal is not barred by this Paragraph Conflicting views have been expressed by the High Court of Madras, one case holding that an uppeal does he, 11 others holding that it does not 12 and a third class of cases holding that a revision will lie in such cases, thus impliedly negativing the existence of a right of appeal 13 According to the High Court of Bombay no appeal will lie in such cases but a revision may lie 14 The Judicial Commissioners Courts of Oudh 10 and Sind 16 have also held that the High Court can interfere in revision in such a case. It is submitted that the view that an appeal lies is correct

Suppose now that the parties accept the award filed in Court and agree that a decree may be passed in terms of the award, has the Court power to pass the decree without waiting for the expiry of the period prescribed by Art 158 of the Limitation Act? The Chief Court of the Punjab17 and the Judicial Commis sioner's Court of Nagpur15 have held that the decree so passed is valid, the reason being that it is, in fact, a decree by consent of parties The High Court of Madras 19 and the Judicial Commissioner's Court of Sind20 have, on the other hand, held that such a procedure is without jurisdiction and that the Court has no power to pass a decree even if an application to set aside the award has been disposed of before that time It is submitted that the former view is correct. The object of waiting till the expiry of the limitation period is only to enable the parties to come in with their objections to the award, if any, and where such parties themselves agree not to object, there is no reason why the Court should wait till the expiry of the period before pronouncing midement

5 Finality of decrees not in accordance with the award

An appeal will lie from a decree based on an award where it is in excess of the award or is not in accordance with the award 1 Thus, where the decree allows

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(1929) 1923 Rang 225 (226) 7 Rang 269
7 (1927) 1927 All 614 (615)
(1907) 29 All 584 (586)
(1896) 18 All 422 (427)
   (1870) 2 N W P H C R 235 (236)
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(1882) 1882 All W N 76 (77) (See (1931) 1931 All 453 (454) 53 All 669 Irregularity is covered by S 99 ] [See (1983) 1993 All 813 (314) Court passing decree in terms of award

without giving 10 days time-It is material irregularity-Decree set aside in revision ] 8 (1873) 20 Suth W R 311 (311)

9 (1930) 1930 Rang 307 (307)

(But see (1925) 1925 Rang 103 (103)

(1912) 17 Ind Cas 481 (481) (Mad) Doubtial if appeal lies

14 (1921) 1921 Bom 32 (92) 45 Bom 532 15 (1921) 1921 Oudh 148 (148) 21 Oudh Car 16 (1916) 1916 Sind 79 (60) 9 Sind L R 193

17 (1913) 21 Ind C1s 298 (301) (Lab)

1916 Pun Re No 18 The observation is however, a cisual and not a con

sidered one ] 11 (1919) 1919 Mad 150 (153) [See also (1929) 1929 Mrd 789 (790) Note 5

1 (1865) 3 Suth W R 168 (169) (1869) 11 Suth W R 140 (141) (1912) 17 Ind Cas 684 (686) 1013 Pun Ri (1912) 17 Ind Cas 684 (686) No 52 Court dismissing stall lanor ing ward, on ground that no civil payment of the amount duo by instalments? or interest, or costs, not granted by the award, the decree is not in accordance with the award and in appeal will therefore, he in appeal will be also where a decree is based partly on an award and partly on the Court's findings" But the mero lict that the judgment is in excess of the award will not are a right of appeal of the decree is in accordance with the award 6

When an award is modified under Para 12, ante, the only award according to which judgment can be pronounced is the modified award. Hence an appeal will not lie against a decree hised on a modified award, though it may not be in accordance with the original award. The contrary view taken in the undermen tioned cases is it is submitted, not sound on principle

Where in appeal hes against a decree which is in excess of or not in accordance with the award, the appellant is not entitled to address the Court on all points which were rused before the lower Court. His appeal would be only in so far as the decree and the award differ and his attack must be confined to the legality of the decree as compared with the award 10

6 Appeal against decree based upon invalid award

Under the old Code prior to the decision of the Judicial Committee in Ghulam Ahin v Muhammad Hasan 1 it was held that S 522 prosupposed a valid and lead award and that therefore in appeal lay against a decree based upon an invilid award 14 Thus it was held that an uppeal lay in the following cases -

(1) Where the reference to arbitration was impugued on the ground that some of the parties bad not consented thereto 2

> (1906) 1906 I'un Re No 18 page 47 8 (1886) 8 All 449 (452) (1932) 1935 Pat 109 (110) (1909) 1 Ind Cas 329 (329) 12 Oudh Cas 23

forth two awards by the same artitritor one modifying the other 1 not one in accordance with the a v red

(1930) 19'0 Lah 47" (4'8) Held to be m according with award (192") 1927 Luli 362 (364) 8 Luh 693 Per

d a not parties to award saying 1 them a parties-They having ul Titled to the proceedings cannot appeal on ground of decree being in exce s of tward

(1651) 3 All 28G (291)

(1J12) 14 Ind Cas 284 (285) (Lth) Revi ion does not lie

(1932) 1932 Cal 713 (713) Decree not arrealable even though grounds of apical were directed against order modifying award But the appeal may be converted into appeal from order modifying award under S 104 (1933) 1933 Lah 13J (139)

9 (1909) 8 Cal L Jour 475 (477)

10 See case cited in f of nete (4) to Note 15 of jara 21 Note 6

1 (1902) 29 Cul 167 (18s) 29 Ind App of 1902 Pun Re No 25 (P C) 11 (1854) 6 All 174 (177)

(1903) 1903 111 W N 150 (160) (1856) 8 All G4 (66) (1893) 9 Cal 90a (906)

(1639) 1859 Pun Re No 131 page 1/2 (1992) 15 Mad 348 (348 340) (1903) 26 M td 47 (48)

(1888) 11 Mad 85 (86) (1990) 5 Oudh Cas 13 (16) (1899) 2 Oudh Cas 355 (359)

(1913) 19 Ind Cas 348 (351) 6 Sand L R

See also cases cited in foot notes 2 to 7 infra [See (1899) 4 Cal W N alvii Obje-

tion taken in appeal for the first time-Not allowed ] [But see (1883) 6 Mad 414 (416) But revision lies ]

(1870) 14 Suth W R 33 (33) 2 (1909) St All 450 (452)

(1833) 1853 Pun Re No 170 (1882) 1882 Pun Re No 4 page 21 (F D)

(1831) 1881 Pun Re No 83 page 60

- (2) Where the award was made out of time 3
- (3) Where the genuineness of the ward was disputed \*
- (4) Where the first that the arbitrator was the retained pleader of the plaintiff was not disclosed to the defendant 5
  - (5) Where one of the ribitrators had not concurred in the award 6
- (6) Where one of the arbitrators signed the award after the same last heen filed in Count

In the Piny Council decision mentioned above where the usual viscoling, ed on the ground that the minor defeudant's gaudian had agreed to the reference without the leave of the Court and also on the ground of miscondict of the uthitation, their Lordships held that no appeal by against a decise based of the award and observed as follows—"Then Lordships would be doing violence to the plain language and the obvious intention of the Code, if they were to held this an appeal lies from a decree pronounced under S 522, except in so far as the decise may be in excess of on on in accordance with the award."

As has been theady seen in Note 13 to Park 15, the introduction of the words for being otherwise invalid in that Paragraph, makes it clear that the intention of the legislature is that objections to the award on the ground of its invalidity must be decided by the Court making the reference and that in appeal against the decided on such ground is incompetent.

It has been held by the High Court of Calcutta that this Pirgiaph contemplates in award made in a case where there is a tail disclosure and that therefore, when of the validity of the reference is itself titacled an ipperliquidity the decree is itself titacled an ipperliquidity. Lubnovia and Rangoonisa and the Chief Court of Allahabid, il Bombay, itself and Rangoonisa and the Chief Court of Oudhis have taken the content of the Theorem is a submitted that the concenters of the Calcutta view is open to justice in view of the decision of the Privy Council in Ghulam Khan v. Yukamani I Hassan is a

8 (1909) 30 411 160 (1/1)

(1905) 9 Cal W N 978 (974) (1885) 11 Cal 37 (41) (1871 91 Cal 44 (177) 473)

9 (1.114) 1914 111 446 (449) 21 Ind Crs 989 (991) % 111 69 (1.112) 14 Ind Crs 400 (400) (118)

(1913) 15 Ind C to 63 (76) 93 C (1 522 (1312) 17 Ind C to 7 (8) (C 11) (1 780) 132 In 1 C to 180 (L th) (1316) 1916 Vird 903 (963) (1314) 1314 Vird 673 (675 677) 21 Ind C to (121) 1 191 F (1 196 (127) 12 f 1h 10

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It has been held by the High Court of Liboro that the Rule prohibiting an appeal against a decree bised upon an award does not apply to a case where the Court has no purisdiction to entertain the suit to The High Court of Midris has, on the other hand, held that the remedy m such a case as by way of revision 17 It is submitted that the Lahore view is not correct \ 11.ht of appeal is expressly negatived by this Parise rule except in the circumstances specified and the general principle is that unless a mant of appeal is given by statute, it does not exist

Judgment without hearing objections to award-Appeal if lies against decree It has been held by the High Court of Allahabad that where a decree is

passed in terms of an inard without considering the objections trised against it. the award is not in conformity with the previsions of sub Part (1), and cannot form the basis of an unaupealable decree and that, therefore an appeal hes against decree passed on such award 1 The High Courts of Calcutta 2 Madras 3 and Rangoon and the Chief Court of the Pupub" have, on the other hand, in such cases interfered by way of recessor. The Allahahad view cannot, it is submitted be accepted as correct

Where a decree based upon an award is attacked on the pround that a sufficient opportunity was not given to a party to substinuite his objections to the award it has been held by the High Courts of Calcutta and Lah as and by the J C s Court of Oudh that the Court acts with material in egulirity in the exercise of its jurisdiction and that the decree may be set uside in revision of The High Court of Rapgoon has however held that in appeal lies in such a case? It is submitted that this view of the Ringson High Court cannot be recented as correct

8 Second appeal

Where a decree is passed in accordance with an award and an appeal is wrongly entertained a aiust it and the decree is set aside in appeal, does a second appeal he against the decree of the lewer appellate Court? The High Courts of Allahabad, Madras and Patna and the Judicial Commissioner & Court of Namour have held that a second appeal hes the reason being that the decree of the lower Appellate Court is not one in accordance with the award 1 But the High Court of Calcutta2 and the Chief Court of Punjahs have interfered in such cases by was of revision

Where a Court of first instance wrongly refuses to have a decree in accordance with an award and a Court of Appeal reverses the decree of the first Court and passes a decree in accordance with the tward, such a decree is according to revi lon]

16 (1928) 1928 I ah 730 (\*30 791)

10 (1988) 1929 134 1957 (1983) 8 Mrd 22 (235 '26) D co of award under S 122 in this logorid the accumant juri data in of the Court—Decree et code in less in a

Note 7 1 (192 ) 132, 111 120 (121) 49 111 174 (1889) 9 111 W 7 15 (16)

(1896) 18 411 122 (428 429) (1-1) 2. (1916) 1916 C /1 806 (S07)

. (1916) 1916 Mad 927 (927)

4 (1933) 1933 Ring 35 (59) \> 11 peal lies J (1915) 1915 Lah 3J2 (312)

(But see (1882) 1582 I an Re to 181

(1J16) 1916 Cal 806 (807) (1J21) 1921 Lah 249 (250) (1317) 1317 Ou lh 210 (211)

(See al o (1934) 1934 Mad 619 (620) Midras High Court mtuferes in 7 (192 ) 199 ) Rat g 298 (9°3)

Note 8 1 (1)14) 1914 411 446 (445) 21 Ind Cas 180 (931) 36 111 63

(1912) 14 Ind Cas 400 (45 ) (All) (18JJ) 23 Mad 172 (173) (1903) 26 Wad 76 (71) (1326) 1926 Pat 164 (160)

(1918) 1918 Nag 191 (193) 2 (1.111) 9 In 1 Cas 206 (297) 05 Cal 421 (1.102) 6 Cal W V G14 (C15) (19"0) 14 5ath W R 23 (33)

(But see (1902) 2 Cal I Jour 142 (113)]

3 (1910) 6 Ind Cas 963 (964) (Lah) Appellate Court sa staference even with con sent 1, ultra cues

(1917) 1917 Lah 3"J (981) 1910 Pnn Ro No 115

the High Courts of Allahabad and Calcutta and the Chief Court of Oudh open to second appeal 4. The reason given is that the provision in sub para (2) of the Paragraph applies only where a decree has been pronounced in accordance with the award by the Court making the reference. But the Chief Court of the Punjah has held that the decree of the lower appellate Court is entitled to the same finality as that of the first Court and that a second appeal will not be 5.

#### 9 Revision

Sub pair (2) of this Paiagraph only prohibits an appeal from a decree based upon an award. But as observed by their Lordships of the Privy Council in Ghulam Khan v. Vachomed Hassan I. L. R. 29 Cal. 167, "in the case of an award revision would be more objectionable than an appeal and hence an application or revision against a decree in accordance with an award does not be much) of the ground of the erroneous decision of the lower Court in respect of any of the grounds of objections falling under Pairs 14 and 15, ante 1. But where the action of the Court with reference to the arbitration proceedings is attacked or any of the grounds mentioned in S. 115 ante, the High Court can revise a decree based upon an award. Thus where a Court passes a decree on an ward without gring notice of the filing of the award to the parties as required by Paia 10 at the

2

4 (1000) 28 All 405 (410) (1323) 10 (1021) 107 All V N 110 (110) (1225) 10 (1021) 107 All V N 110 (110) (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1225) 10 (1

1 (1902) 29 CA1167 (186) 29 Ind Apt 51 1902 Pun Re No 25 (F C) (1933) 1933 Mad 607 (699) Incomplete ward—Decree presed in accordance

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revision unless there is an illegality and also some substantial hum (1933) 1938 Oudh 877 (327) (1925) 1935 Oudh 277 (228) (1924) 1932 Oudh 277 (228) (1924) 1932 Oudh 260 (400) 90 Oudh Cas (1937) 1937 Pr. 138 (140) (1910) 1919 Pr. 03 (98) 4 1 at L Jour 185 (1922) 1922 Sund 1 (3) 15 Sund L 8 165 (1922) 1922 Sund 1 (3) 15 Sund L 8 165 (428) 1932 Cal 475 (470) Reference on the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the contract large of the

3) 1919 Prt 93 (93) \$\frac{1}{2}\$ 1at La 165

5) 1925 Cal 475 (4°6) Reference on behalf of minor will out leve of behalf of minor will out leve of court — Court bolding ref rence valid—No revision first [But see (1926) 1926 Mad 201 (0i) 4th trators deciding matters not

SCH.

(1935) 1935 Lub 113 (114) (1935) 1935 Mud 184 (185) (1933) 1933 All 648 (649)

11939 1933 Oudh 547 (548) 9 Luck 219

78 (1916) 1916 Lah 201 (202) 1915 Pun Re acts with material arregularity and revision lies against the decree 3 A decree passed without giving a party an opportunity to substantiate his objections by improperly refusing his application for adjournment is vitiated by material arresularity and is open to revision But where the lower Court has refused an adjournment in the judicial exercise of its discretion, the High Court eannot interfere in revision 5 Where the Court compels in unwilling arbitrator to decide the matter referred to him a decree passed upon such an award may be set aside in resision 6

It has been already discussed in Note 6 ante, whether an appeal has against a decree hased upon an award where the reference to arbitration is itself impurped as being invalid. The High Court of Mahahad has held that such a decree is open to revision on the ground of its being without jurisdiction? But according to the High Court of Labore and the Chief Court of Oudh, no revision hes in such a ease

See also Notes 3, 5 6 and 7 supra 10 Binding effect of award

A judgment and decree passed in accordance with an award may constitute ves sudicata as much is a judgment and deeree which result from the decision of the Court after the matter has been fought to the end 1 A valid award operates to merge and extinguish all claims covered by the submission and is binding on the parties to the reference even though it his not been made a rule of Court under this paragraph 3

An award does not become uneffectual or invalid as between the parties to the reference merely because other parties to the suit have not joined in the reference 3

A person, who is a stranger to the reference is neither bound by nor can (1873) 1873 Pun Re to 29 page CO Refe (But see (1917) 1917 All 183 (186)

rence in small cause suit-Decree in terms of award-Revision lies (1916) 1916 Sind 79 (80) 9 Sind L R 193 Court passing decree on award with out considering if it was beneficial

to minor party - Revision lies High Court should use revisional powers very sparingly (1921) 1921 Mad 271 (271)

(1978) 1928 Mad 48 (50)

(1915) 1915 Lah 253 (253) 1916 P R No 28 [See (1929) 1929 Cal 831 (832) New

point cannot be raised in revision]

(1888) 11 Mad 144 (144 145) (1921) 1921 Oudh 154 (154) 24 Oudh Cas

263 4 (1916) 1916 All 65 (66)

(1926) 1926 Cal 1018 (1019) [See however (1932) 1932 Mad 588

35 30S

2 (1892) 1892 All W N 238 (238) (1913) 20 Ind Cas 185 (188) (Luh) (1970) 1920 Mad 615 (617) Po tion of

39 A11 489]

1 (1897) 91 Dom 46a (467)

(1881) 7 Cal 727 (729)

45 All 628]

(1880) 5 Cal L Rep 338 (340)

8 (1933) 1933 Lah 476 (427) 14 Lah 105

(1916) 1916 Lah 201 (202) 1915 Pun Re No 99 Reference on behalf of minor without leave of Court No

set aside decree is available (1939) 1932 Oudh 156 (156)

(1916) 1916 All 359 (359) \ward in muta tion proceedings is not res judicata on a question of title and posses [See also (1924) 1924 All 62 (C2 63)

Note 10

revision because temedy by suit to

award dealing with matters out side scope of suit and a such in capable of he ng basis of decree under this Para —Still it is binding on the parties

(See (1912) 15 Ind Cas 819 (821) 5 Sind L R 240]

3 (1921) 1921 Nag 176 (178) Fspecially when it has been acted upon

4 (1891) 6 All 322 (328) 11 Ind App 20 (P C)

enforce5 the award

# 11 Enforcement of the award

The only way of enforcing an award made in a reference through Court is to have a decree passed in accordance with it under this Paragraph 1 Where a decree is passed in terms of an award, the tward can be enforced only by way of execu tion of the decree and no separate suit will be therefor 2. Nor will a suit he to en force an award which was declared void by the Court in proceedings under Para 173

### 12 Suit to set aside award

Where an application to set aside an award is refused and a decree is passed in accordance with it no suit will be thereafter to set aside the award 1 But a minor can sue to set aside a decree against him based on award on the ground that the reference to arbitration was made without obtaining the leave of the Court is required by O 32, R 72

# 13 Court acting as arbitrator

It has been already seen in Note 22 to Pair 1, ante, that a consent by the parties to abide by the decision of the Court is not such a reference to arbitration as is contemplated by this Schedule The decision of the Court, in such a case, however operates as a consent decree and is, therefore, not appealable 1 In the undermentioned cases2 it has been held that such a decision is in the nature of an arbitrator's award and bence is not appealable. It is respectfully submitted that though the actual decision in the said cases is right, the reasoning on which they proceed is not correct

Where the parties agree not to let in evidence but that the Court may make a local inspection the decision of the Court in the suit is neither a consent decree nor an award and is therefore appealable 3

# 14 Valuer and arbitrator

It has been already seen in Note 10 to Para 1 that a reference to arbitra tion implies the existence of some matter in difference which has actually unen at the time of the reference Thus where the intention of the parties is that the person to whom the matter is referred should hold an enquiry in the nature of a judicial enquiry, and hear the respective cases of the parties, and decide upon evi dence laid before him the case is one of arbitration 12 But where a person 13 appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, the case is not one of arbitra tion 1 No judgment could, therefore, he given under this Paragraph on the basis

5 (1909) 4 Ind Cas 1114 (1114) (Mad) ann pa D Note 11 1 (1920) 1920 Mad 615 (617)

2 (1925) 1925 P C 34 (35) 52 C-1 314 52 Ind 4pp 70 (P C) 3 (1907) 1907 Pun Re No 19, page 86 Note 12 1. (1919) 1919 L R 12 (12) 10 L B R 105 2 (1917) 1917 Mad 672 (679) 39 Mad 853

Note 13.

1 (1920) 1920 Mad 800 (802) 42 Mad 625 Same principle applies even if re-ference is made to presiding Judge and another person jointly (1919) 1919 Mad 150 (151)

2 (1929) 1929 All 577 (577) 51 All 83G.

(1925) 1925 Nrg 463 (464) 21 N g H [But see (1915) 1915 Mrd 1074 (10 4) Award of Court is itself 1 decree and objections to award me t lottice by way of appeal from the dette 1 3 (1929) 1929 411 116 (117)

(1202) and on -- -

of the valuator's decision 2

# Illustrations

1 R held a sust against G for injunction and dimages for encrotchment upon her property. In the sust a consent order was made that G was to pruches Ls sincered in the property at a price to be settled by certain referees. The referees settled the price and the lower fourtigare, judgment under this Paragraph in favour of R treating the said without on as in award. It was held by the appellant count that the referees were valuators rather than arbitrators and therefore the lower Court could not give padement under this Paragraph.

2. Where an agreement to lease contained a clause that at the expiration of the jeriod of lease the lessor should take over all the buildings them standing on the jeo jert's 4x a value to be firel by certain persons, it was held that the valuation

made by such persons was not an award within the meaning of Paia 20 and could not therefore be filed in Court \*

ORDER OF REFERENCE OR AGREEMENTS TO REFER

P. 17. [S 523] (1) Where any persons agree in writing that any difference between them shall be referred to arbitration, the parties to the agreement teen ment, or any of them, may apply to any Court having jurisdiction in the matter to which the

agreement relates, that the agreement be filed in Court
(2) The application shall be in writing and shall be numhered and registered as a suit<sup>8</sup> between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs,

interested or claiming to be interested as plaintiff or plaintiffs, and the others or other of them as defendants or defendant, if the application has been presented by all the parties, or, it otherwise, between the applicant as plaintiff and the other parties as defendants

(3) On such application heing made, the Court shall direct notice thereof to be given to all the parties to the agreement, other than the applicants, requiring such parties to show cause, within the time specified in the notice, why the agreement should

not be filed

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arhitrator appointed in accordance with the provisions of the agreement or, if there is no such provision and the parties cannot agree, the Court may appoint an arbitrator

[1877—S 523, 1859—S 326]

# Synopsis

Legislative changes
Legislative changes
Legislative changes
Legislative changes

1
Agreement to refer matters in a pend ing hitgation
Agreement to refer future differences to arbitration

<sup>2 (1901) 28</sup> Cal 155 (163) 3 (1901) 28 Cal 155 (163)

Agreement must relate to matters within Court's jurisdiction 5 (b) Death or refusal of arbitrator to Agreement relating to appointment to public office (c) Resocation of reference to arbi Agreement to refer must be in writing 7 Shall he numbered and registered as (d) Court cannot appoint an unip re a suit - See Note 12 to para 20 Ahatement of proceedings before arbi 8 trator on death of party Appeal Revision

Other Topics

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16

Paragraph whether applicable to cases under Arbitration Act See Note 2

1 Legislative changes —

1 The words of any person named in the agreement or to be appointed by iny Court having purisdiction in the matter to which the agreement relates which occurred after the words shall be referred to arbitration in the corresponding section of the old Code have been omitted in Cl 1 of this Pala graph

2 Clause 4 of this Paragraph roplaces the following words which occurred in the old Code - If no sufficient cause be shown the Court may cause the agreement to be filed and shall make an order of reference thereon and may also nominate the arbitrator when he is not named theroin and the parties cannot agree as to the nomination

It was held under the old Code that an agreement in which the arbitrator was not named could not be filed under S 523 1 Under the present Code in view of the aforementioned changes it is not necessary that the arbitrator should be named in the agreement 3

2 Scope and applicability of the Paragraph

This and Paras 18 and 19 infra deal with the second class of cases of arbitration referred to by the Judicial Committee in Ghulam Khan v Muharitad Hassan, (I L R 29 Cal 167 P C), 117, to references to arbitration without having recourse to litigation

The provisions of this Paragraph apply only to cases where in pursuance of the agreement to refer, the arbitrators have not functioned and made their award Where the award bas actually been delivered, the proper course is to take proceedings under Para 20 to enforce the award 1 Similarly, where an application is filed under this Paragraph but before it is disposed of the arbi trators deliver their award the application is rendered infructuous, and the remedy of the parties is to apply under Para 20° A mere filing of an applies tion under this Paragraph does not oust the purisdiction of the arbitrator to gave his award 3

Arbitration in a pending suit stands on a different footing from an 3-rec ment made out of Court to refer a dispute to arbitration In a pending suit its authority of the arbitrator is derived from the order of the Court making the reference, and if this order is defective there is no proper reference and conse quently there can be no legal award On the other hand in a private reference it is the agreement entered into hetween the parties which confers jurisdiction N 'e ?

Sch Il Para 17-Note 1

<sup>1 (1896) 20</sup> Bom 232 (237)

<sup>2 (1911) 9</sup> Ind Cas 600 (657) 1911 Pan Re No 35

on the arbitrators to deal with the dispute. In such a case if proceedings are taken under this Paragraph and a reference secured under Cl 4 thereof, it is not this reference which constitutes the arbitrator as a private tribunal. It is merely the machinery by which the tribunal already constituted by the agreement of parties is made to function

The provisions of this Paragraph are permissive and do not oblige a party to apply under this Paragraph 5 It is open to a party to the agreement to file a suit in Court notwithstanding the agreement and the only remedy of the other party if he wishes to stand by the agreement is to apply under Para 18, infra, (for further discussion, see Para 18) The provisions of this and the following two Paragraphs do not apply to cases governed by the Indian Arbitration Act, 1899 (See S 3 of the Indian Arbitration Act, 1899 and S 89 of the Code) See also the following cases 6.

If in conciliation proceedings under Chapter 6 of the Dekkhan Agriculturists' Relief Act, XVII of 1879, the parties agree to refer the matter in dispute to arbitration, the conciliator appointed under that Chapter must under S 45 of the Act, forward the agreement to the Court having sursdiction in the matter and the Court must thereupon proceed in the manner provided by this Paragraph and Para 19, infra

3 Agreement to refer matters in a pending litigation

The provisions of this Paragraph cover only cases where parties without recourse to litigation, agree to refer their differences to arbitration i If parties to a litigation who desire to refer their differences to arbitration, desire to avail themselves of the provisions of this Schedule, they can do so only under Paras 1 to 16 thereof 2 In other words, an agreement to refer made by the parties to a litigation without the intervention of the Court cannot be recognised under this Schedule,3 and cannot be filed under this Paragraph as if it was an agreement to refer without recourse to hitigation \* If an award has been passed on such a reference it cannot be made the basis of a proceeding under Para 20 " As to whether such an agreement can be recognised independent of this Schodule, as an adjustment of the suit under O 23 R 3, there is a conflict of opinion for which see Note 9 to O 23, R 3, ante 52

Where however, after an agreement to refer was entered into in a pending suit, the suit itself was withdrawn, in application filed under this Paragraph subse quent to such withdrawal is not incompetent and an award mide in pursuance of the same is valid 6 So also an agreement to refer relating to matters not involved

- 4 (1928) 1928 Lab 170 (173) 5 (1931) 1931 Oudh 127 (129)
- (1897 1901) 2 Upp Bur R 286 Held suit not barred
- 6 (1931) 1931 Mad 170 (171) 54 Mad 193
- (1902) 29 Cal 793 (495) (1929) 1929 Lah 246 (246)
- Note 3 1 ((1911) 12 Ind Cas 873 (375) 36 Wad 353
- 2 (1927) 1927 Bom 565 (581) 51 Bom 908 (FB) 3 (1927) 1927 Sind 66 (72) (1921) 1921 Sind 65 (67, 68) 16 Sind L.B.
- 174 4 (1930) 1930 Bom 98 (104) 54 Bom 197 (1903) 30 Cal 218 (223)
- (1914) 1914 Bom 184 (186, 187) 38 Bom 637 It cannot be recognised at all

- (1926) 1926 Sind a (6)
  - [See also (1882) 1882 Pun Re No. 130 page 3871
- The following decisions under the old Code which took a contrary view it is sub mattel are not correct as law in view of 29 Cal 167 P C
- (1905) 2" All 53 (56) (1904) 1904 All W N 9 (10) (1879 80) 4 Bom 1 (4)
- o (1912) 15 Ind Cas 140 (143) 1912 Pun Re No 115
- 5a [See also (192o) 1925 Nag 208 (203) Ar bitration-Pending suit - Submis sion otherwise than through Court re not illegal}
- 6 (1930) 1930 Lah 1066 (1067)

in the suit is perfectly valid, though entered into ponding suit. Thus where during the pendency of probate proceedings the parties agreed to refer to arbitration the question of the division of the estate, and the agreement left untouched the powers of the Court to issue probate, and the arbitrators also did not deal with that question, it was held that the agreement and the award thereon were valid?

4 Agreement to refer future differences to arbitration - See Notes 2 and 10 to Put 1 ante

5 Agreement must relate to matters within Court's jurisdiction

Before an application can be filed under this Paragraph it is essential that the agreement to refer should relate to matters which the Court is competent to try and has jurisdiction to pass a final decree upon 12 Thus, where an agreement relates to the partition of revenue paying land, it cannot be filed under this Para Graph as the civil Court has no jurisdiction to partition the revenue 1 Where an agreement relates to matters partly the Court it has been held that

agreement beyond its jurisdiction parties agree to this being done Pulagraph 2

The refusal to refer to albitration is a part of the cause of action for an application under this Paragraph The application can therefore be filed in the Court within whose jurisdiction the refusal to rofor was made 3

6 Agreement relating to appointment to public office

The succession to the trusteeship of a public trust or charity is a matter iffecting the public interests and a disputo regarding it cannot be referred to arbitration 1 It has been held by the High Court of Madras that an agreement to tefer to ubitration even if relating to a public office is not necessarily unlawful or opposed to public policy, but must be scrutimised by the Court for the purpose of ascertaining whether it is in violation of the trusts of the institution or affects adversely the interests of the public "

7 Agreement to refer must be in writing

It is essential that the agreement to refer should be in uriting before it can be filed under this Paragraph 1

8 Shall be numbered and registered as a suit - See hote 12 to Pire 20 infra

Where no sufficient cause is shown ?

agreements to refer to arbitration stand on the same footing as all other lawful agreements by which the parties are bound by the terms of what they have above two docusions]

(1935) 1935 Lah 29 (59) (1933) 1933 Pesh 18 (22)

(1924) 1924 Pat 488 (490 491) 3 Pat 443 7 (1923) 1923 Bom 365 (366)

Note 5

1a (1934) 1934 Sind 29 (32) 1 (1917) 1917 Lah 218 (218)

See also Note 5 to para 21 infra

3 (1933) 1933 Lah 18 (21)

1 (1917) 1917 I at 392 (332) (1910) 6 Ind Cas 219 (223) 32 All 503 [See also (1915) 1915 Cal 745 ("1 ) Executor or administrator cannot male a reference contradicting a

w 1117 (1928) 1928 Cal 275 (2.6) (Do)

2 (1922) 1922 Mad 42) (432)

1883 1 un Re No 5 and 1914 Lah 296 - Mr Justice Jai Lal also doubted the correctness of the 1 (1903) 30 Cal 213 (225) (1935) 1935 111 886 (931) agreed to, and from which, i.e., the ancement to refer they cannot retire unless the scope and object of the agreement cannot be executed or unless at be shown that mannest injustice will be the consequence of binding the parties to the contract 1 Where therefore no sufficient cause 12 is shown against the agreement. this paragraph provides that this agreement shall be ordered to be filed grounds on which a contract will be voidable such as flaud, misrepresentation etc. which will enable a party to avoid a contract or which render a contract unenforceable against a party will constitute sufficient cause against filing the agreement under this Paygraph Thus where the agreement to refer is shown to be vitiated by fraud or mistake" or by misiepresentation" or is not consented to by all the raties the Court will decline to file the agreement Similarly where an agreement to refer is entered into by the de facto guardian of a Mahomedan minor it cannot be filed under this Paragraph as such guardian has no authority in law to act for the minor 5 So also where the conduct of the parties shows that they have abandoned and cancelled the agreement to refer, the Court will refuso to order the same to be filed 6 Delay in making the application may be a sufficient cause for refusing to order the agreement to be filed but it must be such as to lead to the inference that the parties had ahandoned the reference to arhitration anything short of it is not sufficient 62 An agreement the submission under which has been revoked for good cause cannot be filed under this Paragiaph 7

10 Arbitrator appointed in accordance with the provisions of the agreement

A submission to arbitation must be strictly construed as it deprives the puty to the submission of the right which he has under the common law to have the dispute to which the submission relates decided by a Court of Law! The junisdiction of the Court to order a reference under this Paragraph is derived from the agreement of the pathes and the Court must refer in accordance with the terms of the agreement. If it fails to do so it acts with material irregularity in the exercise of its jurisdiction. Thus where the agreement is to refer to the arbitration of two European merchanis of Arrachi the Court has no power under this Paragraph to order a reference to an Indian merchanis of Ammitsar Where according to the terms of an agreement to refer a unprie should be appointed from out of seven persons named the Court cannot appoint as an immure i resson who is not one of the seven persons named as Similarly.

Note 9
1 (186 G) 1º Noo Ind app 11º (120 131) (P C)
1a (1 21) Lah L Jou 2 6 (2 8 279) Agree
rient of reference providing for at
n intment of new arbitrator in case

he arbitrator or ginally appointed cluses to act—Resignation of such abilitator is not sufficient cause for not fill at the concernent.

uthitiator is not sufficient cruse for not fill g the agreement (1933) 1333 S nd 68 (70) Suffic ent c use

1 1 of confined to fraud misrelie 6 station and undue influence 2 (1890) 3 C.P.I. R. S9 (92)

2 (1890) 3 C P L R 89 (92) 3 (1919) 1.319 Lah 140 (142) (1933) 1.333 Sind 68 (69) Where the ag es

ment was the result of misuse of onfidence

(1593) 1893 Pun Re No 49 page 216 4 (1917) 1917 U B 6 (6)

5 (1921) 1921 Cal 818 (619) 47 Cal 713 6 (1920) 1920 Nag 29 (30) (1939) 1933 Sn d 68 (69)

- 61 (1933) 1933 Lab 18 (21) 7 (1830) 17 Cal 200 (207 208)
- Note 10

1 (1930) 1930 Sind °02 (203)

2 (1931) 1931 Mad 28 (33) 54 Mad 469 (1934) 1934 Ondh 67 (68) 9 Luck 321 Cou t cannot refer the matter to two out of three abitrators named 11 the agreement where the third

refuses to act (1871 74) 7 Mad H C R 72 (76) (See also (1921) 1921 Pat 161 (162)

G Pat L Jone 287 Court cannot refer again on the first reference proving abortive on its own motion!

3 (1911) 9 Ind Cas 500 (657) 1911 Pun Re

No 35 4 (1911) 9 Ind Cas Goo (657) 1911 Pun Re

No 35 p 173 4a (1571 74) 7 Mad H C R 72 (76) where the agreement is to refor to three arbitrators, the Court has no jurisdiction to add a direction that in case of disagreement among them, the opinion of the majority should prevail There can be no implied agreement in such cases to be bound hy the decision of the majority 5

An order under the last portion of Para 4, unter directing a party to nominate an arbitrator, cannot be passed before the agreement is actually field under the earlier portion 6

#### II Death or refusal of arbitrator to act

Where an arbitrator dies or refuses to act subsequent to the agreement to refer and the agreement does not contain any provision for such a contingency has the Court power to appoint a new arbitrator? There are two provisions in this schedule empowering the Court to appoint an arbitrator -

- (a) Under Cl 4 of this Paragraph where the agreement does not contain any provision for the appointment of arbitrators and the parties cannot agree thereto
- (b) Under Para 5 of this schedule read with Para 19, infra
- As to the power of the Court to make an appointment under C! 4 of this Paragraph the High Court of Allahahad has expressed the view that the expres mon if there is no such provision and the parties cannot agree covers also a care where there has been a provision for a particular arbitrator who is either dead of has retired If he has died or refuses to act it is as though there nere no provisions But this opinion is merely an obiter dictum and the High Court of Bombay has dissented from this view and has held that Cl 4 is not open to such a construction
- As to the power of the Court to proceed under Para 5 and make an appointment it must be noted that that Paragraph applies to agreements nithout recourse to higation only by virtue of Para 19 by which the provisions of Para 5 can be applied by the Court "only so far as they are consistent with the agric There is a diversity of judicial opinion in the application of Para 5 and in order to understand and appreciate the decisions they may be considered under two heads viz -
  - (1) Where the death or refusal of the arbitrator takes place subsequent to the agreement but hefore it is filed into Court under the
  - (2) Where such death or refusal takes place subsequent to the film, under

In cases falling under the first head, it has been held by the High Courts of Calcutta <sup>5</sup> Rangoon <sup>5a</sup> and Madras <sup>4</sup> and the Chief Courts of Punjab, <sup>5</sup> Oudbla and Lower Burma that the agreement becomes incupable of performance on the sea h

(1912) 17 Ind Cas 389 (390) (Mad) 5 (1919) 1919 Lah 70 (71) 1918 1un I' 5 (1926) 1926 Mad 1183 (1181) 6 (1J26) 1926 Lah 505 (a05) Note 11

1 (1927) 1922 411 133 (133) 44 411 523 [But see (1919) 1919 411 48 (49) 42

All 131 ] 2 (1931) 1931 Bom 529 (531)

3 (1874) 12 Beng L R App 13 (14) (See also (1926) 1926 Cal 730 (731, 732)]

3a (1933) 1933 Rang 331 (333) 4 (1931) 1931 Mad 29 (31, 32) 54 Mad 469

(1319) 1919 Lah 231 (232) 1313 1un Pi No 155 page 414 But where there ! a distinct provision authorising a party to appoint another arbitrator, at does not become in stable of

s erformance 5. (1934) 1934 Oudh 67 (6.) 9 Luch 321 (1935) 1935 Oudh 179 (150)

6 (1918) 1918 L B 114 (115)

or refusal of the arbitrator and that the Court cannot order such agreement to be filed under this Paragraph. Thus, where an agreement is to refer to the arbitration of three specified persons, and one of them dies pending arbitration proceedings, the Court cannot order the agreement to be filed under this Paragraph and direct the remaining arbitrators to act or appoint a new arbitrator in his place as it will not be consistent with the provisions of the agreement to do so 7. The High Court of Allahahads has, on the other hand, held that where an arbitrator refuses to act pending arhitration proceedings, the Court can, on a subsequent application under this Paragraph appoint a new arhitrator The decision proceeds on the view that a party, acquiescing in the arbitrators commencing proceedings, should be deemed to have waived his right to object to the opposite party obtaining later on an order of reference under this Paragraph According to the High Court of Labore where an arbitrator named refuses to act. the question whether a new arbitrator can be appointed is one depending on the intention of the parties. If the dominant intention is that the matter should be referred to arbitration then the fact that the parties agreed on the personnel makes no difference, and the Court can appoint a new arbitiator If, on the other hand, the essence of the agreement is to refer the matter to a particular individual only the Court has no power to appoint a new arbitrator sa

In cases falling under the second head the power of the Court to appoint a new arbitrator has been assumed in the following cases? But it is conceived that even in such cases the power of the Court to make a new appointment should be consistent with the terms of the agreement

# 12 Revocation of reference to arbitrator

2 (1904) 27 Mad 112 (115)

Under the common law of England, a party to a submission might at any time before the award was made, revoke the authority of the arbitrator, the reason being that the arbitrator was, in contemplation of law, merely an agent appointed by the parties to decide the matter in dispute between them and his authority was therefore revocable by either of his principals. This has not been followed in this country. Aspointed out by the Privy Council in Pestonjee v Manockjee & Co., 12 Moo Ind App 112, at p 130, no party to an agreement to refer to arbitration can, after a reference has been made, revoke the submission unless for good cause and a mere arbitrary revocation of the authority is not permitted. The following have been held to be 'sufficient cause' for revoking a submission to arbitration.

- (1) The fact that the arbitrator is colluding with the opposite party \*
- (2) The fact that the arbitrator is discovered to have been acting as a multitear for one of the parties without remuneration or to be indebted to such party?

5 (1902) 29 Cal 275 (282)



where the agreement is to refer to three arbitrators, the Court has no junishisters to add a direction that in case of disagreement among them, the opinion of the majority should prevail Thero can be no implied agreement in such cases to be bound by the decision of the majority

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- (a) Under Cl 4 of this Paragraph where the agreement does not contain any provision for the appointment of arbitrators and the parties cannot agree thereto
  - (b) Under Para 5 of this schedulo read with Para 19 infra

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- (1) Where the death or refusal of the arhitrator takes place subsequent to the agreement but before it is filed into Court under this
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(1912) 17 Ind Cas 389 (390) (Mac) 5 (1926) 1926 Mad 1183 (1184) 6 (1J26) 1926 Lah 505 (a05) Note 11

1 (1922) 1922 All 133 (133) 44 All 528 [But see (1919) 1919 411 48 (49) 42 All 191 ]

2 (1931) 1931 Bom 523 (531) 3 (1874) 12 Beng L R App 13 (14) [See also (1926) 1926 Cal 730 (431

732)] 3a (1933) 1933 Rang 331 (333) 4 (1931) 1931 Mad 28 (31 32) 54 Mad 469 5 (1919) 1919 Lah 70 (71) 1318 1 m Re

(1919) 1319 Lah 231 (232) 1319 Iun R No 155 page 414 But where there i a distinct Provision anthorn ag ; 1 arty to appoint another arbitrate it does not become in apable of 1 erformance

54 (1934) 1934 Oudh 67 (6J) 9 Lu 1 321 (1935) 1935 Oudh 179 (160)

6 (1918) 1918 L. B 114 (115)

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In cases falling under the second head the power of the Court to appoint a new arbitrator has been assumed in the following cases. But it is conceived that even in such cases the power of the Court to make a new appointment should be consistent with the terms of the ancement

12 Revocation of reference to arbitrator

Under the common law of England a party to a submission might at any time before the award was made revoke the authority of the arbitrator the reason being that the arbitrator was in contemplation of law merely an agent appointed by the parties to decide the matter in dispute between them and his authority was therefore revocable by either of his principals. This has not been followed in this country? As pointed out by the Pray Council in Pestonies v Manackies & Co. 12 Moo. Ind. App. 112 at p. 130 no party to an agreement to refer to arbitration can after a reference has been made revoke the submission unless for good cause and a mere arbitrary revocation of the authority is not permitted. The following have been hold to be sufficient cause for revoking a submission to arbitration—

- (1) The fact that the arbitrator is colluding with the opposite party \*
- (2) The fact that the arbitrator is discovered to have been acting as a multiflear for one of the parties without remuneration or to be indebted to such party.

(137) 1932 11 345 (349) (18 1) 15 Seth V 15 31 (331) (1877) 2 Cul 4t 5 (463 164) (1860) 16 0 1 ur Re No 80 (1917) 1917 Lul 65 (68) No 12 1 (1901) 4 Oudd Cts 17 (71) 4 (1907) 29 All 13 (14)

4 (1907) 29 Cal 715 (287)

Note 12 1 Hais'us j.: Lace of E. jlad Vol. 1 p. 448 2 (1904) 27 Vand 112 (115)

- (3) Unleasonable delay in the conduct of the proceedings before the ubitrators, not caused by the party seeking to revoke the sub mission 6
- (4) Relationship of the arbitrator to one of the parties unknown to the other?

The following do not constitute "sufficient cause' for revocation of a sub

- mission (1) Delay in the conduct of the proceedings where such delay is caused by the very party seeking to revoke 8
  - (2) The fact that one of the arbitrators figured as a witness for the prosecution in a security proceeding against the party seeking to 10roke 9
  - (3) The fact that the arbitrator is entering into foreign matters and that a minor is likely to be interested in the arbitration and that he would not be bound by it 10

# 13 Court cannot appoint an ampire

Where the agreement to refer does not contain any provision for appointing an umpire in case of difference between the irbitrators, the Court cannot appoint an umpire under this Paragraph 1

14 Abatement of proceedings before arbitrator on death of party-See Note 17 to

# 15 Appeal

In order under this Paragraph filing or refusing to file au acteement is appealable under S 104 sub section (1), Cl (d) 1 But a decree passed in terms of the award made in pursuance of a reference under this Paragraph is not appeal able 2 Nor does an appeal he against an order revoking the reference to arbi tration 3

# 16 Revision

The emission of the Court to register and number the application as a cuit is an irregularity But if the irregularity is requiesced in by the puties it does not rifect the merits of the case and affords no ground for interference in ierision

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of suit the order is a decree and
 6 (1630) 17 Cal 200 (205)
    (1933) 1933 Pesh 18 (21) Not a sust for all
   As for decisions under the old Cae
  appealable]
 7 (1933) 1933 Sind 68 (69 70)
   which held that the order as o inted to a
 8 (1918) 1918 Pat 83 (86) 4 Pat L Jone 394
9 (1932) 1932 411 348 (349)
   decree see the following
   (1899) 22 Mad 299 (300) 9 Mid L Jour 10
   (1931) 3 All 296 (291)
(1891) 3 All 427 (431 432)
10 (1874) 91 Suth W R 395 (396)
                     Note 13
   (1907) 1907 Pun Re No 126 page 613
 1 (1886) 8 411 64 (66)
   a contrary
    (1882) 1882 Pun Re No 191 page 5.8
[See also (1931) 1931 Bom 529 (531
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539) Court appointing umpire as sole arbitrator-Held not justified] 48 9 5 9

un Lo No 9 (1921) 60 Ind Cas 500 (500) (Lat)

(See also (1916) 1916 Lah e9 (91) 1916 Pan Re No 117 Order setting aside award on a reference under this Para for mis conduct does not fall under S 101 Cl (d) or (f) but as the proceedings are in the nature

3 (1926) 1926 411 55 (56) 48 411 27 Note 16 1 (1914) 1914 Lah 145 (146) 21 It d C ts 125 (926) 1914 I un Ro \o 23

Stay of sust where there is an agreement to refer to arbitra tion

P. 18. [New.] Where any party to any agreement to refer to arbitration, or any person claiming under him, institutes any suit against any other party to the agreement, or any person claiming under him, in respect of any matter agreed to be

referred, any party to such suit may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to the Court to stay the suit; and the Court. if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arhitration, and that the applicant was, at the time when the suit was instituted and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the suit.

[Cf Indian Arbitration Act, S. 19,]

#### Synonsis

2

3

Note No.

Scope and object of the Paragraph Where any party institutes any sunt'

Application for stay of suit must be made at the earliest opportunity Effect of award made subsequent to suit in pursuance of agreement to refer before suit

Effect of award made prior to suit

Note No Sufficient cause—Burden of proof Direction of Court to stay suit Dispute as to agreement to refer-Veli dity of agreement

Removal of stay order Appeal Presidency Small Cause Court's power

to stay 10

# 4a Other Tomes

At the eviliest possible of portunity and in all case, where assues are settled at or before such ettlement See Note 3

"May rake an order staying the suit See Note 6

Procedure by Court where arbitration is immacticable Sco Note 6 Procedure in case of denial of agreement Note 7 Pt (3) Sufficient reason-Instances See Pua

Note 9 Pts (2) to (6)

#### 1 Scope and object of the Paragraph

This paragraph must be read with S 28 of the Contract Act, 1872, S 21 of the Specific Relief Act, 1877, and Para 22 of this Schedule The general rule as declared by S 28 of the Contract Act is that every agreement by which are party thereto is restricted absolutely from enforcing lus rights under or in recres of the contract by the usual legal proceedings in ordinary tribungle is your agreement to refer future disputes or an agreement in uniting to refer error disputes to arbitration has been declared by the said section to be an excert .-the general rule Such agreements are therefore valid and binding on to Lange They are, however, not specifically enforceable (S 21 of the Specific East in 1877) But if a party to the agreement sues in respect of the matter agrees. . . \*\* referred to arbitration, the Court may stay the suit under this Parerell and thus enable the defendant to apply under Para 17 to carry on the arrange of Proceedings as under the agreement Before the present Code, the engage of such an agreement could be pleaded as a bar to the suit under S 21 ciant specific

Relief Act That section, so far as it enabled such a plea to be rused as a bar las now been declared by Para 22, sufra, to be not applicable to cases governed by this Schedule 1a

The object of this Paragraph is to provide against the confumacious conduct of a plaintiff who had agreed to refer a particular matter to arbitration but wants to resile from it, but the discretion is in the Court to stay the suit or not, the paramount idea being that a tubnnal constituted by the parties should not come in conflict or usurp the function of the tribunal which the Sovereign h s provided 2

#### 2 Where any party institutes any suit

This Paragraph is restricted to cases in which a suit is instituted after an agreement to refer to arbitration has been entered into. An agreement to refer entered into pending suit does not oust the puisdiction of the Court, nor can't afford a valid ground for staying the suit under this Paragraph 1

# 3 Application for stay of suit must be made at the earliest opportunity

The power vested in the Court to stay a suit under this Paragraph's discretionary and can be exercised only on an application made for that purpose at or before the settlement of issues, of the provisions of S 19 of the Indian Arbitration Act which require that the application should be made at any time after appearance and before filing a written statement or taking any other steps 17 the proceedings

# 4 Effect of award made subsequent to suit in pursuance of agreement to refer before

Where no application for stay is made within proper time or an application is made and dismissed, the award made subsequently and pending the suit is invalid When once the suit is filed, the jurisdiction of the arbitrators cea ? and they become functus officio 1 Tho leading case on the point is the decision in Doleman and Sons v Orsett Corporation, [(1912) 3 K B 257] which has been Moulton LJ. quoted with approval and followed by the High Courts in India

(1887) 9 All 168 (170) (1886) 8 All 57 (61) (1882) 4 All 546 (548) (1888) 1888 All W N 133 (133) (1897) 11 bom 199 (214) (1875 76) 1 C 11 42 (50 51) (1889) 5 Cal 498 (500) (1890) 23 Cal 956 (907) Held he urgument rendered moperative owing to lapso of time (1918) 1918 Vind 518 (549) (1911) J Ind Cas so (82) 33 4H 315 (1869) 1 N W P H C R 252 (252) (1885) 11 Cal 232 (235) Held contract not

(1531) 1891 Pun Re No 50 pige 274 (1809) 4 Oudh Cas 17 (70)

1a (1920) 1J20 Cal 975 (975)

(1932) 1332 Oudh 265 (266) 8 Luck 98

34 Long 312 Cases under 5 1) of the Arbitration (ct) Note 3 1 (1314) 1914 Lab 436 (437 4 4) 1331 2

Ra No 115

o (1918) 1918 Vad :19 (720) 41 Vad 115

Note 2

(1.312) 15 Ind Cas 140 (145 146) 1912 Pag

[See also (1309) 4 Ind Cas 1,3 (13)

1 (1914) 1914 Lom 184 (185 186) as bom 6

[Sco 1lso (1921) 1921 5 1 d 39 (201) 15 Said L R 44]

to the suit-No reference was mide

Note 4

1 (1912) 3 h B 2,7, Doleman and Sons ' Orsett Corporation-C tel in (1) 1921 Cal 7.0 (770) (1931) 1931 Lah 657 (5.0)

(1916) 1916 L B 101 (101) (Sca however (1,32) 1932 Oudh 365 (%6) 8 I uck 93 5 21 of the Speci tie Relief tet was held to be a bar [1922] 1922 I ah 363 (371) 3 Lab - " F I lowing Doleman & care

in delivering the judgment in thit case observed as follows — The law will not enforce the specific performance of in agreement to refer to arbitration but if duly appended to it his the power in its discretion to refuse to a party the alternative of having the dispute settled by a Court of Law and thus to leve him in the position of having, no other remedy than to proceed by arbitration. If the Court has refused to stry an intion or if the defendant has obstained from asking it to do so the Court has seen of the dispute and it is by its decision, and by its accession ident that the rights of the parties are settled. It follows that in the latter case, the private tribunal, if it has ever come into existence is function officio unless the parties agree de note that the rights of the parties are formed by arbitration and that the action itself shall be referred. There cannot be two tribunals, each with the juri-diction to misst on deciding the rights of the parties and to competition to accept its decision.

But in order to apply the doctrine that an iward made pending suit is might the following conditions must be fulfilled -

- (1) The percon instituting the suit must be a party to the agreement to
  - (2) The party wishing to stay the suit must have the right to highly to the Court to stry it
- (3) The subject matter of the dispute must be the same before the arbitrator and the Court 2

The salidity of the agreement entered into prior to the suit is not however affected by the institution of the suit and it is only the subsequent anaid that is invalid. Hence it has been held by the High Court of Calcutta that though an award is made subsequent to suit the Court can nevertheless stay the suit in order to enable the defendant to have the invalid award set aside (under Paris 20 and 21) and thereafter re commence the arbitration proceedings. Otherwise a party to the agreement can suilify the entire arbitration proceedings by filing a suit at the last moment when the award is about to be delivered without giving the opponent any time to obtain a stay of the suit.

# 4a Effect of award made prior to suit

A valid award operates to merge and extinguish all claims embraced in the submission and constitutes a bar to any action on the original demand. See S. 11, Note 27.

An award given after the period fixed in the agreement is not binding on the parties unless the period has been extended by the parties. The extension may however be made or ally See also Paragraph 8 Note 3

# 5 Sufficient cause-Burden of proof

It is for the plaintiff to show that there is sufficient cause as to why the matter should not be referred to arbitration in accordance with the agreement. The burden is not upon the defendant to show that no such cause exists \(^1\) (as to

- (1918) 1918 Mad 719 (719) 41 Mad 115 Following Doleman s case
  - (19 b) 1926 Sind 86 (88) Following Dole min s case
    - (1922) 1922 Oudh 1.8 (1.9 160) 25 Oudh Cas 63

(See however (1922) 1922 All 48 (49) 44 All 292 Case arising under S 19 Arbitration Act]

9 (1927) 1927 Lah 165 (463)

(245) Case under S 19 Arb trition Act] Note 4a

Sub

- 1 (1933) 1933 Lah 173 (173 174)
- Note 5 1 (1922) 1922 Lah 97 (97) 2 Lah 19 (1933) 1933 Rang 331 (332)

what is sufficient cause see Note 9 to Pus 17, supra)

#### 6 Discretion of Court to stay suit

The defendant is not entitled as of right to a stay of the suit under this Paragraph . The granting of stay is in the discretion of the Court 1 The Court will however exercise the discretion ordinarily in favour of the stay, for, as observed by Lord Schoulne in Wallesford v Watson 2 If parties choose to determine for themselves, that they will have a domestic forum instead of resorting to the ordinary Courts, then since that Act of Parliament, (that is, the Common Law Procedure Act, 1854 S 11, which corresponds to Para 18 of the Civil Procedure Code) was passed a prime facte duty is cast upon the Courts to act upon such an agreement

# 7 Dispute as to agreement to refer-Validity of agreement

The Court can stay a suit under this Paragraph only when there is a subsisting preement to refer to arbitration. Where the agreement has become void and inoperative as for instance, by the death of the arbitrator specified in the abreement it can afford no valid around for granting stay under this Paragraph Similarly where the preement bas been revoked for sufficient cause or is other wise invalid in law (as where it is vitiated by fraud of mistake) the Court will decline to grant stay 4

Where the parties dispute the agreement, the Court should decide as to the tinth and validity of the agreement before it proceeds to giant or refuse a stay under this Paragraph 3 Where the parties have entered into a fresh agreement which materially alters the original agreement containing the arbitration clause the existence of the original agreement cannot be urged as a ground for stay Buif the fresh a reement merely amounts to an extension of time for the performance of the original contract, it has not the effect of supersedin, the same so as to invalidate the arbitration clause " Where a contract contains several clauses of which the arbitration clause is one the Court is not a fortion; bound to stay the Thus where a seller files a suit upon certain accepted but unpaid bills and there is a clause in the indent by which the buyer is bound to accept and pix at maturity the bills drawn by the seller notwithstanding any objection that the buyer may have regarding any variations in the terms of the indent the buyer is not entitled to 1el, on a clause in the indent agreein, to refer the dispute to arbitration Such a suit is governed by S 32 of the Negotiable Instruments to and the Court should not stay the suit under this Paraciaph 5

In the undermentioned case it has been held that where a suit is fild imperching the very agreement containing the arbitration clause the Court can order a stay of the arbitration proceedings.

# 8 Removal of stay order

no of the anlitrators 339 (390) (Mad)

Woles J and 12 to Part

Note 6 1 (1918) 1918 Mad "19 (720) 41 Mad 115 (1933) 1933 Bom 202 (704)

2. (1873) 42 L J Ch 447 Wallesford v Wat son - Referred to : 1 1319 Cil 479 (450) 51 Ind Cas 80 (52) Note 7

1 (1931) 1931 Mad 25 (32 31) 54 Mad 469

3 (1917) 1917 Lah 261 (765 206) 1917 Lun Fe

4 (1914) 1914 Cal 294 (296) 21 Ind C , 17 (21J) 41 Cal 35 5 (1922) 1922 Lah 353 (353) 1 Lah 553

6 (1913) 1 )19 C 1 1042 (1018) [See also (1919) 1919 Cal 920 ( ) In this case stry was refused]

refuses to act<sup>1</sup> or the defendant neglects to take steps to proceed with the arbitration, the pluntiff is entitled to apply for a removal of the order for stay. The Court cannot, however, proceed with the sub without vacating the stay order

9 Appeal

In appeal hes from an order under this Para\_naph staying or refusing to tay the suit \(\text{fide} S \) 101, suh s (1), Cl (e) \(\text{I}\) But an older of \(\text{r}\) received court-taying or refusing to stay a suit under this Paragraph is not \(^2\) decree within the meaning of S 177 of the \(\text{tgr}\) Tennucy \(\text{tet}\) and no appeal hes against such an order to the exist Court \(^1\)

10 Presidency Small Cause Court's power to slav

According to the High Court of Bombayl the Presidency Small Cause Court has power to stay the suit under this Parigraph as well as under S 19 of the Indian Arbitration Act The High Court of Calcutta? has, however, held that the High Court can stay under this Paragraph the suit pending before the Presidency Small Cause Court, but his left open the question whether the Small Cause Court has also concurrent nower to grant stay.

P. 19. [S, 574] The foregoing provisions, so far as they filed under the to proceedings all proceeds

under Pais 17

Count under that paragraph, and to the award and to the decree following thereon

[1877—S 524; 1859—S 326]

Synopsis

Note No

1 Power of Court to remit or set aside

agreement filed under Para 17 See Note 11 to I ara 17 ante 2 Appeal See Note 15 to Para 17 ante

1 Scope and applicability of the Paragraph

This Para, raph empowers the Court to apply the provisions of Piras 1 to 16 to proceedings under Para 17 so far as they are consistent with the agreement to refer. But in order to so apply those provisions it is essential that the agreement should be actually filed under Para 17.1

- 2 So far as they are consistent with any agreement filed under Para 17 —See Note 11 1ara 17 a ite and Note 7 Para 15 ante
- 3 Power of Court to result or set aside award—See Paras. 14 and 15 ande and the undermentioned cases 1

Appeal -See Note 15 to Para 17 a ste

- 1 (1921) 1921 Bom 458 (405) 45 Bom 1181 [See also (1919) 1919 Cal 295 (295)] 2 (1914) 1914 411 275 (276)
- Note 9 1 (1018) 1018 All 238 (238) 40 All 219

Scope and applicability of the Para

So far as they are consistent with any

- Note 10
- 1. (1925) 1928 Bom 275 (277) 57 Bom 420 (1931) 1931 Bom 343 (344) 55 Bom 503

referring to arbitration -Lvide ice led and decree passed-Full Court cannot acteriese and order stay]

cannot interfere and order stay]
[But see (1907) 31 Bom 236 (241)]

(1930) 1930 Cal 51 (52) 56 Cal 100

Sch II Para 19-Note 1

Note 3.

# ABBITRATION WITHOUT THE INTERVENTION OF A COURT

P. 20. [S 525] (1) Where any matter has been referred to arbitration without the intervention of a court, and an award has been made thereon any error intervention of court intervention of Court any Court having jurisdiction over the subject matter of the award to that the award to flet in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit<sup>12</sup> between the applicant as plaintiff and the other parties as defendants

(3) The Court shall direct notice to be given to the pathes<sup>1</sup> to the arbitration, other than the applicant, requiring them to show cause, within a time specified, why the award should not be filed.

[1877—S 525; 1859—S 327]

Synopsis Note No Note No Any person interested in the award Legislative changes Awards made on arbitration without Juriadiction over the subject mallered the intervention of a Court the award 11 3 Scope of the Paragraph (a) Small Cause Court Regular aust to enforce the award Shall be numbered and regulered at a Award made pending suit-See Note 9 aust 13 to O 93 R 3 ante See also lara 10 Notice to parties 5 ante (a) Lost anard-See Note & to Para Where any matter has been referred 91 infra 15 to arbitration - See Para 21 infra (b) Decision of majority (a) tward determining matters not 16 (c) Parties to reference 7 referred-See Para 21 infra 17 Court fee (b) Whether part of award may be 15 filed-See Para 21 1 fra Limitation

Other Topics

Court to which application under this Paragraph should be made. See Notes 10 and 11

the sward hard puried cir n oce

the matter to which the award relates Sec Note 10 infra

2 Awards made on arbitration without the intervention of a Court
A reference to arbitration out of Court originates in a submission which is
an agreement between the parties to be bound by the adjudication of their differences or disputes by an arbitrator appointed with their consent so not be reference the irbitrator makes an award or an adjudication of the re pectro
rights of the parties. In order to constitute an award therefore the follows s
elements are essential:

1 ' ...

- (1) There must be a difference or dispute between the parties 1b
- (2) There must be a submission to arbitration and a reference thereon to an arbitrator appointed by the parties
- (3) There must be an award by the arbitrator on the points referred to him

as between the purties to the submission, a talta award is a final adjudication of the dispute, between them embriced in the submission, and is conclusive upon the merits of the controversy submitted. It operates, therefore, to merge and extinguish all claims embruced in the submission and, after an award is made the submission and award furnish the only basis by which the rights of the parties can be determined and constitute a bar to any action on the original rights of the parties. It is not necessary for the talkity of the award that it should be filed or enforced in a Court of law. But fit is desired to enforce the rights created by the award through the Court, the award has to be converted into a judgment of Court on which a decree may be made 22. For this purpose a party in whose favour an award has been made has two courses open to juin.

- (t) He may proceed by in application under this Paragraph So Note 3
- (11) He may hie a regular suit to enforce the award See Note 4

3 Scope of the Paragraph

This Paragraph provides for a summary procedure for filing in Courts wards made on arbitration without the intercention of a Court. The procedure is, bowever, optional and does not preclude the party from bringing a regular

1b(1903) 30 Cal 831 (839) [See the Note 10 to Para 1 ante] 1 (1906) 33 Cal 881 (838)

(1924) 1324 Cal 72 (73) (1903) 1 1nd Cas 105 (10, 106) (Lom)

(1907) 7, Bom 401 (403 404) (1977) 1977 Bom 937 (235) But where ward does not replace but merely defines and ascertains original rights a suit on original rights not barred (168.) 11 Cal 1986 (388 392) 12 Ind App 67

(1883) 11 Cal 986 (388 392) 12 Ind App 67 (PC) (1918) 1918 Lali 239 (240) 1917 Pun Re . 10 99

and the alternative if the award is found to be mailed a prayer may be added for adjudication on the merits (1917) 1317 Lab 65 (67) 1317 Pun Re No

(1916) 1916 Lah 264 (265) (1916) 1916 L B 101 (102) It is however open to the pluntill to impugn the validity of award ind if he succeeds in proving the award to be invited an adjudication on the original rights may be made

[Sec also (1J18) 1918 Mad 719 (719) C P C 382 A 383 41 Vad 115 (117) (1919) 1J19 Mad 1113 (1113 1114) (1910) 5 Ind C 1s 425 (420) 6 Nag L R 1 (1892) 1892 J11 W N 288 (288) (See also (1974) 1924 Sind 23 (24) 17 Sind L R 178)

(1912) 15 Ind Cas 819 (921) 5 Sand L R 240 240 (1891) 18 Ca) 414 (418) 18 1nd 4pp 73 1891

(227) 197 Al 739 (734) (1874) 188 Al 739 (734) (1874) 188 Al 1 W N 148 (145) (1863) 188 Al 1 W N 227 (237) (1862) 12 Al 1 W N 228 (228) (1866) 6 Suth W R 94 (95) (1873) 20 Suth W R 449 (179) (1904) 7 Oudh Cas 309 (870) (1904) 7 Oudh Cas 309 (870)

No 99

\*\*a (1871) 6 Beng L R 315 (325) (b B)
(1893) 8 Valad 423 (479)
(See also (1902) 29 Cd 167 (187 183 184 29 Lt d App of 1 2902 Pun Ro
No 25 (F O)

(1925) 1928 Mad 107 (115) Note 3 1 (1932) 1933 Mad 462 (465) 55 Mad 653

2 (1884) 1894 All W N 149 (149). (1921) 1921 All 384 (386) 43 All 103 (1927) 1927 All 733 (734) (1931) 1931 Oudh 127 (129) (1901) 7 Oudh Cas 369 (370) (1892 96) 2 Upp Bur R 11

(1897 1901) 2 Upp Bur R 10

sunt to enforce the rights created by the award 3 (Se\* Note 4, infra) The inquiry under this Paragnaph is imited to the conditions specified in Pars 41 (See Note 2 to Para 21, infra) While, in a regular sunt to enforce the award, it is some to the defendant to attack the award on all possible grounds 4

As to whether a proceeding under this Paragraph is resplained in a subsequent suit to enforce or set aside the award, see Note 27 to 8 11 ante. A refusal to file the award under this Paragraph does not amount to a dener, and therefore does not lender the award void or otherwise unenforceable, as against the parties to the award, but leaves the award to have its ordinary leaf adulty, unless the validity of the award as an award was directly and substantially in issue in such proceeding 6

This Para and Para 21 infra have no application to awards made by an arbitrator appointed under the Rules made by the Government under the Co operative Societies Act. Such awards can be enforced in the same manner as decrees of civil Courts

#### 4 Regular suit to enforce the award

Apart from the procedure under this Paragraph, a regular suit may be brought to enforce the rights under the award 1 (See Form No 10, Appendix 4 to Sch 1) It has been held in the undermentioned case that a suit to enforce the terms of the award is in essence one for specific performance of the award But it has been held by the High Courts of Madras and Allahahad that the question whether a suit to enforce an award is a suit for specific performance of the award, would depend upon the nature and purport of the award, and the period of limitation for the suit would also depend upon the nature and purport of the award It is submitted that the latter view is correct Where the award directs the performance of a duty or condition and where the performance of such a duty or condition may be specifically enforced under the Specific Relief 36, the suit may he one for specific performance of the award. But where the award settles or declares the title of the parties and a claim is made based on the title so conferred, the suit cannot be called a suit for specific performance of the award any more than is a suit upon a sale-deed, a suit for specific performance of a contract of sale 42 On the same principle it has been held that a suit for recovery of money due under an award is a suit for money and as such

3 (1921) 1921 All 384 (386) 43 All 106 (1933) (1902) 26 Bom 76 (80) (1910) 5 Ind Cas 597 (598) 1910 Pan Re

(1917) 1917 Lah 65 (67) 1917 Pun Re No 12 (1892) 1882 Pun Re No 77, page 218

(1863 1869) 4 Mad H C R 11J (120) (1892) 15 Mad 99 (100) (1932) 1932 Mad 462 (465) 55 Mad 6e9

(1932) 1932 Mad 462 (465) 55 Wad 6 (1932) 1932 Mad 745 (747) (1916) 1916 Wad 583 (584)

(1897 1901) 2 Upp Bur R 293 4 (1926) 1926 Lah 125 (127) 7 Lah 42

5 (1925) 1925 P C 216 (219) 52 Ind App 265 5 Rang 186 (P C) 6. (1891) 18 Cal 414 (418 419) 18 Ind App 73

1891 Pun Re No 70 (P C) (1921) 1921 Bom 389 (391) 45 Bom 329 (1906) 33 Cal 881 (887) 7, (1933) 1933 Cal 695 (696) 60 Cal 906-

Note 4
1. See S 30 of the Specific Relief Act, 1877

(1933) 1933 All 748 [748] Livil dispate as to right to share of offenns, right of arbitration — Award for defendant to deliver half of offens not filed—Surt for recovery of half of offenns or many the alternative from the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the

(1935) 1935 Lah 134 (135) In whah case lah 134 (135) In whah case hat 178 Lamizton 4ct wil not apply [See (1933) 1933 Cal 407 (468) 6 Cal 707 But a person not a par f

Cal 707 But a person not seek a to the arbitration cannot seek a enforce an award)

2 (1918) 1918 Cal 899 (300)

2a (1900) 23 Mad 593 (596) 3 (1901) 23 Mi 28a (288).

L [See (1902) 24 111 164 (168 169)] [See also (1900) 33 Cal 831 (557)]

4a (1901) 23 131 285 (288). (1934) 1934 Bom 140 (143 145) cognisable by a Court of Small Causes, even though, in such a suit, the validity of the award may be contested 5 As to whether a suit, brought after an application to all the award under this Paragraph is dismissed is burred by the rule of res sudscata, see Note 27 to S 11, ante

# 5 Awards made pending suit

See Note 9 to O 23, R 3 ante See also Para 10, ante

Where in award is made on a reference to irbitration during the pendency of a suit in which the same subject matter is in issue the award cannot be filed under this pungraph 1

- 6 Where any matter has been referred to arbitration -Sci Para 21 infra.
- 7 Award determining mallers not referred See Para 21 sufra.
- 8 Whether part of award may be filed See Note 7 to Para 11, infra-
- 9 Any person interested in the award

A person who is not a party to the reference to arbitiation and therefore is not bound by the award cannot enforce the sward even though he may derive an advantage from it 1 The arbitrator is not a person interested in the award within the meaning of this Para He cannot, therefore apply under this Para to file an award "

10 Jurisdiction over the subject matter of the award

Under the old Code the application had to be filed in the Court of the lowest grade having purisdiction over the matter to which the award relates It was held on an interpretation of the words in quotation, that the jurisdiction depended upon the value of the matter to which the arbitration related and not on the value of the matter awarded 2 The use of the words having jurisdiction over the subject matter of the award in the present Paragraph makes it clear that the jurisdiction now depends upon the reliefs awarded rather than on the matter originally in dispute 3 In order to decide whether the Court has inrisdiction over the subject matter of the award, it is necessary to determine whether the Court would have under Ss 16 to 20 of the Code jurisdiction to try a regular suit between the parties in which the reliefs claimed are the reliefs granted by the award sa It is, however the entire matter dealt with by the award and not morely a particular portion thereof that must be considered in determining the jurisdiction of the Court Where the award deals with matters partly within the jurisdiction of a Court and partly without it, it cannot be filed

5 (1925) 1925 Bom 519 (519) 49 Bom 693 (1919) 1919 All 12 (13) 42 All 169

(But see (1924) 1924 Rang 192 (192) 1 Rang (1871) 3 N W P H C R 117 (118)

Note 5

tainable (1935) 1935 Sind 184 (186) Note 9

1. (1884) 6 111 322 (328) 11 Ind App 20 (P C). Confirming 2 All 809

(1929) 1929 Lab 814 (815) [See also [1886] B.A)] 310 (351)) 2 (1935) 1935 Lah 134 (135) Note 10

1 [See (1864 66) 2 Lom H C R 91 (93)]

2 (1906) 29 Mad 44 (45) (1,04) 31 Cal 203 (206) 3 (1914) 1914 Cal 683 (694)

(1933) 1933 411 350 (381)

3a (1933) 1933 All 880 (881) (1934) 1934 Sind 29 (82) 4 (1919) 1919 Vad 22 (23)

(1869 70) 5 Mad H C R 128 (129) (1932) 1932 Mad 462 (463) 55 Mad 689 (1933) 1933 All 380 (381)

[See however (1931) 1931 Rang 252 (254) 9 Rang 480 Observation of My2 Bu J in the order of reference

to the effect that where the portion

under this Paragraph in that Court and no decree can be validly made thereon Thus an award directing the payment of a sum of money and also declarate the dissolution of a marriage cannot be filed in a Small Cause Court which has no jurisdiction to deal with the question of dissolution of marriages 6 Similarly, in Ramlal v Kısan Chandra, 63 where the properties in dispute and dealt with by the award, were all outside British India, it was held by the Privy Council that the award could not be filed in a British Indian Court

Before assuming jurisdiction under this Paragraph the Court has to be satisfied that it has jurisdiction to entertain the application and should, if necessary, take evidence regarding jurisdiction before assuming jurisdiction.

# 11 Small Couse Court

Where an award merely directs the payment of money a suit to recover the money is cognisable by a Court of Small Causes 1

Shall be numbered and registered as a fust "

It has been soon in Note 5 to S 2, sub s (2), ante, that the word "suit" for the purposes of the Code, means-

(1) any proceeding under the Code which is instituted by the presen tation of a plaint, and

(2) any proceeding which, according to any specific provisions of law should be regarded as a suit under the Code

An application under this Paragraph or under Para 17 must, therefore, be regarded as a suit for the purpose of the Code, masmuch as it has to be "numbered and registered as a sust" It has accordingly been held that the provisions of O 9, R 13, O 23, Rr 1 and 3 and O 35, R 5 can be applied to such applications. But though such an application is a "suit" the order thereof is not a "decree" The reason is that such a decision is appealable as an order under the provisions of S 104, ante, and is thus excluded from the definition of "decree".5

It has, however, been beld in the undermentioned cases that an application V 1/2 1

within jurisdiction is separable from the other portion without affecting the basis of the award, the case may be different? 5 (1932) 1932 Mad 462 (463) 55 Mad 689 See cases cited in Poot Notes (6) and (7)

below

6 (1919) 1919 Mad 22 (23) G (1924) 1924 P C 95 (102) 51 Cal 361 51

Ind App 72 20 Nag L R 33 (P C) (See also 1931 Rung 252 (2.4) 9 Rang 480 Property outside British Indial (1920) 1929 Lah 24 (26) Award relating to

property situate outside British India cannot be filed in British India

(1931) 1931 Sind 47 (48) 25 Sind L R 201 Property outside jurisdiction of

(1871) 15 Suth W R 556 (556) Mnnssf's Court not having jurisdiction over the collection of rent, the sward re lating to that matter cannot be filed in that Court 7 (1839) 16 Cal 452 (456)

(1932) 1332 Mad 462 (463) 55 Mad 6-9

Note 12.

3 (1904) 31 Cal 516 (518) O 23 R 1 (1921) 1921 Lah 34 (35) 2 Lah 114 0 .3. (1910) 5 Ind C is 991 (995) (Lah) (1922) 1922 Oudh 189 (196) 20 Oudh Car

1 (1927) 1927 Bom 259 (259, 260) 5 See definition of "decree" in 5 2 116 S 2 6 (1921) 1921 Bom 380 (390) 45 Loin 32) (1921) 1921 Pat 161 (162), 6 Pat L John

(1979) 1979 I ah 533 (533) 1931 1 512 5-7 .

> No decisions us a a 3 the Code

unticed

under Para 17 or under this Paragraph is not a 'smit at all for the purposes of the Code It is submitted that this view cannot be accepted as correct

But an application under Para 17 or under this Paragraph should be recarded as a suit only for the pur poses of the Code It is not a suit within the meaning of the Limitation Act, 1908 or of the Dekkhan Agriculturists Relief Act or of the Court Ices Act. 1670sa or for the purposes of the taxation of the pleaders fee on such applications. It has been held by the Judicial Commissioner's Court of Sind in the undermentioned case10 that an application under this part to file in award is a suit within the meaning of S 16 of the Provincial Small Cause Courts, Act.

# 13 Notice to parties

II.

The issue of a notice to the parties under sub para (4) is imperative 1. The word parties is not contined to persons who have actually appeared before the arbitrators A B and C igreed that in case of any dispute between them the matter should be referred to the arbitration of persons chosen by each party to the dispute and that in the event of any such party refusing to nominate an arbitrator. the arbitrator nominated by the other party should nominate auother arbitrator and the two to ether should nominate an unpute Deputes having arisen A and B called upon C to nomin te an inbititor (fuled to do so and thercupon 4 and B nominated an arbitiator who chose another ubitiator and they having appointed an umpire mide an award I applied to ble the award in Court It was beld that C was a party to whom notice should go although ho did not actually appear before the arbitration 3

14 Lost award See Note 8 to I ma 21 mira

# 15 Decision of majority

Where a dispute is referred to several arbitrators and the agreement of reference does not provide that the decision of the millority shall prevail an award by the majority of the arbitrators is not valid. The more fact that an uneven number of arbitrators have been appointed does not show that the parties agreed to be bound by the award of the majority 2 The Court cannot in such cases annount an umpire 3 Even in a case where the parties agree to be bound by the award of the majority the proceedings will be vitiated upless all the arbitrators take part in the proceedings . As to the validity of a decision by the majority of the arbitrators on a reference pending suit see Note 2 to Para 4 ante

(1914) 1314 Sind 122 (123) 8 Sind L R 60 Application under p ra 17-Reference and award - Award set aside-It was held that there was no sust and therefore no dience und

pura 15 which applies to such orders and is therefore rot a decree (192,) 1927 Sind 103 (104) 19 Sind L R of 34

71)

8 (1924) 1924 Sind 23 (24) 17 Sind L R 178 (1897) 21 Bom 63 (67-69)

Sa (1894) 10 Cal 12 (14) 9 (1930) 1930 Oudh 89 (JO) 5 Luch 678

10 (1935) 1935 Sind 208 (209) 1 (1933) 1933 41) 166 (167) 2 (1886) 8 411 340 (351)

Note 15 1 (1919) 1919 Pat 74 ("8) (19.3) 1J23 Oudh 181 (181) 26 Oudh Cas 350

(18 9) 18:9 I un Re \o 57 page 145 (18,3) 19 Suth W R 4: (48) (1867) " Suth W R 26J (270)

(1905) 2 Cal L Jour 61 (64) (1882) 1882 Lun Re No 191 page 558 2 (1970) 1920 Vad 130 (130) Dissenting from

1 117 Bom 128 3 (1976) 1976 Mad 1183 (1184)

4 (1918) 1918 Cal 865 (566) (1903) 23 411 W N 159 (160)

# 16 Parlies to reference

An award binds only the parties making the reference Where a reference is made by some only of several persons having a common interest, and they have no express authority from the others to act on their behalf also the latter are not bound by the award 1 Where one of the parties to a reference is a minor and an application is made to the Court by another party to file the award, the Court before filing the award, should decide definitely whether the reference vas for the benefit of the minor so as to be hinding on bim 2.

# 17 Court fee

An application to file an award under this paragraph is not chargeable with a Court fee as if it is a suit but is chargeable only as in application 1 See al o Art 18, Sch II of the Court fees Act, 1870

# 18 Limitation

The period of limitation for in application to file an award is six months from the date of the award 1 (Art 178, Indian Limitation Act) It has been held that the date of the award in Art 178 really means the date on which the award was published or handed over to the parties and not the date on which it was made or signed 2 The Court has no power to enlarge this period under S 5 of the Limitation Act 3 Nor can a party claim the benefit of S 6 of the Act 4

526] (1) Whore the Court is satisfied that the P. 21. S matter has been referred to arbitration and that Filing and enforce an award has been mado thercon3 and where no ment of such award ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved, 10 the Court shall order the award to be filed and shall proceed to pronounce judgment accord-

ing to the award

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall he from such decree except in so far as the decree is in excess of or not in accordance with the award f1877-S 526: 1859-S 3271

11 Pat 131 A reference to arbitra tion to which the Larta of a joint family was a party is binding on his

| [1011 0 020 , 1000 0                                                                                                                                                                                                                                                                                          | 021 1                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
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| Sync                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| I Legislative changes Il Scope of the enquiry under this paragraph Ill Where the Court is satisfied that the matter has been referred to arbitration and that an award has been made there                                                                                                                    | on laidily of seference and award  (b) treement to refer in continuous deration of droping on annual procedur g coloration of the continuous description of the coloration of |
| 1 (1977) 1.27 (11 125 (136) [See (1932) 1032 Lah (9 (70) Two out of three partners referring to arbitration—ward is valid as between themselves—virid acted on—lessons deriving benefit under it cannot after wards imposed by (131) (24) [2 (1910) 7 Ind Cas 31 (33) (Cal) [2 (1910) 7 Ind Cas 31 (33) (Cal) | minor soci<br>Note 17<br>1 (1884) 10 Cal 11 (11)<br>Note 18<br>1 (1915) 1915 VII (20) (371) 23 VII 85 (31)<br>[See also (1916) 1316 Mad 283 (5-4)]                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |

4 (1923) 1323 Raig -- (-6 214) 1 ha s

XII Revision

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(2) Form of award (c) Registration of award (i) Part of award if can be filed (n) I ost award IV Grounds of objection under Paras 14 and 15 Proved VI Res judicata
VII Withdrawal of application — Se Note 12 to lara 'O atte and

Note 15 to Para 1 12 VIII Revocation of submission - Sec Note 12 to Para 17 ante 13 7 IX Appeal against an order filing or 8 refusing to file award-Sec S 104 Note 15 ante 14 9 X Appeal against decree on award —Sub Para (2) 10 15 īı (a) Enforcement of award 16 Appeal to Privy Council 17

# Other Topics

"A decree shall follow Sce Soto 16 Award on a vague agreement to refer - W1e ther valid See Note 18 F N (a) Delay in making the iward- tward whether

valid See Note 9 F N (2) Matters for enquiry under this paragraph See Sust to enforce award See Para 20 Note 4

I Legislative changes -

1 The words where the Court is satisfied that the matter has been refer ed to arbitra tion and that in award has been made thereon are now See Note 3

The word proved has been substituted for the worl shown a Note 10 3 546 5 (9) 1 1 cm Se Note 15 ant 9 101 (f) art

2 Scope of the enquiry under this paragraph

It has been seen in Note 4 to Para 14 auto that it is a fundamental removale of the law of arbitration that the submission furnishes the source and prescribes the limits of the authority of the arbitrator and that the award must conform to the submission in substance and in form Subject to this limitation. however the arbitrator is the sole and final judge of law and fact and the Court will not review the award upon the merits nor constitute itself as a Court of appeal to go into the merits of the matter and to see whether the conclusions arrived at are sound and reasonable 1

There is no provision of law which requires the arbitrator to adopt any special procedure in arriving at his award 2 and the proceedings are not intended to be earried on according to the rules of procedure contuned in the Code 28 Ho is not bound to make any record of the proceedings2b or to give a reasoned judicial decision. In any inquiry under this paragraph the Court has to satisfy itself only on the following points -

- (1) that there was a matter in difference between the parties existing at the time of the arbitration (see Note 3 unfra)
- (2) that there was a valid submission of the matter in difference and a reference thereon in arbitration (see Note 4)
- (3) that the subject matter of the reference was such as could be lawfully referred to arhitration and that the Cnurt has jurisdiction over

Sch II Para 21-Note 2

1 (1912) 15 Cal L Jour 110 (113 114) (1333) 1933 Luli 1034 (1035] Partition sward-Unequal distribution by ar intrators - He was not asked to explain it-Court cannot refuse to tile award

(1J02) 79 Cal 167 (183) 29 Iod App 51 1902 Pun Re No 25 (P C) (1910) 38 Cal 143 (147)

(1909) 4 Ind Cas 503 (503 504) (Lah)

(1923] 1923 Rang 199 (201) 1 Rang "65 (1916) 1916 Wad 583 (584) (1905) 7 Bom L R 793 (197) (1930) 1930 Lah 22 (23) 2 (1910) 38 Cal 143 (147) (1912) 15 Cal L Jour 110 (113) 2a (1922) 1922 Cal 226 (228) 2b (1910) 38 Cal 143 (147)

(1912) 1913 Wad W N 1016 (1079) 3 (1912) 1913 Mad W N 1076 (1079) (1912) 23 Wad L Jour 290 (296)

### 16 Parties to reference

An award binds only the parties making the relevence. Where a reference is made by some only of several persons having a common interest, and they have no express authority from the others to act on their hehalf also the latter are not bound by the award 1 Where one of the parties to a reference is a minor and an application is made to the Court by another party to file the award, the Court before filing the award should decide definitely whether the reference was for the benefit of the minor so as to he hinding on him 2

#### 17 Court fee

An application to file an award under this paragraph is not chargeable with a Court fee as if it is a suit but is chargeable only as an application 1 See also Art 18 Sch II of the Court fees Act 1870

#### 18 Limitation

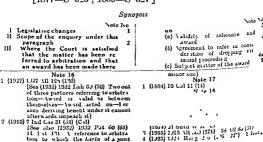
The period of limitation for an application to file an award is six months from the date of the award 1 (Art 178 Indian Limitation Act) It has been held that the date of the award in Art 178 really means the date on which the award was published or handed over to the parties and not the date on which it was made or signed 2 The Court has no power to enlarge this period under S 5 of the Limitation Act 3 Nor can a party clum the benefit of S 6 of the Act 4

526] (1) Where the Court is satisfied that the P. 21. S matter has been referred to arbitration and that an award has been made thereon3 and where no Filing and enforce ment of such award ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved,10 the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall he from such decree except in so far as the decree is in excess of or not in accordance with the award

[1877—S 526:1859—S 327]

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Note 15 to Pura 1 12 VIII Revocation of submission - Sec Note 12 to Para 17 ante 13 IX Appeal against an order filing or refusing to file award-See S 104 Note 15 ante 14 X Appeal against decree on award -Sub Para (2) 15 (a) Enforcement of award 16

XI Appeal to Privy Council

XII Revision

# Other Tomes

" I decree shall follow Se Note 10 Award on a vague agreement to refer - Whe ther valid See Note 18 P N (a) Delay in making the award - tward whether

vilid Sco Note 9 F N (2) Vitters for enquiry under this paragraph See Note 2 Suit to enforce award See Pura "O Note 4

# 1 Legislative changes -

H.

1 The words where the Court is satisf d that the matter has been refer ed to arbitra ion and that in award has been mide thereon are new See Note 3

2 The word proved has been substituted for the word show: see Note 10

3 -ab > (9) 1 v > e > ot 15 and 9 101 (A ant

#### 2 Scope of the enquiry under this paragraph

Ly has been seen in Note 4 to Para 14 aute that it is a fundamental remarks of the law of arbitration that the submission furnishes the source and prescribes the limits of the authority of the arbitrator and that the award must conform to the submission in substance and in form. Subject to this limitation. however the irbitrator is the solo and fin il judge of law and fact and the Court will not review the invidupon the ments nor constitute itself as a Court of appeal to go into the merits of the matter and to see whether the conclusions arrived as are sound and reasonable 1

There is no provision of law which requires the arbitrator to adopt any special tracedure in arriving at his award and the proceedings are not intended to be earried on according to the rules of procedure contained in the Code 22 He to not bound to make any record of the proceedings2b or to give a reasoned indicial decision 3 In any inquiry under this para, raph the Court has to satisfy itself only on the following points -

- (1) that there was a matter in difference between the parties existing at the time of the arbitration (see Note 3 sufra)
- (2) that there was a valid submission of the matter in difference and a reference thereon to arbitration (see Note 4)
- (3) that the subject matter of the reference was such as could be lawfully referred to arbitration and that the Court has jurisdiction over

Sch Il Para 21 Note 2 1 (1912) 15 Cal L Jour 110 (113 114) (1333) 1933 Luli 1034 (1035) Partition award Unequal distribution by ar titrators - He was not asked to relain it-Court cannot refuse to

(1923) 1923 Rung 199 (201) 1 Rung 965 (1916) 1916 Mad 583 (584) (1905) 7 Bom L B 793 (79 ) (1930) 1930 Lah 22 (23) 9 (1910) 38 Cal 143 (147) (1912) 15 Cal L Jour 110 (113)

2a (19°2) 1922 Cal 226 (228) 2b (1910) 38 Cal 143 (147)

(1912) 1912 Mad W N 1076 (10.9) 3 (1913) 1912 Mad W N 1076 (1079) (1912) 23 Mad L Jour 290 (296)

the subject matter of the award (see Notes 5 and 10 to Para, 20. ante).

- (4) that an award was made thereoo (see Notes 6, 7 and 8), and
- (5) that no grounds of objection such as those mentioned in Paras 14 and 15 have been proved (see Notes 9 and 10).

The Court should then proceed to give judgment according to the award,32 that is, it should state in the judgment what its constitution of the award is as to the rights and interests of the parties. and a decree dealing with the specific rights of the parties should be drawo up 5 The award should be construed rea sonably and in accordance with what may be supposed, under the circumstances of the case, to have been the intention of the arbitrator Every reasonable picsumption should be made to favour of the award being a final and certain termination of the matters in dispute 7

# Where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon

Under S 526 of the old Code, it was held by the High Court of Bombay in the cases cited below that the Court had no jurisdiction to enquire into the factum or validity of the submission and award, and if the defendant denied any reference to arbitration, the only course open to the Court was to dism , the application and refer the parties to a regular suit to enforce the award. But this view was dissented from by the same High Court in a later Full Bench cies in which it was held, following the decisions of the other High Courts' that the existence and validity of the reference and award was the foundation of jurisdic tion of the Court under that section, and that, therefore, the Court ought to decide on ovidence whether the matter was referred to arbitration and whether an award was made thereon The addition of these words gives effect to the latter viow. See the undermentioned cases \*

The word "matter' in this as well as in the previous paragraph, is not wider than the expression "matter in difference used in Para 1 of this Schodule" is has been seen in Note 8 to that palagraph, the difference must be one which has actually arisen at the time of the reference though it need not have arisen at the tune of the agreement to refer 53 The Court must, therefore, before film, the

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3a (1907) 5 Oudh Cas 27 (29)
      (1901) 4 Oudh Cas 17 (21)
(1891) 4 Oldan Cas 17 (21)
4 (1891) 13 MI 366 (367)
(1883) 7 Ibom 316 (318 322)
5 (1891) 13 MI 366 (367)
6 (1898) 20 MI 245 (248)
7 (1925) 1928 Sand 144 (145)
   Note 3
1 (1885) 9 Bom 254 (258)
(1833) 17 Bom 674 (677)
(1896) 20 Bom 596 (401 602)
2 (1905) 29 Bom 621 (627) (FB)
3 (1595) 17 111 21 (26 28)
     (1306) 28 M1 621 (622)
(1898) 25 Crl 757 (764)
(1882) 4 Mad 319 (320)
(1897) 20 Mad 89 (30)
                    (But see (1975 78) 1 111 156 (158)
Decided under S 327 of the Code of
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1859] 4 (191~) 1 H- Bom 123 (127 12~) 47 Bom 258 The Court sh uld be satisfied that

there was a proper reference to

arbitration (1934) 1934 Sand 29 (32) Reference to 11 bitration deprises a parts of his right to resort to ordinars tribunals and should therefore to strictly

construrd (1926) 1926 Lah 91 (93) Court can diride whether there was reference and

whether there was any di jute for reference

(1903) 30 Cal 631 (542) The que tien to be determined is whether there was any matter in difference tetnee! the parties which could be and was

referred to arbitration (1923) 1323 Rang 139 (201) 1 Rang 263 5 (1911) 12 Ind Cas 633 (610) 5 Sml L R

52 See the cases cited in feet no s (4) 17 hos 10 to para graph 1.

award satisfy itself that there was a real dispute between the parties, and that there was an arhitration thereon.

#### 4 Validity of reference and award

Before ordering an award to be filed, the Court should satisfy itself not only that the matter in difference was referred to arbitration, but also that the submission was tailed in law.

An award binds only the parties making the reference and persons who are properly represented in the arbitration proceedings2. Thus an award on a question of partition when all the members of the joint family are not parties to the reference is not hinding oo the non-parties' though as between the parties themselves it will be hinding . Again, the capacity to make a submission is co-extensive with the capacity to contract. A person who cannot make a contract cannot make a submission and a person whose capacity to make a contract is restricted, can only make a submission to that extent 5 Thus a minor cannot himself make a submission although a guardian may make it on his behalf for his benefit 6. An executor or administrator is competent, but only noder certain circumstances, to make a reference to arhitration 7 But though, as a geogral principle 1 person who is not properly represented in the proceedings is not bound thereby, the proceedings before arbitrators are not intended to be carried on according to the sules of procedure contained in the Civil Procedure Code If there is a hinding reference to arbitration, all that is occessary to be seen is that there is a substantial represectation of the different interests before the arbitrators. There is no rule of procedure by which, on the death of some of the parties, the arbitrators could substitute their legal representatives or appoint gualdian ad litem for such representatives if they happen to he minois 8

An agreement to refer, as has been seen to Para 17 antermust, for the purposes of that paragraph, be no urting In cross, however, of anadas without the intervention of the Court, it is not necessary for its validity that the submission should have been to writing it may be orall or cun be gathered from documents connected by oral oudcoce. We

# 4a Agreement to refer in consideration of dropping eriminal prosecution

An agreement to refer a dispote to arbitration in consideration that a threa-

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| See also (1933) 1932 Lish 459 (160) | Ptt 131 A reference to which the | Halibury's Laur of England Vol 1 | Laur of the | joint family was a | putty is building on his minor son | (1830) 1893 A C 79 (81) I onder and North | 3 (1931) 313 Ft 123 (1218)
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Western and Great Western Joint 4 [1928) 1929 Cal 270 [270]
Lathway Co v Billington [See also (1923) 1932 Lth 60 (70)]
6 (1911) 12 Ind Cas (39) (610) 5 Smd L R [5 (1915) Cal 745 (748)]
6 (1915) 1919 Cal 745 (748)
1 Halbbury Louis of England Vol I.

(1921) 1921 Sind 61 (65) 17 Sind L B 211 (1926) 1926 Lah 91 (98) (1930) 1920 Lah 92 (22) Even if the dispute 7 (1915) 1915 Cat 745 (748)

is not detailed in the reference, it is sufficient if the arbitrators satisfied themselves as to the nature of the dispute

Note 4

1 (1919) 1919 Mad 1029 (1033) (1922) 1922 Lub 149 (165) (1906) 29 All 621 (622) 2 (1922) 1922 Cal 226 (228) see Note 16 to

paragraph 20 [See also (1932) 1932 Pat 60 (61) • 11 6 [See Note 20 to pura 1 ante] 7 (1915) 1915 Cat 745 (748) 8 (1922) 1922 Cal 226 (225) 9 (1911) 14 G. 14 L Jour 168 (205) (1935) 1935 Mad 276 (278)

(1932) 1932 Mad 745 (746) 56 Mad 85 Submission in Presidency Town but to which the Arbitration Act does not apply (1893) 17 All 21 (27)

(1894) 17 Ail 21 (27) (1872) 18 Sath W R 593 (594) (1864) 1864 Suth W R Gap 76 (1) 10 (1920) 1920 All 258 (260) 42 All 525 tened or pending criminal prosecution should be dropped is opposed to public policy and the reference as well as the award if any made-thereon are invalid. But an agreement to refer in consideration in the withdrawal of an application under S 476 of the Criminal Procedure Code is not enough to vitate the award.

#### 5 Subject matter of the award

Paragraph 20 provides that any person interested in the award (made without the intervention of the Court) may apply to any Court having jurisdiction over the subject matter of the award, that the award be filed in Court It follows that the subject matter of the award must be one over which the Court would have jurisdiction if a suit were brought in respect thereof Questions therefore which could not be made the subject of a civil suit, under S 9 of the Code such is caste ques tions could not be the subject of an award enforceable in a Court of law 1 The High Court of Bomhay has however held that the jurisdiction of the Court to file an award is conferred by Para 20 and not by S 9 of the Code and that the Court could therefore file an award under Para 20 even though the subject matter of the award is not of a civil nature (such as a decision of man pan offer ings) and therefore not cogmisable by a civil Court under S 9 ante2 It is sub mitted that this view is not correct. The object of thing an award in Court is to convert it into a decree of Court so that it could be enforced like other decrees under provisions of the Code 3 It necessirily follows that unless the Court has jurisdiction over the subject matter under S 9, any decree passed in respect of such subject matter would be meapable of execution under the Code

But the fact that a suit could be instituted in a civil Court in respect of a principlar matter, does not necessarily mean that such matter can be releved to arbitration. The difference or dispute between the parties should be such that the parties could if they were so minded settle the matter between themselve by a tailed agreement. Thus a dispute as to the office of a public charity, or the appointment of a guardian to a minor? not relating to a private right as between the parties cannot be made the subject of an award by arbitrators. On this sum principle a dispute irising from some illegal transaction or some transaction opposed to public policy cannot be made the subject of a valid award? as any gree ment which the parties themselves could make in settlement of the dispute would not be inforceable and the award of the arbitrator on such a dispute would like was be invalid and unchroreable? See also pura. I Note 10 ante.

Note 4a (1930) 1930 P C 100 (102) 5, Ind App 117 of Cal 1801 P C ) and App 117 of Cal 1801 P C )

(1J33) 1933 Cal 817 (S1J) Non compound

able offence

2 (1935) 1935 Sind 10 (11) Note 5

1 (19\_J) 1971 Stad I (4) 28 Stad L R 299

(1934) 1934 \ld 493(493) \text{ ward partitioning joint property including agricultural land by meter and bounds—Cuil Court has no jurisdiction to enter tain application for filing award [See also [1856] 1836 I um Re \text{ o}

56 Puse 118]
2 (1918) 1918 Lah 68 (62 63) is the award
merely settled shares of the parties
and did not retually partition agri
cultural lind the matter is cogni
sable by civil Court

(1908) 70 11 p 578 6 (1910) 32 111 d 33 (413) 7 (1908) 70 411 137 (17) 8. Halsbary a Laws of 1 ugla d (new cd b.)

(1931) 1.331 All 1.33 (43.6)

### 6 Form of award

In ward on a reference through Court, should be in writing signed by the urbitations See Para 10, ante But as his been seen in Note 1 to that I true it is an award made on a reference made without the intervention of the Court need not be in writing or be signed by the arbitrators. It may be oral 1 But if the irbitrators resolve that their award is to be put in the form of a docutrent to be signed by them is a final expression of their decision it is only such accuracy that can be treated as their award?

## 6a Registration of award

In sward on a reference without this intervention of the Court affecting it movesble property of the value of more than Rs 100 is compulsorily registrable if it falls within the terms of S 17 of thin Relistration Act 1

# 7 Parl of award of can be filed

I the parties agree by the terms of the submission or at the time of the arbitra ion that the matters in dispute may be taken on seriatum by the arbitra tors and that the award may be delivered in segurate parts each part may be treated 4- a separate award and filed under this paragraph 1

Bu in the absence f in specific provision in the submission of the award

(1) determines any matter not referred to irbitiation or (2) fails to de crimine iny of the matters referred to arbitration or (3) is indefinite or vague or is illegal in respect of a portion of it the question arises whether the Court can fle the tillid portion of the award. If in case (1) the matter not referred to arbitration can be senarated from the portion referred the latter can be filed the former being treated null and void 2. But if the objectionable portion is inseparable from the rest or not so clearly separable that it can be seen that the part of the award attempted to be supported is not it ill affected by the fighty portion, the whole award will be avoided of

In case (2) the award is not a complete award and is therefore invalida-Lut the parties may wave this objection and if they show by their conduct that they do not want a decision upon the points or if the arbitrators find that there In no matter in difference in respect of these points, the award may be hied to the extent it was given. Similarly if an award leaves nothing to be done but the

1 (1957) 1 ; 2 Lat GO (G1) 11 Lat 131 Halstury a I wast I maland tol I p 60 2 (1,334) 1,334 bom 6 (8)

(1933) 1933 Lab 173 (174) (1 J19) 1 J19 Mad 1113 (1113 1114) (1862 63) 1 Mad H C R 178 (180) 2 (16J2 16 %) 2 U B R 2.6

(1931) 1931 Bom 6 (8) Note 64

4 (1911) 14 Cal I Jour 189 (203) (1934) 1934 All 493 (494)

(1999) 1993 Sind 200 (203)

longer law 1

(1842) 17 Suth W R 352 (359)

[See also (1874) 21 Suth W R 182 [See also points 2 and 3 to Note 7 to

| But see (1881) 3 Mad 68 (70) No.

(See also (1935) 1935 Rang 34 (35)

enefit

trom

Laragraph 14 ante ]

5 [See point 3 to Note 3 to Paragraph 14 arte; 6 [1934] 1934 Lah 205 (306) 6 [1912] 1912 Vad W A 1076 (107.)

(1911) 14 Cal L Jour 188 (209 310) (1921) 1921 All 384 (388) 43 All 108 7 (1921) 1921 All 384 (396 387) 43 All 109

7

(1932) 1932 411 154 (155)

performance of some ministerial act it is not faulty for want of inality on the principle certum est quod certum reddi protest8 (that is certain, which can be made certain )

In case (3) also, the award is invalid. Where the award did not state either the facts found by the arbitrators or the grounds for then decision and it was consequently impossible to bold that the award proceeded solely on those grounds which entitled the arbitrators to act under the arbitration clause, it was held that if the had was not separable from the good portion of the awaid the whole was had 10

## 8 Lost award

Where an award in writing is lost secondary evidence of the terms thereof cannot be adduced in a proceeding under this paragraph. The remedy of the parties is to tile a regular suit to enforce the terms of the award 1

## 9 Grounds of objection under Paras 14 and 15

See generally Paris 14 and 15 and the notes thereto. Where a period of time is fixed in the submission for the making of an award, the ribitrators have no purisdiction to make the award after the period and the award so made is invalid Where no such period is fixed in the submission the award should be made within a reasonable time which should be decided with reference to the facts of each case 2

### 10 Proved

Under S J26 of the old Code, it was provided that where no ground as wis mentioned in Ss 520 and 521 (Paras 14 and 15) was shown the Court should order the award to be filed It was held in some cases that even on a mere alligatio; by affidavit or verified statement that the award was had on the ground specified in S o20 or S o21 the Court was bound to dismiss the application and refer tho puties to a separate suit In other cases it was however held that the word

shown which occurred really meant proved and that it is not sufficient to allege cause or make out that there is room for an ument, but that the cause nus, be both alleged and proved to the satisfaction of the Court " The substitution of the word proved gives effect to the latter view

11 Res judicata - See Note 27 to S 11 ante

As has been seen in that note all claims embraced in a submission ne put an end to by a valid award which thereafter furnishes the only basis for determining the 11 hts of the parties and constitutes a har to any action on the out ind demand 1 See also

- 5 (1J11) 11 Ind C s J See pos it 3 to Note
- 10 (1922) 1322 Cil 399
- 1 (1920) 1920 Lah 39t (1589) 12 M d 331 (
- Nate 9
- 1 (1333) 1933 Lah 173 (174) 2 (191 i) 1319 Lah 406 (40.) 1313 Pan Re No "I Agreement to refer wis in 1905
  - -twird in 1910-Hell iwirdein sot le fled Note 10
- 1 (1553) J Cal 52" (460)
- (1581) 10 C 1 74 (71) (157 78) 1 M 1 Ja (1 5) " (154 ) 11 Cal 166 (168)

- Note 11
  - 1 (1916) 1316 L B 74 (° a) 8 L B R 1 (1918) 1316 Sind 13 (16) 13 5 r d 1 B 5 (1985) 11 Cal 386 (° 92) 12 h d 31 6 (1 c) (1910) 1316 Ough 781 (2×3) 18 Ough Car (1910) 1316 Oudh 191 (2-3) 18 Und Care award cal not be defeat d me elf because award was not hiel
    - Court (1920) 13.0 Lah 2 0 (2'-) (1634) 18 Bom 495 (504)

defence in a subsequent suit between the pirties even though it was made on a private reference in another pending suit

12 Withdrawal of application-See Note 12 to Pura 20, ante and Note 15 to Para 1

13 Resocation of submission-See Note 12 to Para 17, auto

14 Appeal against an order filing or refusing to file award - See S 101 Note 15 ante An appeal against an order filing or refusing to file an award is not a decree or air-order having the force of a decree and an appeal against such order is chargeable with Court-fee under Sch 2, Art 11 of the Court-fees Act 1 The value for purposes of purisdiction in such cases is to be based on the same method as that for the original application itself, i.e. the value of the subject matter of the award 2

15 Appeal against decree on award-Sub S (2)

Section 104 (f) provides for an appeal against an older filing or refusing to file an award under this Paragraph This right of appeal is not taken away merely because a decree is passed in accordance with the award las See S. 104, Note 15 ante.1a

But up appeal hes from a decree passed under this sub-pringraph except in so far as the decree is in excess of, or not in accordance with the awaid 1 Thus where the decree does not correctly interpret the award? or where the decree awards something which the arbitrators having jurisdiction to award did not award, an appeal will be But the appellant is not entitled in such appeal to re-open the whole case and to address on all questions which were raised before the lower Court, his attack must be confined to the legality of the decree as compared with the award 4

The decree passed under this Paragraph is a decree "open to appeal within the meaning of O 43, R 1 (d), and, therefore, an appeal lies against an order refusing to set aside an ez parte decree passed under this Paragraph 5

### 16 Enforcement of award

In award could not be enforced by execution until it has been made a Rule of the Court by a decree being passed in accordance therewith 1 person who was a party to the arbitration but who was not a party to the decice which followed the award could not enforce the decree 2

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2 (1920) 1920 L B G (7) 3 U B R 210
3 (1896) 20 Bom 238 (218)
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### Note 14

1 (1932) 1932 Oudh 282 (282) G Luck 703 2 (193) 1935 Mad 723 (724)

Note 15 lea (19°5) 1935 Pe-h 69 (71) The appellate Court can go into question of exist ence of reference and award and also questions falling under paras 14 and

15 ante 1a [See also (1933) 1933 411 166 (167) The Court should pass an order filing award and then pass a decree in accordance with award] ([See also (1933) 1933 All 59 (60)]

1 (1911) 9 Ind Cas 39 (39) (Lab) (1869) 12 Suth W R 85 (85)

(1970) 19 Suth W R 62 (62) But an appeal will be against an order made in execution proceedings taken in that Judgment

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(1899) 16 Cal 462 (485)
       [See 140 (1914) 1914 Lth 145 (146),
21 Ind Cas 925 (926) 1914 Pun Re
       No 28 Award in proceedings under
       paras 17 and 19-No appeal hes
```

from order filing award The following cases under the old Cole are no longer law -

(1901) 1701 Pun Re No 84 page 272 (1478) 3 Cal 375 (378) (1831) 1831 Pun Ro No 70 page 156 (1906) 1906 Pun L R No 35 page 120

17 Appeal to Privy Council

See Note 8 to S 104 aute The pravisions of sub Para (2) cannot be real so is to affect the right of the parties to go in appeal to the Privy Council under Ss 109 to 111 of the Code and do not har any such appeal I 18 Revision

The general principle in the case of awards is that it is final. An appeal a allowed from a decree passed nn an award only to a very limited extent \ res sion in such a case would be more phiectingable than an appeal 1. The High Cour should, therefore proceed very warrly in allowing revision in cases of award No revision will be where the conditions of S 115 are not satisfied 3 But where there is no real dispute which could be referred to arbitration in award filed by the arbitrators into Court amounts to an abuse of the process of the Court and therefore the order is open to revision 5 Similarly, where the Court assumes 1 purisdiction which it has not and files the sward a revision will lie . It was broadly held in the undermentioned cases relying upon the decision of the Pritty Council in Ghulam v Muhammad Hassan ea that no revision at all will be in any case in which a decree has been passed on in iward. It is submitted that this is not correct and that the decision of the Privy Council does not lay down any such broad proposition

Exclusion of cer tain words in the Specific Relief Act 1877

P. 22. [New] The last thut seven words of Section 21 of the Specific Relief Act, 1877, shall not apply to any agreement to refer to arbitration, or to any award, to which the

provisions of this schedule apply

Synopsis

Note No. E

Exclusion of last thirty seven words in S 21 Specific Relief Act

1 Exclusion of last thirty seven words in S 21 Specific Relief Act

Section 21 of the Specific Relief Act ennmerates the contracts which can not be specifically enforced and the last portion of the section runs as follows

Ind save as otherwise provided by the Codo of Civil Procedure and the Indian Arbitration Act 1899, no contract to refer present or future differences to arbitration shall be specifically enforced but of any person who has riade such a contract and has refused to perform it sues in respect of any subject which to has contracted to refer the existence of such contract shall bar the sui The words in italics are the last thirty seven words of this section referred to 17 this Paragraph See also Note 1 to Para 18 ante

P. 23. [New] The forms set torth in the Appendix with such variations as the circumstances of each caso require, shall be issued for the re-Forms

pectivo purposes therein mentioned Note 17

1 (1912) 15 Ind Cas 2 (3) 15 Oudh Cas 55 Note 18 1 (1902) 29 Cal 167 (187) 99 Ind 1pp 51

1902 Pun Re No 25 (P C) 2 (1921) 1921 Mad 271 (271)

7. (1315) 1915 Lah 105 (105) 1915 Pun Re No revision (1932) 1932 All 154 (15J)

(1914) 1914 Lah 477 (47") No revision lay in the absence of material irregulari

ties in the proceedings 4 (1914) 1914 Bom 123 (121) 38 Bom bis 5 (1839) 16 Cal 482 (185) Agreement of re-er ence vague and indefinite-tward in pursuance of it is had and cann I te enforced

(1884) 10 Cal 11 (13)

[See also (1902) 5 Oudh Cas 6a (1919) 1919 Lah 319 (319). 6a (1902) 29 Cat 167 (185) 29 Ind 177 1 1902 I un Rs No. 25 (P C)

### APPEXDIX.

### No 1

### Application for u Order of Reference

(True of sust )

- 1 This gail is in-tituted for (state miture of claim) 2. The matter in difference between the parties is (state restler of difference)
- 3 The applicants being at the parties interested have agreed that the matter in difference tetween them shall be referred to arbitration
  - 4 The applicants therefore apply for an order of reference

Dated the

If the partie are agreed as to the arbitrators at should be so stated

No 2

Order of Reference

(Tatle of sust )

Upon reading the application presented on the ordered that the following matter in difference arising in this suit, namely -

day of

 $\begin{array}{ccc} A & B \\ C & D \end{array}$ 

be referred for datermination to X and Y, or in case of their not agreeing, then to the determina tion of Z, who is hereby appointed to be unipere, and such arbitrators are to make their award in writing on or before the day of 19 and in case of the said arbitrators not agresing in an award, the said umpire is to make his award in writing within

months after the time during which it is within the power of the aibitrators to make an award shall have ceased

----

Laberty to apply

Given under my hand and the seal of the Court, this

day of

Judge.

No 3.

Order for Appointment of New Arbitrator

(L'atte of sunt )

, [state order of Whereas by an order dated the day of reference and death, refusal etc of arbitrator] it is by consect ordered that Z be appointed in the place of X (deceased or as the case may be) to act as arbitrator with Y, the surviving arbitrator, under the said order, and it is ordered that the award of the said arbitrators be made as or before the day of 19 .

Given under my hand and the sell of the Court, this day of

No 4.

Special Case, (Title of suit)

In the matter of an arbitration between A. B of and C. D. of the following special case is stated for the opinion of the Court .-

Dated the

|                                                            | re state the facts co                             | -                                |   | parag   | raphs]             |      |
|------------------------------------------------------------|---------------------------------------------------|----------------------------------|---|---------|--------------------|------|
| -                                                          |                                                   |                                  |   |         |                    |      |
| Secondly, wheth                                            | 1er                                               |                                  |   |         |                    |      |
| Dated the                                                  | day of                                            | 19                               |   |         | Å<br>T             |      |
|                                                            |                                                   | No 5<br>Award<br>Fitle of suit ) |   |         |                    |      |
| and C D of                                                 | an arbitration betwe                              | een A B of                       |   | _       |                    |      |
| Whereas in purs<br>and dated the<br>difference between 4 i | uance of an order of<br>lay o<br>B and C D namela |                                  |   |         |                    | e 10 |
| has been referred to us                                    |                                                   |                                  | - |         |                    |      |
| We award                                                   | duly considered t                                 |                                  |   | us do l | ereby make cur and | d 43 |
| (0) 43-44                                                  |                                                   |                                  |   |         |                    |      |

day of

19

### THE THIRD SCHEDULE.

### EXECUTION OF DECREES BY COLLECTORS.

- P. 1. [S. 321.] Where the execution of a decree has been transferred to the Collector under Section 68, he may—
  - (a) proceed as the Conrt would proceed when the salo of immovable property is postponed in order to enable the judgment-debtor to raise the amount of the decree: or
  - (b) raise the amount of the decree by letting in perpetuity, or for a term, on payment of a premium, or by mortgaging, the whole or any part of the property ordered to be sold; or
  - (c) sell the property ordered to be sold or so much thereof as may be necessary.

## Synopsis

| Note No  1 Applicability of this Schedule 1 Powers of the Court and of the Collector 1 (2) Ancestral properts (3) Application to set aside 1 sale— bre Note, 2 to 6 to 8, 70 | 2 | III<br>V | (c) Competency of Court to call back records sent to the Collector (d) Mortgage of part of the property in suitistiction of the decree Clause (a) "Order 21 Rule 83 On payment of a premium Appeal | No<br>4<br>5<br>6<br>6 |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|----------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------|
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|----------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------|

## Other Topics

Madra. Court of Wards Act See Note 1 1
Pt (1)
Power of Collector to dismiss or restore execu

tion case Sea Note 1 Pt (10)

Power of Collector to order payment by metal ments See S 70 Note 2 Pt (6)

2 Applicability of this Schodule

Section 148. Bengal Tenancy Act (VIII of 1885), provides that this Schedule shall not apply to any suit for recovery of neit Similarly, S 199, Cl. (a) of the Madras Estates Land Act (I of 1908), enacts that this Schedule shall not apply to any suit, appeal or other proceeding under that Act

Under S 9, sub-S (3) of the Central Provinces Tenancy Act (1 of 1920), the Collector executing a decree for rent may, notwithstanding anything contained in this Schedule, allow the tenant time, not exceeding in the aggregate two months, to satisfy the decree.

Section 22.A, sub.S (2) of the Dekkhan Agriculturists' Relief Act (XVII of 1879), provides that a re sale under that section shall be deemed to be a sale under the provisions of Para 10 of this Schedule.

The provisions of S 11, Madris Court of wards Act, do not affect the da es of the executing Court or the functions of the Collector under this Rule 1

### la Powers of the Court and of the Collector

As has been seen in Note 2 to S 70, ande, where a decree is transferred > the Collector for execution, the Collector has the powers of execution only a i not of deciding other matters and even the powers of execution are him of by this Rule to the three courses specified in this Rule 1 Thus he has no power to inquire into the objections to attachment or sale to entertain applications ! ! raterble distribution to decide whether the decree was satisfied or to decade whether there has been a comprom se 5 Nor can be deal with property a covered by the order of sales or set aside the acts of the owner of the piece before the transfer was made?

Within the limits of the Rule however the Collector has absolute jure diction to find out the hest method of execution allowed to him by law " Where the execution of a decree obtained against a Hindu father and sought to be executed against the joint fimily property is transferred to the Collector for execution, he becomes seized of the entire interest including the sons intere in the property, and can sell it in such execution? He can dismiss an execut of application for default and can likewise restore it in proper cases 10 Sim larly where an order is passed under a mistake be can set it aside on discovery of the mistake 11

In all matters arising in execution but not covered by the provis 02 of this schedulo, the civil Court continues to have jurisdiction Court has power to hear objections to the sale held by the Collector's or to entertum a suit to set aside the order of the Collector setting aside a sale or to inquire into the question whether the decree is satisfied 134 Where the Collec cr fails to effect the sale of property ordered to he sold by the decree it is open to him to return the papers to the Court But the Court has the power to end the papers back if the reason which prevented the sale was not such as to ejerate as a complete impediment to the execution of the decree no fresh apples on for that purpose is necessary 14 It has been held in the undermentioned c. 3 that after the transfer of the decree to the Collector for execution the cul-Court cannot entertain an application to add legal representatives of a decea cl party 15

See also Noto 2 to S 70 Notes to S J1 and Notes to O 20 R 18

2 Ancestral property

According to the Allahabad Government Notifications, decrees for the sale of ancestral property must be transferred to the Collector for execution See No e3

Sch III Para 1-Note 1 1 (1918) 1918 Mad 348 (349) 41 Mad 503 Note la

<sup>1 (1893) 7</sup> Bom 332 (335) 2 (1921) 1921 Lom 45 (46 47) 45 Bom 81?

Collector cannot confirm the sale

<sup>3. (1974) 1974 411 307 (303) 46 411 414</sup> 2. (1931) 1931 All 541 (517 off)

<sup>10 (1327) 1331</sup> All 541 (517 041)
10 (1327) 13 2 Nag -67 (2 0 2 -) 15 Na -2
152 But campot invest 6216 2 --

<sup>13 (156 ) 1-87</sup> All W \ 20 ( 0"). 13a(1932) 1933 S : d 112 (111 115) ... 5 L . JO:4 14. (19 0) 15 0 Oudh "5 ( t). 15 (16 11 "53 111 \ \ 161 (161)

to S 70 It has been held that property to which a title is obtained by gift is not "ancestral property"

See also the undermentioned case

3 Application to set aside a sale See Notes o to 6 to 8 "0

In Allahabad the Collector has been empowered to set aside sales on prounds similar to those provided for by 0 21 Rr 69 and 90<sup>1</sup>. The orders passed by the Collector in such matters have been held to be judicial orders. It has also been held that the Collector has an inherent power to set aside a sale held by him the is satisfied that it is vituated by the fraud of the decree helder.

4 Competency of Court to call back records sent to the Collector

The Court that has made a decree or judged order which has been trans mitted to the Collector for execution is not deprived of its judged power with respect to it. It has power where necessary, to recall its own records transmitted to the Collector. But such judged power ought not to be exercised unless the Court is set in motion by one of the pirities to the proceedings in execution.

See also Noto 2 to S 70 and Noto 7 to S 54

5 Mortgage of part of the property in satisfaction of the decree

It is open to the executing authority to effect a mortgage of part of the property to satisfy a mortgage decree 1

6 Clause (a)-Order 21 Rule 83

The postponement of the sale should be for a reasonable period. It should not be unreasonably long. See Noto 3 to O 21 R 83

6a On payment of a premium

Where the Collector intends to let the land he should do so on a premium to raise the amount of the decree He should not let it out on a yearly rental 1

7 Appeal

See Note 7 to S 70 and the following case 1

p. 2. [S 322] Where the execution of a decree not being a decree of Collector in special the same, but being a decree for the payment of money in satisfaction of which the Court has ordered the sale of immovable property, has been so transferred, the Collector, if, after such inquir as he thinks necessary, he has reason to believe that all the liabilities of the judgment-debtor can be discharged without a sale of the whole of his available immovable property, may proceed as hereinafter provided

Note 2 1 (1916) 1916 All 107 (10") 38 All 481

<sup>2 (1933) 1933</sup> All 189 (188)

Note 3 1 (1935) 1935 All 668 (871)

<sup>2 (1335) 1935</sup> All 868 (871) 3 (1935) 1335 All 868 (869)

<sup>1 (1683) 7</sup> Bom 332 (3°6)

<sup>(1837) 11</sup> Bom 4/8 (482) [See also (1830) 7 All 407 (409)] (1883) 5 All 314 (315)

<sup>2 (1894) 8</sup> Born 301 (302)

Note 5 1 (1925) 1925 Bom \_77 (978)

Note 5a 1 (1933) 1933 Bom 369 (869)

Note 7

<sup>1 (1890) 12</sup> All 564 (568) The Government has power to prescrite Rules providing for appeals from Collector's orders

### Synopsis

## Decree for the payment of money Note No 1

1 Decree for the payment of money

I decree for sale of ancestral land or of an interest in such land in enforce ment of an hypothecation on such land is a decree for the recovery of money within the N W P Government Notification, No 671 of 30th August 18501

P. 3. [S 322-A] (1) In any such case as is referred to in paragraph 2, the Collector shall publish a notice, Notice to he given allowing a period of sixty days from the date to decree holders and of its publication for compliance and calling to persons having claims on property moon-

- (") every person holding a decree for the payment of money against the judgment debtor capable of execution by sale of his immoveable property and which such decreeholder desires to have so executed, and every holder of decree for the payment of money in execution of which proceedings for the sale of such property are pending, to produce before the Collector a copy of the decree, and certificate from the Court which passed or is evecuting the same, declaring the amount recoverable thereunder.
- (b) every person having any claim on the said property to submit to the Collector a statement of such claim, ind to produce the documents (if any) by which it is ox idenced
- (2) Such notice shall be published by being affixed on a conspicuous part of the court-house of the Court which made the original order for sale, and in such other places (if any) as the Collector thinks fit, and where the address of any such decree holder or claimant is known, a copy of the notice shill be sent to him by post or otherwise

Synopsis

1 Power of Collector to hear objections

# Scope of the Para

1 Scope of the Para The persons who are entitled to notice under this Paragraph are -

- - (1) Persons holding decrees for money-(a) which are capable of execution 1 sale of the immovable prints
    - of the nudement dobtor, or (b) in which proceedings for sale of such property are pen ling ar l
    - (2) persons having any claim oo the property of the judgment debter
- Where properties have been I laced under the management of the College the Court cannot, under the processors of Pari 11, infra issue any traces

Sch III Para, 2-Note 1 - 1 (1532) 1 111 [15 (115) (1 B)

against such properties in execution of a decree for the payment of money The holder of decree passed ofter the property comes under the management of the Collector is therefore not a person whose deered is capable of execution by sale of the immovable groperty of the judgment debtor and is not entitled to be placed on the list of creditors frame lunder the following Pungraph 1

### 2 Power of Collector to hear objections

The Collector is not authorized to her any objection to the sale of the property advertised for sale. Ho can only call for claims 1. Where the Collector icting under this Paragraph called on every person who had claim on the property of the judgment debtor to submit a statement thereof and in pursuance of the authority vested in him satisfied the claims made it was not competent to a person who had not made the statement required to claim to set aside the arrangement made by the Collector 2

P. 4. [S 322-B] (1) Upon the expiration of the said period, the Collector shall appoint a day for hearing any Amount of decrees representations which the judgment-debtor and for payment of money to be ascertained and the decree holders or claimants (if any) may mmovable property available for their desire to make and for holding such inquiry as

estisfaction he may deem necessary for informing himself as to the nature and extent of such decrees and claims and of the indiment debtor's immovable property, and may, from time to time, adjoin a such hearing and monny

(2) Where there is no dispute as to the fact or extent of the hability of the judgment-debtor to any of the decrees or claims of which the Collector is informed or as to the relative priorities of such decrees or claims or as to the hability of any such property for the satisfaction of such decrees or claims the Collector shall draw up a statement specifying the amount to be recovered for the discharge of such decrees the order in which such decrees and claims are to be satisfied, and the immovable property available for that purpose

(3) Where any such dispute arises the Collector shall refer the same with a statement thereof and his own original thereon. to the Court which made the original order for sale, and shall, pending the reterence stay proceedings relating to the subject thereof. The Court shall dispose of the dispute if the matter thereof is within its jurisdiction, or transmit the case to a competent Court for disposil and the final decision shall be commumcated to the Collector, who shall then draw up a statement

as above provided in accordance with such decision

Sunonsis Note No 1 Appeal

Note No

Statement of debts

Note 2 Sch III Para 3-Note 1 1 (1898) 20 111 429 (429)

9 (1591) 4 C1 L R 118 (118)

### Statement of debts

In the statement of dehts to be prepared by the Collector under this pars graph only such persons are to be entered as are referred to in Para 3 abo a As his been seen in Note 1 to that paragraph a person who has obtained a decres for money after the management of the debtor's property has been placed in the hands of the Collector is not a person referred to in that paragraph and is a t therefore entitled to be placed in the statement prepared under this paragraph!

## 2 Appeal See Para 6 anfra

P. 5 [S 322-C] The Collector may, instead of him-clf issuing the notices and holding the inquiry Where District required by paragraphs 3 and 4, draw up a state Court may ment specifying the circumstances of the judg notices and hold in quiry ment-debtor and of his immovable property of

far as they are known to the Collector or appear in the records of his office, and forward such statement to the District Court and such Court shall thereupon issue the notices, hold the inquiry and draw up the statement required by paragraphs 3 and 4 and times mit such statement to the Collector

P. 6. [S 322-D] The decision by the Court of any disjute arising under paragraph 4 or paragraph 5 shall as between the parties thereto have the force of Effect of decision of Court as to dispute and be appealable as a decree

Sunonsis

hote ho | Court fee

Appeal

1 Appeal

The decision by the Court of any dispute arising under Pilas 4 and 18 under the terms of the paragraph appealable as a decree Where a District Judys to whom a dispute was referred by the Collector, wrongly sent back the same to the Collector and he decided it it was held that the remeds of the approximately party was to have appealed against the order of the District Judge and no to ... the Collector for a declaration of lns right 1

# 2 Court fee

Article 11 of Sch II of the Court fees Act 1870 applies only to 1 care randa of apport ignist decisions which are not decrees or orders law the fit of decrees An order made by the Court under paras 1 and 5 has as et cal in this paragraph the force of a decree and is consequently not within it il of the second schedule of the Court fees 1ct 1870 1 memorandum of all against such an order is therefore chargeable with an al talorers fee in let it! Sch I of that let 1 The High Court of Madras has however, taken a coult it view and held that it is charge ible oul, with a fixed fic The deci ion carr the neces tel as correct

Sch III Para. 4-Note 1 1 (1506) 18 AH 313 (315) Sch HI Para 6-Note I 1 (1506) 15 6 AH W \ 63 (70)

- P. 7. [S 323] (1) Where the amount to be recovered and the property available have been determined as provided in paragraph 4 or paragraph 5 the Collector may,—
  - (a) if it appears that the amount cannot be recovered without the sale of the whole of the property available, proceed to sell such property, or
  - (b) If it appears that the amount with interest (if any) in accordance with the decree, and when not decreed, with interest (if any) at such rate as he thinks casonable, may be recovered without such sale, raise such mount and interest (notwithstanding the original order for sale)—

 by letting in perpetuity or for a term, on payment of a premium, the whole or any part of the said property, or

(ii) by mortgaging the whole or any part of such pro-

perty or

(iii) by selling part of such property, or

- (ii) by letting on faim, or managing by himself or another, the whole or any part of such property for any term not exceeding twenty years from the date of the order of sale; or
- (v) partly by one of such modes, and partly by another or others of such modes
- (2) For the purpose of managing the whole or any part of such property, the Collector may overers all the lowers of its owner.
- (3) For the purpose of improving the saleable value of the property available or any part thereof, or rendering at more suitable for letting or managing, or for preserving the property from sale in satisfaction of an incumbrance, the Collecter may discharge the claim of any incumbrancer which has become payable or compound the claim of any incumbrancer which has become payable or not, and, for the purpose of providing thinds to effect such discharge or composition, may mortgage, let or sell any portion of the property which he deems sufficient. It am dispute arises as to the amount due on any incumbrance with which the Collector proposes to deal under this clause, he may institute a suit in the proper Court, either in his own name of the pudgment-debtor, to have an account taken, or he may agree to refer such dispute to the decision of two arbitators one to be chosen by each party, or of an umpire to be named hy such authations.

(4) In proceeding under this paragraph the Collector shall be subject to such Rules consistent with this Act as may, from time to time, be made in this behalf by the Local Government

## Sunovsis Scope of the paragraph \ota \o 1

! Scope of the Paragraph

Where a decree is transierred to the Collector for execution the latter Las absolute jurisdiction to decide and find out the best method of execution allosed to him by law 1 The civil Court has no power to pass orders in such matters Thus where certain properties were sold by the Collector but the whole of the sale amount was not deposited by the auction purchaser it is entirely in the discretion of the Collector to decide whether he would re sell the property or not in order to realiso the balance of the purchase money 2 But as has been seen in Note 1 to Para 1 above the Collector, has no purisdiction to decide whether the decice is entisfied 3

Where in exercise of his powers the Collector has granted lease to the decree holder in satisfaction of his decree he cannot subsequently resile from it nor can the Court interfero in the matter as, for example authorising the "ran of a frosh leaso 42 Where a decree was transferred to the Collector for miling suggestions for the satisfiction of the decree and the Collector suggested that half the attached land should be farmed out to the deerco holder for certain period in satisfaction of the decree but the latter was not prepared to take such lease and the oxecuting Court thereupon merely filed the proceedings at was held that the procedure was wrong and the proceedings could be filed only if all the lanfal means for satisfying the decree had been tried and found to be impracticable

An order of a Collector under this Rule disallowing the application of a decree holder that the amount of the decree might be satisfied by a ten lorary alienation instead of by a sale is not appealable 6

Recovery of ba lance (if any) after letting or manage ment

P. 8. [S 324] Where, on the exputation of the letting or management under paragraph 7, the amount to be recovered has not been realized, the Collector shall notity the fact in writing to the judgment debtor or his representative in interest, statin-

at the same time that, it the balance necessary to make up the sud amount is not pud to the Collector within six weeks nom the date of such notice, he will proceed to sell the whole on the sufficient part of the said property, and, if on the expiration of the said six weeks the said balance is not so paid, the Collector sail sell such monerty or part accordingly

Sch III Para 7-Note I 1 (1924) 1924 411 807 (303) 46 411 414 " (1924) 1924 411 01 (00) 46 411 62 3 (191) 17 I. d Cus Li (143) 37 Bom 32

P. 9. [S 324-A] (1) The Collector shall, from time to time, render to the Court which made the original order for sale an account of all monies which come to his hands and of all charges incurred by him in the evercise and performance of the powers and duties econferred and imposed on him under the provisions of this schedule, and shall hold the balance at the disposal of the Court

(2) Such charges shall include all debts and habilities from time to time due to the Government in respect of the property or any part thereof, the rent (it any) from time to time due to a superior holder in respect of such property or part, and, if the Collector so directs, the expenses of any witnesses summoned by him

(3) The balance shall be applied by the Court-

(a) in providing to the maintenance of such members of the judgment-debtor's family (if any) as are entitled to be maintained out of the income of the property, to such amount in the case of each member as the Court thinks fit, and

(b) where the Collector has proceeded under paragraph 1, in satisfaction of the original decree in execution of which the Court ordered the sale of immovable property, or etherwise as the Court may under

Section 73 direct; er

(c) where the Collecter has proceeded under paragraph 2—
(i) in keeping down the interest on incumbrances on the property,

(a) where the judgment-dehtor has no other sufficient means of subsistence, in providing for his subsistance to such meant as the Court Flynks for and

- tence to such amount as the Court thinks fit, and the court in discharging rateably the dams of the original decree holder and any other decree holders who have complied with the said notice, and whose claims were included in the amount ordered to be recovered.
- (4) No other holder of a decree for the payment of money shall be entitled to be paid out of such property or balance until the decree-holders who have obtained such order have been satisfied, and the residue (if any) shall be paid to the judgmentdebtor or such other person as the Comt directs

### Sunopsis

Scope of the Paragraph

Maintenance of judgment debtors | Charges | Claim for rateable distribution—Sub | Family | Para 3 (c) (ui) |

## Other Topics

### Accounting by Collector See Note 1

### I Scope of the Paragraph

Where a decree has been sent to the Collector for execution he is bound to render, to the Court, an account of all momes which came into his hands and must hold the balance of the amount after deducting necessary charges at the disposal of the Court 1 Ent he cannot be compelled either to give up the account books into the Court nor does the Paragraph require him to pay the balance into Court 2

## 2 Maintenance of judgment debtor's family

The provision for the maintenance of the judgment debtors family is a matter for the determination by the Court and not by the Collector 1

3 Charges The Collector is entitled to recover as expenses of sale fees on the scale prescribed for sales under the Land Revenue Code Poundage fee may also be allowed in addition to such expenses 1

4 Claims for rateable distribution-Sub Para 3 (c) (iii)

The omission, by the person claiming nateable distribution, to invite the attention of the Collector to his own right of rateable distribution does not deprive him of the right to claim such distribution in a regular suit the fact that the decree which is noted to be satisfied will have to be re opened does not affect the question 1

See also Note 4 to S 73 ante

### P. 10. [S 325] Where the Collector sells any property under this schedule, he shall put it up to public auction in one or more lots, as he thinks fit, Sales how to be conducted and may-

- (a) fix a reasonable reserved price for each lot;
- (b) adjourn the sale for a reasonable time whenever, for reasons to be recorded, he deems the adjournment necessary for the purpose of obtaining a fair price for the property.
  - (c) buy in the property offered for sale, and resell the same by public auction or private contract, as he thinks fit

## Synopsis

## Scope of the Paragraph Note No 1

(1904) 6 Bom L R 825 (830 931)

(1890) 3 C P L R 147 (149)

Sch III Para 9-Note 1 1 (1894) 16 All 1 (2) He cannot make over the whole proceeds to the decree holder (1931) 1931 All '00 (701) He cannot dispose of the balance in excess of the de cree amount without instructions (1912) 16 Ind Cas 59 (60) 36 Born 519

<sup>2 (1904) 5</sup> bom L R 825 (8.0 831) Note 2 1 (1704) 6 Born L R 822 (824) (1904) 6 Bom L R 825 (830 831)

<sup>1 (1927) 1927</sup> Bom 17 (18) (1926) 1926 Bom 335 (8-6) Note 4

<sup>1 (1933) 1933 411 666 (669)</sup> 

### 1 Scope of the Paragraph

As soon as a sale is confirmed, the Collector is functus office and his only duty is to return the faleis to the civil Comt 1

According to the Bombay cvil circulars an application by the decree holder for permission to bid at the auction held by the Collector must be made to the Collector 2

Restrictions as to alienation by judg ment debtor or his representative and prosecution of reme dies by decree halders

P. 11. [S 325-A] (1) So long as the Collector can exercise or perform in respect of the judgment-debtor's immovable projectly, or any part thereof, any of the powers or duties conferred or imposed on him hy paragraphs 1 to 10, the judgment-debtor or his representative in interest shall be incomretent to mortgage, charge, lease or alienate

such property or part except with the written reimission of the Collector, nor shall any Civil Court issue any process against such projecty of rait in execution of a decree for thopayment of money

(2) During the same period no Civil Court shall issue any process of execution either against the judgment debtor or his property in respect of any decree for the satisfaction whereof provision has been made by the Collector under paragraph 7

(3) The same period shall be excluded in calculating the

period of limitation applicable to the execution of any decree affected by the provisions of this paragraph in respect of any remedy of which the decree-holder has been temporarily deprived

Sinonsis

I ole N Note No Incompetency to transfer Power of civil Court to issue process Al enation subsequent to adjustment Termination of the Collector's power Permission of the Collector Limitation

Other Tonce

Alie iate le 1 mg f See Note 1 Pt (1")

## 1 Incompetency to transfer

This paragraph imposes a gersonal disqual fication on the jud\_ment debtor and his representatives by declining that they are incompetent to mortgage charge lease or ahenate then 110] eities whilst they are under the management of the Collector under the provisions of this schelule 1 A mortgage charge lease or other alienation made in contrivert on of the provisions of this parier inh is s holls soid and not merels soidable is against the Collect a and reisons chiming through him 3. It is incapable of intification or of enforcement in equity 4. Where Sch III Para 10 Note 1

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<sup>1 (199 ) 11</sup> Bom 4 8 (481 497)

<sup>2 (1919) 1918</sup> Bom 216 (21") 42 Lom 621

Sch III Para 11 Note 1 1 (190 ) 3 Nag L R 171 (176)

<sup>2 (1919)</sup> 

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a mortgagee under a mortgage which is void as being in contravention of the provisions of this paragraph pays off a prior mortgage he will have no right to be subboated to the rights of the prior mortgage "

But the moompetency of the md\_ment debtor under this paragual is confined to the property in respect of which the Collector has assume limit and does not extend to property which has been excluded from such management \(\text{transfe}\) by the judgment debtor of such property is not within the profib to this paragraph \(^6\) Again the disability to transfer property in respect of which the Collector has assumed management will not affect the validity of any size ment to pay money recoverable from his person or other property. Size in \(^6\)\_accomment is enforceable in law and is as a valid as any other contract \(^{6a}\)

A member of a joint Hindu family a sainst the manager of which a decret his been obtained as representing the family is a judgment debter with rite meaning of this paragraph and is meompetent to alienate any portion of the go perties in the management of the Collector. But the incompetency does nevered to the lessee from the Collector and he can therefore alienate his in an in the lesse. The disability to alienate begins from the date of the old ref transfer to the Collector and continues so long as any of the debts, for the lin fection of which the property was taken under the management of the Collector menans unpaid. In other words the disability continues until the decise is satisfied and the proceedings in appeal and revision therefrom an complete. But the design of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of the complete of

## Illustrations

- 1 I the judgment debtor makes a transfer of his proporty after the Court 11 e and order transferring the decree for execution to the Collector and before 11 order reckies the Collector. The transfer 1, void 11.
- 2 A de reo was transferred to the Collector for execution A portion of the profession of the judgment debtor was sold by the Collector the price reduced be made than sufficient to satisfy the decree before the sale was confirmed h at the detail of the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to the sale was confirmed to t
- 3 The execution of a decree against f is transferred to the Collector and helfi is become we ted in him for the purpose of such execution. The Collector stant between the property to f for a certain number of years is mortifyed between the properties during the subsistence of the lease. The mortifyed is demused properties during the subsistence of the lease. The mortifyed is the incompetency of A continues so long as the schome to hyporlation with it.

Whose, however, a sile takes place in contravention of this 112-table without either party. I nowing that he was violating the law, the vender will require be compelled to refund the parchase money received by him 1 Agin (1924) 1924 Oudh 302 (303) 27 Oudh 7 (1925) 1924 P.C. 163 (163) 24 Ng Lh I.

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5 (19<sup>34</sup>) 19<sup>34</sup> Oudh 202 (303) 27 Oudh 7 (1925) 1925 P C 165 (165) 24 \ \cdot \cd
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<sup>(311) 16 \</sup>ng L R 1.5 13 (1904) 29 All 415 (417) (1899) 1899 Pun Re \( \cdot \) 91 6 03 14 (1924) 1921 \( \cdot \) 237 (133) 0 \( \alpha \) g I R 7

where i suit is brought by a mostgrove on a most<sub>nine</sub> executed by the indoment debter in configuration of this jarratiph but the latter does not tuse any plea as to the void character of the mostgae and a decree is passed thereon he cannot tue ture before in a century of the decree.

A contract of sale does not errote a chugo within the meaning of this Pra. 19 The word aborate is used ejuster genera with the preceding words most, use churge or lease and contemplates a trinsfer which would have a practice of feet and not a douse such as a will or a dousto mortis cause which can have operation only after the death aft he textor?

A family settlement based on the assumption of antecedent title in the ratios is not an alienation and does not contrarene this Para 18

### 2 Alienation subsequent to adjustment

Micr an adjustment has been certified and is recorded by the Collector the prohibition against alientation imposed by this paragraph no longer subsists. It is completent to the pulment debtor to mortgage sell or otherwise absence his project of thereafter.

Where a mortgine is made in contrivention of the Para but the decree is a rined out of the mortgine amount the mortgine is not rold as the Collector cannot after the decree is satisfied exercise my of the lowers given to him under the Cole and the disability of the mortgage coases.

### 3 Permission of the Collector

So long as the properties of the judgment deliter are in the management of the Collector his unitem permission is absolutely necessary to validate a montgage or oner aftenation executed by the judgment debtor. The permission need not knower take any special form. Not is thecessary that onery detail of the transaction should be sanctioned by the Collector nor should these be a separate permission in respect of each deed when it is clear that the whole transaction had his termission?

Permission to alienate can be inferred from written words employed by the Collector from time to time 2

I sale will be valid even if permission is obtained left in the ich stration of the document.

Valle by a judement debtor with the joinnession of the Collector under this scholale has not the same offect as a sale by a Collector himself in execution but amounts only to a prix its sale?

### A Power of civil Court to issue process

4 Yower of any Court to save process

Where a Collector holds a pudgment debtor a property under this control by surfue of the jowers conferred on him by 5 63 a new process cannot be issued by a cut Court in execution of a decide by the pumping of monopy. But any attach

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Note 2
1 (1911) 12 1 a Cas 5/3 (5 4) 35 Bona 5/6
2 (1933) 1933 Nag 239 (230 240)
(1931) 1934 Nag 33 (35)
Note 2
1 (1921) 1921 Ondh 1/6 (181 182)

2 (1930) 1930 Oudh 510 (o18) (1929 1929 Oudh 441 (443 Lemuttina in sal d [1921] 1921 Oudh 176 (180) A process thich is they I cannot become legal when the Collectors for era cease ment effected before the papers which had been returned by the Collector are sea back to the Collector will be vahid. An attachment before judgment can be effected since it is not a process in execution. The surplus sale proceeds of c satisfaction of a mortgage decree may be attached in execution as it is not a retrehment of any immovable property. But no Receiver can be appointed to take an account of the annual income of the property within the control of the Collector. The Allahabad High Court has held that the prohibition does a apply to a mortgage decree in which the Court has ordered the sale of specific property.

# 5 Termination of the Collector's powers

The powers of the Collector under the schedule terminate as soon as the decree is certified as satisfied. Thus where a deposit is made of the amount which would fully satisfy the decree? For where the Collector leases the property to the decree holder for a certain number of years in full satisfaction of the decree and the decree is certified as satisfied? The Collector's powers under this schedule cease and an alienation made by the judgment debtor thereafter is not void. But the mere fact that the property is sold and fetches more than the decretal amount does not put an end to the management of the Collector. His powers continue to exist till the confirmation of the sale. The presumption is that such powers continue until they are proved to have ceased. Where a civil Court draws proved to the properties attached by it and sends the same to the Collector but the latter returns it to the civil Court for some corrections to be made therein the proceedings before the Collector must be deemed to be pending even during the period during, which the Form C. was pending in the civil Coars for correction?

## 6 Limitation

This puragraph expressly excludes from calculation the period during such period the decree is before the Collector for execution. The teason is that during such period the decree holders have no remedy by execution against ite property of the judgment debtor in the management of the Collector. But the exclusion is permissible, only in cases where a provision has been made under Para 7 for the satisfaction of the decree and where the decree holder has in consequence been deprived of his remedy. Consequently if no such provision is made the period cannot be excluded.

The words period of limitation in this Paragraph apply to thore trictions placed upon the right of the decree holder both by the Limitation let 1908 and by S 48 of the Code\* Where at a sale held by the Collector builders appear and the Collector sends the papers back to the civil Court but the civil Court returns the papers gain to the Collector the period from the

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<sup>2 (1921) 1921</sup> Oudh 176 (180) 5 (1931) 1931 All 541 (543) 3 (1922) 1922 Nag 238 (238) 6 (1.122) 1922 Nag 267 (269) 18 Nag LE U-4 (1927) 1927 Oudh 216 (217) Note 6 (1.122) 1922 Nag 267 (269) 18 Nag LE U-4 (1927) 1927 Oudh 216 (217)

<sup>5 (1925) 1125</sup> Oudh 448 (451) 23 Oudh Cas 1 100 M 7 Tool Ca Kr() (Nad)

<sup>6 (1931) 1931</sup> All 38 (40)

date of the original application will be excluded for the purposes of S 48 of the Code  $^5\,$ 

P. 12. [S 325-B] Where the property of which the sale has been ordered is situate in more districts than one, the powers and duties conferred and imposed on the Collector by paragraphs 1 to 10 shall be exercised and performed by such one

shall be exercised and performed by such one of the Collectors of the said districts as the Local Government may by general rule or special order direct

P. 13. [S 325-C] In exercising the powers conterred on him by paragraphs 1 to 10 the Collector shall have the powers of a civil Court to compel the attendance of parties and witnesses and the production of documents

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ment, effected before the papers which bad been returned by the Collector are sea back to the Collector will be valid An attachment before judgment can be effected since it is not a process in execution? The surplus sale proceeds af er satisfaction of a mortgage decree may be attached in execution as it is no an attachment of any immovable property 4 But no Receiver can be appointed > take an account of the annual meome of the property within the control of he Collector 5 The Allahabad High Court has held that the prohibition does n apply to a mortgage decree in which the Court has ordered the sale of specific FID perty 6

# 5 Termination of the Collector's powers

The powers of the Collector under the schedule terminate as soon as the decree is certified as satisfied 1 Thus where a deposit is made of the amoun which would fully satisfy the decree 2 or where the Collector leases the property to the decree holder for a certain number of years in full satisfaction of the decree and the decree is certified as satisfied the Collector's powers under this schedule cease and an ahenation made by the judgment debtor thereafter is not void Bat the mere fact that the property is sold and fetches more than the decretal amoun does not put an end to the management of the Collector His powers continue of exist till the confirmation of the sale . The presumption is that such powers continue until they are proved to have ceased 5 Where a civil Court draws op Form C in respect of the properties attached by it and sends the same to the

Collector but the latter returns it to the civil Court for some corrections to be made therein the proceedings before the Collector must be deemed to be pend no even during the period during which the Form C was pending in the civil Court for correction 6

# 6 Limitation

This paragraph expressly excludes from calculation the period damag which the decree is before the Collector for execution 1 The leason is that dar ing such period, the decree bolders bave no remedy by execution against the Fiv perty of the judgment debtor in the management of the Collector? But the exclusion is permissible only in cases where a provision has been made under Part 7 for the satisfaction of the decree and where the decree holder has in consequence been deprived of his remedy Consequently if no such provised in made the period cannot be excluded 3

period of limitation in this Paragraph apply to the re-The words trictions placed upon the right of the decree holder both by the Limitation let 1908 and by S 48 of the Cede Where at a sale held by the Collector no bidders appear and the Collector sends the papers back to the civil Court lu the civil Court returns the papers again to the Collector the period from the

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<sup>2 (1921) 1921</sup> Oudh 1 6 (180) 3 (1922) 1.92 \quad \quad \quad 238 (288) 4 (1927) 1927 Oudh 216 (21) 5 (1925) 1.25 Oudh 448 (451) 28 Oudh Cas

<sup>330</sup> 

<sup>6 (1931) 1931 411 38 (40)</sup> Note 5

<sup>5 (1931) 1931</sup> All 541 (543)

<sup>6 (1</sup>J22) 1922 Nag 267 (269) 18 Vag L R 157 Note 6

<sup>1 119 0) 7 1</sup> d Ca SCO (SCO) (Mad)

<sup>4 (1913) 1919</sup> All 64 (65) 42 VII 118 (1310) 8 Ind Cas 311 (3 h) 13 Oudle Cas

date of the original application will be exclude 1 for the purposes of S 48 of the Code  $^{5}$ 

P. 12. [S 325-B] Where the property of which the sale has been ordered is situate in more districts than one, the powers and duties conferred and imposed on the Collector by paragraphs 1 to 10 shall be exercised and performed by such one may by general jule or special order direct

Powers of Collector to compel attendance and production P. 13. [S 325-C] In exercising the powers conferred on him by paragraphs 1 to 10 the Collector shall have the powers of a civil Court to compel the attendance of parties and

witnesses and the production of documents

# THE FOURTH SCHEDULE

## (See Section 155)

## ENACTMENTS AMENDED.

| 1    | 2   | 3                        | 4                                                                                                                                                                                              |
|------|-----|--------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Year | No  | Short title              | Amendment                                                                                                                                                                                      |
| 1870 | VII | The Court fees Act, 1870 | In article 1 of Schedule I after the act "plannt" the words 'written staterar' pleading a set off or counter claim zed after the word 'Act" the word 'or of crea objection " shall be inserted |
|      |     |                          | From article 11 of Schedule II the words from<br>an order rejecting a plaint or shall be<br>omitted                                                                                            |
|      |     |                          | For the entry in the first column of Schedul II<br>relating to article 19 the following entry<br>shall be substituted, namely                                                                  |
|      |     |                          | "Agreement in writing stating a que tion<br>for the opinion of the Court under the<br>Code of Civil Procedure, 1903                                                                            |

### APPENDIX I.

The High Courts Act or the Charter Act, 1861.

An Act for establishing High Courts of Judicature in India. (24 & 25 Vict., C, 104), (6th August, 1861)

[Repealed and re-enacted with slight modifications by the Government of India Act
5 & 6 Geo V Ch 61 (1915)]

Be it enacted by the Queen's Vost Excellent Vajests by and with the advice and concent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled

and it the alfa's spiritual and remport and commons it in a present remainer was ended and it the atthority of the same as follows —

(1) It shall be lawful for Her Vajesty by Letters I stent under the Grost Seal of the Luted A implement to erect and establish a High Court of Judiceture

High Courts may be at Fort William in Bengal for the Bengal Division of the Prendency
exhibithed in the several of Fort William aforesud and by the Letters Patent to creat and
lie idencies of India
destablish the High Courts at Madras and Bombay for those Press
and eversal I readencies at such time or respectively. Such High Courts to be established in the
said eversal I readencies at such time or respective times as to Her Majesty may seem fit and

said events I readeduces at such time of respective times as in the Analony may seem in and the fligh Court to be established under any such Letters Patent in vny of the said Press dencies shall be deemed to be established from and after the publication of such Letters Patent in the same Presidency or such other time as in such Letters Patent may be appointed in this behalf

(2) The High Court of Indicature at Fort William in Bennal and at the Presidencies

Constitution of High the and as many Junges not exceeding fitting to the fitting to the control of the fitting to the control of the fitting to the control of the fitting to the control of the fitting to the control of the fitting to the control of the fitting to the control of the fitting to the control of the fitting to the control of the fitting to the control of the fitting to the control of the fitting to the control of the fitting to the control of the fitting to the control of the fitting to the control of the fitting to the control of the fitting to the control of the fitting to the control of the fitting to the control of the fitting to the control of the fitting to the control of the fitting to the control of the fitting to the control of the fitting to the control of the fitting to the control of the fitting to the control of the fitting to the control of the fitting to the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the fitting the control of the

1st Barristers of not less than five years standing or

2nd Members of the Corenanted Gval Service of not less than ten years standing and who shall have served as Zillah Judges or shall have exercised the like powers as those of a Zillah Judge for at less three years of that period or

3rd Persons who have held judicial office not inferior to that of Principal Sudder timeen or Judge of a Small Cause Court for a period of not less than five years, or

4th Persons who have been pleaders of a Sudder Court or a High Court for a period of not less than ten years if such pleaders of a Sudder Court shall have been edimitted as pleaders of a High Court

Provided that not less than one third of the Judges of such High Courts respectively including the Chief Justice shall be Burnsters and not less than one third shall be Members of the Covenanted Chilf Service

(3) I rouded always that the persons who at the time of the establishment of

such ligh Court m any of the said Presidencies are Judges of the herein named to be the Court of Judges and the ligh Courts Sudder Dewany Adawlut or Sudder Adawlut of the same first Judges of the ligh Court of Sudder Dewany Adawlut or Sudder Adawlut of the same Court of Sudder Dewany Adawlut or Sudder Adawlut of the same Court of Sudder Dewany Adawlut or Sudder Adawlut of the same Court of Sudder Dewany Adawlut or Sudder Adawlut of the same treatment of the Sudder Adawlut of the same in the Sudder Adawlut of the same in the Sudder Adawlut of the same in Judges of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of the sudder Adawlut of th

Court

(4) All the Judges of the High Courts established under this Act shall hold their offices during Her Majesty a pleasure provided that it shell be law Tenure of office of High Ind for any Judge of a High Court to resign such office of Judge to the Governor General of Judge in Council of Covernor in Council of the Presidency in which such High Court is established

AFP

of High Court thereto from the Supreme Court shall have rank and precedence before the Judges of the High Court not transferred from the Supreme Court and except as aforesaid all the Judges of each High Court shall have rank a i

precedence according to the seniority of their appointments unless otherwise provided in ther natents (6) Any Chief Justice or Judge transferred to any High Court from the Supr A

Court shall receive the like salary and be entitled to the like to Salaries etc of Judges tiring pension and advantage as he would have been entitled to ! ! of the High Court and in respect of service in the Supreme Court if such Court hid been continued his service in the High Court being recloned to

service in the Supreme Court and except as aforesaid it shall be lawful for the Secretary of State in Council of India to fix the salaries allowances furloughs retiring pensions and (then necessary) expenses for equipment and vovage of the Ch of Justice, and Judges of the several High Courts under this act and from time to time to alter the same Provided always so h alterations shall not affect the salary of any Judge appointed prior to the date thereof

(7) Upon the happening of a vacancy in the office of Chief Justice and during any ab sence of a Chief Justice the Governor General in Council or Governor in Council as the case may be shall appoint one of the Provision for vacancy of the office of Chief Jus

entered on the discharge of

tice or other Judge

from such absence and upo such High Court and during any absence of any such Judge or on the appointment of any such Judge to act as Chief Justice it shall be lawful for the Governor General in Council or Governor in Council as the case may be to appoint a person with such qualifications as are required in persons to be appointed to the High Court to act as a Judge of the said High Court and the person so appointed chall be authorized to sit and to perform the duties of a Judge of the said Court until some person has been appointed by Her Majesty to the office of Judge of the same Court and has entered on the discharge of the dut es of such offices or until the ab sent Judge has returned from such absence or until the Governor General in Councilor Governor in Council as aforesaid shall see cause to cancel the appointment of uch acting Judge

(8) Upon the establishment of such High Court as aforesaid in the Pri den y Abolition of Supreme of Fort William 11 Bengal the Supreme Court and the Court of Sudder Sudder Dewany Idawint and Sudder Azamut Idiwlat at Courts Courts Calcutta in the same Presidency shall be abolished

And upon the establishment of such High Court in the Presidency of Valtat the Supreme Court and the Court of the Sudder Adambut and Foundarry Adambut in the samo Presidency shall be abolished

And upon the establisment of such High Court in the Pres dency of Eo big the Supreme Court and the Court of Sudder Dewnry advant and Sudder Foundary Adawlut in the same Presidency shall be abelished

And the records and documents of the several Courts so abolished in each Pre den v shall become and be records and documents of the High Court established in the Presidency

(9) Each of the High Courts to be established under this act shall have and

exercise all such Civil Criminal Admiralty and Vice Idm relit Jurisdiction and powers Testamentary Intestate and Matrimonial Jurisdiction of call and appellate and all such powers and authority for and a relation to the administration of justice in the Ires dence Ir of High Courts which it is established as Her Majesty may by such Letters Patent as afore and grant

and direct subject however to such dire tions and limitations as to the exercise of Original Civil and Criminal Jurisdiction beyond the limits of the Presidency Towns as rar let prescribed thereby and saves by such Letters Patent may be otherwise directly about and without prejudice to the legislative powers in relation to the matters of its said of the Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Governor Gover said of the Governor General of India in Council the High Court to be established in a

Presidency shall have and exerci a all jurisdiction, and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act

at the time of the abelition of such last mentioned Courts. (10) Until the Crown shall otherwise provide under the powers of this Act all juris

diction now exercise ! by the Supreme Courts of Calcutta Madras High Courts to exercise and Bombay, respectively over inhabitants of such parts of India same jurisdiction as as may not be comprised within the local limits of the Letters Sunreme Courts Patent to be assuel under this Act establishen Hall Courts at Fort William, Madras and Bomban, shall be exercised

by s ich High Courts, vest ectively

(11) Upon the c tiblishment of the said High Courts in the said Presidencies res partitely all provi ions then in force in India of lets of Parlia

provisions Ext ting applicable to Supreme Courts to apply to High Coarts.

ment or of any orders of Her Majesty in Council, or Charters, or of any lets of the Legislature of India which at the time or respective times of the establishment of such High Courts are re nectively applicable to the Supreme Courts at Fort Williams in Benyal Madras and Boulbay respectively, or to the Judges of

the e Courts, shall be taken to be applicable to the said High Courts and the Judges thereof respectively, so far as may be consistent with the provisions of this act and the Lotters Patent to be issued in pursuance thereof and subject to the legislative powers in relation to

the matters alore aid of the Governor General of India in Council (12) From and after the abolition of the Courts abolished an aforesaid in any of

Provisions as to nend ing lioccedings in abo lished Courts

the 11d Presidencies the High Court of the same Presidency chall have jurisdiction over all proceedings pending in such abo hahed Courts at the time of the abolition thereof and such nio ceedings and all previous proceeding, in the said last mentioned Court, shall be dealt with a, if the same had been had

in the said High Court save that any such proceedings may be continued, as merely as circumstances nermit under and according to the practice of the abolished Courts res pectively

(13) Subject to any laws or regulations which may be made by the Governor General in Connect, the High Courts established in any Presi

dency under this let may by its own rules provide for the Power to High Courts exerci e by one or more Judges or by dist ion Courts constituted to provide for exerci e of juri-diction by single by two or more Judge, of the said High Court of the original Judges or Division and appellate inrudiction tested in such Court in such manner as Court. may amear to such Court to be convenent for the due adminis

tration of justice

Chief Ju tie to deter mine what Judges shall sit alone or in the Divi

(14) The Chief Justice of each High Court shall from time to time determine what Judge in each case shall sit alone and what Judges of the Court whether with or without the thief Justice, shall constitute the several Division Courts as

cion Courts aforesaid

(15) I ach of the High Courts established under this Act shall have superintendence over all Courts which may be subject to its appellate jurisdiction and shall have power to call for return, and to direct the transfer of any suit or appeal from any such Court to any other Court of equal or superior musdiction and shall have power to make and issue general rule for regulating the practice and proceedings of

High Court to superin tend and to finme rules of practice for suboids nate Courts

such Courts and also to prescribe forms for every proceeding in the said Court for which it shall think necessary that a form be provided and also for keeping all books, entries and accounts to be kept by the officers and also to settle tubles of fees to be allowed to the sheriffs, Attorney, and all clerks and officers of Courts and from time to time to alter any such rule or form or table, and the rules so made and the forms so framed, and the tables so settled, shall be used and observed in the said Courts provided that such general rules and forms and tables be not inconsistent with the provisions of any law in force, and shall before they are issued, have received the sanction, in the Presidency of Port Welliam of the Governor General in Council, and in Vadras or Bombay, of the Governor in Council of the respective Presidencies

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(16) It shall be lawful for Her Majesty, if at any time hereafter Her Majesty sees it so to do, by Lettere Patent under the Great Seal of the United Her Majesty may estab Kingdom, to erect and establish a High Court of Judicature in and lish a High Court in the for any portion of the territories within Her Majesty's dominions

North Western Provinces in India not included within the limits of the local jurisdiction of another High Court to consist of a Chief Justice and of such number of other Judges with such qualifications as are required in persons to be appointed to the High Courts established at the Presidencies hereinhefore mentioned, as Her Majesty, Iron time to time, may think fit and appoint, and it shall be lawful for Her Majesty by such Letters Patent to confer on such Court any such presidention, powers, and authority as under this act is authorised to be conferred on or will become vested in the High Court to be established in any Presidency hereinbefore mentioned, and, subject to the directions of such Letters Patent

av such vernor far #5

1107160 and to the Chief Justice and other Judges thereof, and to the person administering the

Government of the said territories (17) It shall be lawful for Her Majesty, if Her Majesty shall so think fit at

Other or supplement tary Charters may be granted within

any time within three years after the establishment of any High Court under this Act by Her Letters Patent, to revoke all or such parts or provisions as Her Majesty may think fit, of the Letter three Patent by which such Court was established and to grant and reare after cetabl chiment malac el other servere and menticiones as Het Majesty may think

have been granted or made in the first instance

(18) It shall be lauful for Her Majesty from time to time, by Her Order in Council, to transfer any territory or place from the jurisdiction | Territorial limits of of one to the jurisdiction of any other of the High Courist either unitable to the court of the High Courist either the Court of the High Courist either the Court of the High Courist either the Court of the High Courist either the High Court of the High Court of the High Court of the High Courist either the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the High Court of the Hig jurisdiction of Court may territorial limits of the jurisdiction of the said several Couris be altered by order in as to Her Majesty, with the advice of Her Privy Council 1149

Council

seem meet (19) The word 'Barrister" in this Act shall be deemed to include Barristers of England or Ireland, or members of Faculty of Advocates in Interpretation of terms Scotland, and the words Governor Caneral and Governor shall comprehend the officer administering the Government

## APPENDIX II.

## COVERNMENT OF INDIA ACT, 1915

[5 & 6, Geo, V, Ch 61 (1915), as amended by 6 & 7 Geo, V, Ch 37 (1916), 9 & 10 Geo, V, Ch 101 (1919)]

# An Act to consolidate enactments relating to the Government of India 29th July 1915

Be it enacted by the hing's Most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same as follows

### PART IX

## THE INDIAN HICH COURTS

## Constitution

101 (Ch Act, Ss 2, 19)—(1) The High Courts referred to in this Constitution of High Act are the High Courts of Judicature for the time being Courts.

- (2) Each High Court shall consist of a Chief Justice and as many other Judges as His Majesty may think fit to appoint Provided as follows
  - (i) The Covernor General in Council may appoint persons to act as additional Judges of any High Court, for such period, not exceeding two years, as may be required, and the Judges so appointed shall, whilst so acting, have all the powers of a Judge of the High Court appointed by His Majesty under this Act.
  - (11) The maximum number of Judges of a High Court, including the Chief Justice and additional Judges, shall be twenty
  - (3) A Judge of a High Court must he-
    - (a) a barrister of England or Ireland, or a member of the Faculty of Advocates in Scotland, of not less than five years standing,
    - (b) a member of the Indian Civil Service of not less than ten years' standing, and having for at least three years served as, or exercised the powers of, a District Judge, or
    - (c) a person having held judicial office, not inferior to that of a subordinate Judge or a Judge of a Small Cause Court, for a period of not less than five years, or
    - (d) a person having been a pleader of a High Court for a period of not less than ten years

- (4) Provided that not less than one-third of the Judges of a High Court, including the Chief Justice but excluding additional Judges, must be such barristers or advocates as aforesaid, and that not less than one third must be members of the Indian Civil Service
- (5) The High Cout for the North-Western Provinces may be styled the High Court of Judicature at Allahabad, and the High Court at Fort Williams Bengul is in this Act referred to as the High Court at Calcutta

Synopsis

Legislative changes
Appointment of temporary Judges,
Proviso I to Sub S (2)

2 Sub S (4)

Act applies only to Chariered High
Courts
Sub S (4)

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nr 12 Legislative changes — Clause (d) of Sub S (3) has been substituted by the Indus High Courts Act 1922 (12 and 13 Geo 3 C 20)

2 Appointment of temporary Judges Proviso I to Sub S (2)—This protee does not mean that as regards each High Court appointments can only be made for periods ach exceeding two years in all however much they may be required subsequently. It should be in for such period and is exercised.

nmissioners Courts in

Iudia are not chartered High Courts and cannot exercise powers under S 107 of this 4ct of Sub Section (4) —The expression fone third of the Judges of the High Courts and the substantial of the Judges of the High Courts and the substantial of the Judges of the High Courts and the substantial of the Judges of the High Courts and the substantial of the Judges of the High Courts and the substantial of the Judges of the Judges of the High Courts and the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of the Judges of t

means one third of the crising number of Judges Brespective of the previous strength and number of the Judges constituting the High Court?

Tenure of office of 102 (Ch. Act, S 4)—(1) Every Judge of a High

Tenure of office of 102 (Ch. Act, S 4)—(1) Every Judge of a Injudges of High Courts Court shall hold his office during His Majesty spleasure (2) Any such Judge may resign his office, in the case of the High Courts in the case of the High Courts in the case of the High Courts in the case of the High Courts in the case of the High Courts in the case of the High Courts in the case of the High Courts in the case of the High Courts in the case of the High Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in the Courts in

Galcutta, to the Governor-General in Council, and in other cases to the local Government

103 (Ch Act, S 5)—(1) The Chief Justice of a High Court shall have

Precedence of Judges of 1 and and precedence before the other Judges of the same Court

(2) All the other Judges of a High Court shall have rank and precedence according to the seniority of their appointments, unless otherwise provided in their patents

104 (Ch Act, S 6)—(1) The Secretary of State in Council maj fix the salvines, allowances, furloughs, rotining persons, and Salaries etc of Judges where necessary, expenses for equipment and royage, for thigh Courts

Courts and may alter them, but any such alteration chall not affect the salary of any Judgo appointed before the date thereof

(2) The remuneration fixed for a Judge under this section shall commerce on his taking upon himself the execution of his office, and shall be the whole probt or advantage which he shall enjoy from his office during his continuance therein

(3) If a Judge of a High Court dies during his voyage to India, or within six months after his arrival there, for the purpose of taking upon himself the eve-

Govt of India Act Section 101-Note 2 1 (1918) 1918 Mad 263 (263) 43 Ind Cas So Note 3a 1 (1934) 1934 Posh 97 (33) Note 3

(850). Note 3 (850). 1 (1919) 1919 MI 257 (257) 5t Ind Cas 65(66) cution of his office, the Secretury of State shall pay to his legal personal representatives, out of the livenines of India, such sum of money as will, with the amount received by or due to him at the time of his death on account of salary, make up the amount of one year salary.

- (4) If a Judge of a High Court dies while in possession of his office and after the expiration of six months from his arrival in Judia for the purpose of taking upon himself the execution of his office, the Sectetary of State shall pay to his legal personal representatives, out of the revenues of India, over and above the sum due to him at the time of his death, a sum enual to six months salary.
- 105 (Ch let S 7)—(1) On the occurrence of a vacancy in the office of the form of Chief Justice of a High Court, and during any absence of the fudge of the form of the fudge of the fugh Court at Calcutta, and the local other Judges of the same High Court to perform the duties of Chief Justice of the Court in the court and has entered an the discharge of the duties of the office of Chief Justice of the Court and has entered an the discharge of the duties of the office of Chief
- Court until some jet on has been appointed by His Majesty to the office of Chief Justice of the Court and has entered on the discharge of the duties of that office, or until the Chief Justice has returned from his absence as the case requires.

  (2) On the occurrence of a vacancy in the office of any other Judge of a
- High Court, and during any absence of any such Judge, or on the appointment of any such Judge to act as Chief Justice, the Governor General in Council in the case of the High Court at Calonita, and the Local Government in other cases, may appointed to the High Court to et as a Judge of the Court and the person so appointed to the High Court to et as a Judge of the Court and the person so person has hern appointed by His Majesty to the office of Judge of the Court, until some person has hern appointed by His Majesty to the office of Judge of the Court and the sentence on the disclarage of the duties of the other or until the absent Judge has returned from his absence of until the Governor General in Council or the Local Government as the case may be sees cause to cancel the appointment of the acting Judge

Synopsis.

Note No Note No Time within which appointment of acting Judge should be made 2

- 1 Sub Section (2)—The worts upon the bappening of a reancy in the office of Judge, mean wopen the high coming of a vacancy in the office of a Judge repointed to this office by Hiss Majesty. They are not applicable to the case of a nature; caused by a person appointed to act as a Judge under this sub-section.<sup>1</sup>
- 2 Time within which appointment of acting Judge should be made —ho limit of time; is mentioned within which the appointment should be made. This is left to the discretion of the Local Government. Hence the fact that an appointment is made by the Local Government not immediately or with an arsonabile time siter the occurrence of the vacance will not have the effect of un-bladting the appointment and vender the judgment of the Julge on appointed valuality!

Section 105-Note 1 1 (1594) 16 All 186 (152)

Note 2 1 (1598) 20 All 267 (293, 294) 2, Ind App.

of (PC) This renders the contrary view taken in (1891) 16 411 136 (FB) no longer law.

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### JURISDICTION

106 (Ch Act, S 9)—(1) The several High Courts are Courts of record and have such jurisdiction, original and appellate in Jurisdiction of High cluding admiralty jurisdiction in respect of offences

Junisdiction of High cluding admiralty jurisdiction in respect of offences committed on the high seas, and all such powers and authority over or in relation to the administration of

justice including power to appoint clerks and other ministerial officers of the Court and power to make rules for regulating the practice of the Court as are vested in them by letters patent, and subject to the provisions of any such letter patent, all such jurisdictions powers and authority as are vested in those Courts respectively at the commencement of this Act

(2) (21 Geo 3, C 70) —The High Courts have not and may not exerce any original jurisdiction in any matter concerning the revenue or concerning any act ordered or done in the collection thereof necording to the usage and pract at of the country or the law for the time being in force

Synopsis

Original revenue jurisdiction Revenue—Meaning of 1 Power to make rules for regulating the 3 practice of the Court

1 Original revenue jurisdiction - Sub S (2) re enacts the probibition wh h 23

issued thereunder. The High Court has now no original jurisdiction in matters concerns a revenue. Thus a suif by an assesses for a declaration that an agreement for compo- ( a of

directing the Chief Revenue Officer to do his statutory duty and state a case for the open of the Court is not one made in the exercise of Original jurisdiction in any matter on wars the revenue and the High Court is completent to pass such an order.

- 2 Revenue—Meaning of —Money derived by a sale of smuggled goods which its stand and confiscated by the customs authorities is revenue within the meaning of the Storonsequently an action in trover against the Secretary of State for India for the recent of the value of such goods on the sliegation that the action of the customs authorities a life, it cannot be entertained on the original sale of the If the Court 1.
- 3 Power to make rules for regulating the practice of the Court —The High C. it is empowered under Sub S (1) to make rules for regulating its practice. It is not at a significant the sanction of the Local Government should be obtained for such Rules! Where the is nothing inconsistent in the Rules so framed with the provisions of the Code of C. if for dure the High Court can apply the provisions of the latter Code. Thus there here, a provision in the original side Rules of the Madras High Court similar to that contained no 3?

to apply to the original side also 2

Section 106-Note 1 1 (1919) 1919 Vad 715 (716) 48 Ind Cas 790 (792)

2 {1923} PC 130 (142) 50 Ind App 227 47 Bom 742 (PC) [But see (1921) 1921 Mad 524 (525) 44 Mad 718 Not good law in usew of 1923 P G 198) Note 2 1 (1927) 1927 Mad 689 (692) Note 3

30 Mai 412.

1 (1928) 1928 Mad 472 (473) 2 (1928) 1928 Mad 385 (387)

107 (Ch Act, S 15)-Each of the High Courts has superintendence over all Courts for the time being subject to its appellate Powers of High Court jurisdiction and may do any of the following things that with respect to subordinate is to say -Courts

(a) call for returns.

- (b) direct the transfer of any suit or appeal from any such Court to any other Court of equal or superior jurisdiction,
- (c) make and issue general rules and prescribe forms for regulating the practice and proceedings of such Courts
- (d) prescribe forms in which books, entries and accounts shall be kept by the officers of any such Courts and
- (c) settle tables of fees to be allowed to the sheriff attorneys, and all clerks and officers by Courts

Provided that such rules forms and tables shall not be inconsistent with the provisions of any law for the time being in force and shall require the previous approval in the case of the High Court at Calcutta of the Governor General in Council and in other cases of the local Government

### Sunopsis Note No Note No Legislative changes Criminal proceedings 11 1 12 Superintendence 2 Power to expunge from record Difference of opinion among Judges 13 Over all Courts Power of superintendenco-If can ho Election Courts 4567 exercised by Judge sitting in the in Rent controller Land acquisition proceedings selvency or original side of the Subject to its appellate jurisdiction High Court 15 Agency commissioner Power to transfer-Cl (b) Pewer to punish contempt of Court a Commissioner acting under the Defence 16 of India Act authority Proceedings under the Legal Practs Power to issue writ of certiorari 17 ĩġ. tioners Act Appeal

Other Topics

Interlocutory orders-Whether can be set Pt (5) aside by High Court See Note 2 Pt (19)

Powers of superintendence when not to be Powers of superintendence and revisional exerc sed See Note 2 Pts (2J 28) jurisdiction under S 116 See Note 2 Legislative changes —This section is practically a reproduction of S 15 of the High

Courts Act or the Charter Act 1861 (24 and 25 Vict C 101) The word law in the provise to the section was substituted for the word

Sch 1 of the Government of India (Amendment) Act 1916 (e and 7 Geo V C 37)

2 Superintendence - The term Superintendence has a legal force and signification which are perfectly well known to the Legislature! The object of superintendence is to keep all inferior Courts and jurisdictions within the bounds of their authority to see that they do what their duty requires them to do and that they do it in a legal manner la In England it is the peculiar business of the Court of the King's Bench to superintend all inferior tribunals and therein to enforce the duo exercise of those judicial and ministerial powers with which the Crown or Legislature has invested them and this not only by restraining their excesses but also by quickening their negligence and obviating their denial of justice 2

Section 107-Note 2

1 (1867) 7 Suth W R 430 (431) Per Nor man, J

12 Short and Mellor s Crown Practice 2nd

edition page 2 (1875 76) 1 Cal 180 (182) Case under S 15 of the Charter Act

(1933) 1933 Cal 132 (134) 2 Blackstone s Commentaries, 'p 110, et.

This wide power has been given to the High Courts in Indit in a limited and modified form by S. 115 of the Civil Procedure Code, by S 435 of the Grimmal Procedure Code, by S 107 of the Government of India Act, 1915, by Cl 13 of the Letters Patent (Madras, Bombay and Calcutt) and by other enactments These however, do not exhanst the powers of superintendence of the Chartered High Courts in India When the Supreme Courts were established in India they were invested with the same powers of superintendence as were exercised by the Court of the Queen's Bench in England 3 Under S 9 of the High Courts Act, 1861 (known as the Charter 4ct) which abolished the Supreme Courts and empowered the establishment of the High Courts, it was provided that the High Court to be established 'shall have and exercit all jurisdiction and every power and authority whatsoever, in any manner vested in any of th Courts in the same Presidency, abolished under this Act "33 Finally S 106 of the Govern ment of India Act 1915 (which has repealed the High Courts Act, 1861) provides that the High Courts have, 'subject to the provisions of any such Letters Patent, all such jurisdiction powers and authority as are vested in those Courl's respectively at the commencement of the It is thus clear that in addition to the powers given by this section and by other statutes the Chartered High Courts have inherited from the Supreme Courts the wide powers of superintendence exercised by the Court of the Ling & Bench in England 4 Thus a Charlerel High Court can issue a writ of certiorars to persons or bodies acting judicially but which are not Courts subject to the appellate jurisduction of the High Court, and which cannot be dealt with under S 107 of this Act 42 (For a fuller discussion of this, see Note 17, infra)

The powers of superintendence under this section are not merely administrative bit and are nucle under that the powers vested in the High Courts under S 115. The latter applies only where a case his been deceded by any Court subordinate to its High Court in which no appeal hes thereto and the High Court can interfere only in the three cases specified therein. There are no such limitations upon the power of the High Court under this section which can therefore be exercised even in cases not covered by S 115. It may be exercised in administrative as well as judicial matters, and in Civil as well as Chiminal proceedings.

The exercise of the power is in the discretion of the Court to which the application is und the power being one in the nature of extraordinary pursadection should be extraordinary pursadection should be extraordinary pursadection about a sparingly and with caution and on sound judicial principles in The principles grading the exercise of such discretion have been thus stated by West J in Stunnal agr view Anahunal's stollows --

(1) The Court having called up the record or proceedings of a subordinate Court will itself investigate the facts on which a jurisdiction has been samed or declined, on which it depends whether the subordinate Court could or could not legally deal with the matter in question, either at all, or on the proof to which it has referred the case, or according to which its mode of sagar or of action may or may not, have been in contradiction, rather than observed.

<sup>3 (1883) 7</sup> Bom 341 (359 260)

Sa [Sec also (1915) 1915 Bom 269 (270) 40 Bom 66 ] 4 (1927) 1927 Mad 130 (130) 50 Mad 130

<sup>(1930) 1030</sup> Mad 896 (899 900) 53 Mad 979 4a (1912) 16 Ind Cas 755 (765) 36 Mad 72

<sup>4</sup>b (1933) 1933 Lah 259 (260)

<sup>5 (1896) 18</sup> All 4 (7) (1919) 1919 All 46 (48) 42 All 26 52 Ind

Cas 279 (280) (1914) 1914 Cal 607 (608) 22 Ind Cas 848

<sup>(850) 41</sup> Cal 876 High Court's power of superintendence not restricted by Santhal Parguas regulations and rules

<sup>(1899 1900) 4</sup> Cal W N 36 (38 39) (1933) 1933 Lah 327 (328) (1917)

<sup>7 (1877 78) 3</sup> Cal 243 (218 244)
72 (1907) 31 Bom 133 (142)
(1933) 1933 Bom 190 (411)
(1933) 1933 Cal 132 (134)
(1893) 2 Cal W N 717 (714)
(1890) 12 Sath W B 74 (74)

<sup>(1927) 1927</sup> Lah 14 (15) (1930) 1930 Lah 859 (6.)1) 8. (1883) 7 Bom 341 (371, 372) (F II)

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to the rules of procedure, or the principles implied in them to such a material extent as to defeat the purpose of the law

- (2) If the Court finds that the external conditions of purisdiction of investigation and of command have been satisfied by the inferior Court it will not substitute its own appreciation of evidence or its own judgment thereon 9 (a) Where an appeal is provided the Court will not interfere by any peremptory order
- with the ordinary course of adjudication save in cases wherein a defect of the law and a grave wrong are manufest and are irremediable by the regular procedure
- (4) Where a de rec or order of a subordinate Court is declared by the law to be for it own purposes final or conclusive though in its nature provisional as subject to displacement by the decree in another more formal suit the Court will have regard to the intention of the legislature that promptness and certainty should in such cases be in some measure accepted instead of judicial perfection. It will rectify the proceedings of the inferior Court where the extrinsic conditions of its legal activity have plantly been infringed but where the alleged or apparent error consists in a misappreciation of evidence or misconstruction of the law intrinsic to the enquiry and decision it will respect the intended finality and will intervene peremptorily only when it is manifest that by the ordinary and prescribed method an adequate semedy o the intended remedy cannot be had
- (a) The Court will am all cases regard ats exercise of the extraordinary jurisdiction as discretional and subject to considerations of the importance of the particular case or of the principle involved in it of delay on the part of an applicant and of his merits with respect to the case in which the interference is sought
- (6) The Court will sedulously abstain from making any order of raius ug to make it on grounds the appreciation of which is exclusively assigned by law to some other authority provided the legal competence be exercised in good faith on matters that may reasonably be understood as with n its lawful range

The following are some of the clas es of cases in which in accordance with the principles et forth above the High Court will interfere under this Section -

- (1) Where the de 15 on of the lower Court is without jurisdiction or in excess of its turi diction 10
- (2) Where the lower Court has failed to do uts duty 11 Thus where the lower Court has refused to frame a material issue20 or to add a necessary party 23 or strach a
- property14 or to proceed with an execution sale la or to confirm the sale18 which it is bound to do under law the High Court will interfere Similarly where the 9 (1937) 1937 Mad 612 (62a) 55 Mad 883 11 (1835) 18 All 4 (8) When in a partnership

Per Thirusenbatachariar J (1987) 1933 Bom I (") Superintendence is not the same thing as hearing an

appeal (1867) 7 buth W R 130 (191)

10 (1870) 14 Suth W R 33 (83) (1934) 19 4 Lah 156 (157) 15 Lah 80

Court has power to pass couse quential orders after setting aside the order

(1670) 5 Beng L R App 29 (30)

(1930) 1920 Pat 277 (278) Order not shown to le without jurisdiction or in excess of musdiction

(1863) 9 buth W R 386 (387) (De) (1870) 13 Suth W R 439 (440) (Do) suit the decree was not passed in accordance with law and form and the decree given could not be exe cuted

(1876) 1 All 296 (997) Lower Court did not consider whether sufficient ground

were shown for review (18"0) 14 Suth W R 9 (10)

(1869) 11 Suth W R 191 (19 ) (18"0) 13 Suth W R 34 (34) (18"0) to Suth W R 418 (419)

(1873) 20 Suth W R 16 (17) 12 (1923) 1923 Pat 518 (519)

13 (1919) 1919 Mad 439 (440) 50 Ind Cr. 58

(1918) 1918 Pat 493 (488) 47 Ind Cas 725

(725)14 (1871) 15 Suth W R 246 (24") 15 (1914) 1914 Cal 607 (609) 22 Ind Cas 848

(8a0) 41 Ca1 876 16 (1876) 26 Snth W R 44 (46) 3 Ind App 230

(P (')

order of the lower Court is hopelessly inadequate in not containing any particulars or a discussion of the evidence 17 the High Court will interfere under this section on the ground that there is a failure of duty

- (3) Where the decision of the lower Court is such that grave and irreparable hairs or loss would result to the applicant 18 The High Court can set aside even inter locutory orders 19
- (4) Where the decision of the lower Court amounts to a denial of the right of fair trial 20 In the case cited below it has interfered even with an order passed under the Court's inherent powers 21

(5) Where the decision of the lower Court amounts to a manifest injustice 22

The High Court will not generally interfere in the following cases .-(1) Where the applicant has other remedies open to him as for instance by way of

appeal23 review24 or separate smit 25

- (2) Where the effect of interference would be tantamount to giving a right of appeal or revision which the applicant is not entitled to under law and which would amount to an crasson of the law 26
- (3) Where the error complained of against the lower Court is not one relating to jurisdiction but is a mere error of law or error of fact or improper appreciation of evidence 27
  - (4) Where the applicant is guilty of lackes and delay 28

3 (710)]

[1920] 1920 Pat 131 (137) 5 Pat L Jour 550 (1924) 1924 Pat 761 (764)

(1919) 1919 Pat 270 (276) 49 Ind Cas 442 (449) 4 Pat L Jour 57 (1925) 1925 Pat 674 (676)

(1926) 1926 Pat 207 (208) 4 Pat 723 Order refusing to add a party as a co

(1920) 1920 Pat 600 (602) 51 Ind Cas 189 (191) 4 Pat L Jour 277 Dismissal of suit on failure to amend plaint-No opportunity given to continue the suit with the plamt as it is

(1928) 1928 Pat 111 (112) Reinsal of tem

(1918) 1918 Mad 1071 (1071) 58 Ind Cas 133

(1915) 1915 Cal 29 (81) 24 Ind Cas 313 (316) (1933) 1933 Lah 259 (260) Shutting out

(723) 4 Pat L Jour 20 Order reins ing leave to sue a receiver without

local investigation 20 (1919) 1919 Pat 573 (574) 49 Ind Cas 389

(390)

plaintiff

(1928) 1928 Pat 111 (112) 21 (1918) 1918 Pat 100 (103) 47 Ind Cas 719

report therefor 22 (1920) 1920 Pat 568 (570)

porary wrong

(1923) 1923 Vad 500 (501)

1d Cas 917

Order directing

56 Ind Cas 155

injunction - Manifestly

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defendant's evidence manifestiv
                 improper and amounting to denul
                 of instice
24 (1918) 1918 Cal 415 (416) 44 Ind Cas fc3
                 (767, 769)
25 (1878) 3 Cel 248 (248, 249)
(1897) 1 Cel W N 617 (623)
     (1872) 17 Suth W R 80 (80)
(1872) 20 Suth W R 80 (80)
(1872) 20 Suth W R 202 (202)
(1872) 17 Suth W R 477 (478)
(1871) 15 Suth W R 170 (170)
(1870) 12 Suth W R 103 (104)
       (1869) 6 Bom H C 1 C 174 (176)
26 (1918) 1918 Cal 415 (417) 44 lad Cal 763
                 (767)
      (1867) 4 Bom H C A C 87 (90)
      (1867) 7 Suth W R 212 (218)
(1870) 14 Suth W R 217 (278)
(1874) 22 Suth W R 277 (278)
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(1879) 3 Cal L Rep 137 (189) (1879) 4 Cal L Rep 14 (17)

(1877) 2 Cal L Rep 545 (547) (1874) 22 8nth W R 522 (523).

(1872) 12 Suth W R 87 (89)

aside sale.

28 (1924) 1924 Pat 37 (38) 2 Pat 800 Nest to pay process fee for notice to a-

tion purchaser in a petition to Kt

[See also (1868) 10 Suth W R 6 (e)]

- 3 Over all Courts —To attract the operation of this section it must first of all be stablished that the decision sought to be assimiled is that of a Court subject to the appellate jurisdiction of the High Court. This section does not entitle the High Court to restrify executive injustice. Thus an order passed by a Magistrite in his executive cipicity under \$2.50 of the Police Act or when dealing with the Press Act 1931 caunot be revised under this Section.
- 4 Election Courts A Subordinate Judge schmang to try an election pet tion under the Madrax District Municipalities 4ct most acting as a Gave that as a personal designate and the High Court cannot set aside such an order though sliegt! under this section. Similarly the High Court has no pursistion to review on order passed by a Presidency Magriaton in an inquiry held under the rules frunced under the Madras City. Municipal Act. III of 1904 as to the competency or otherwise of a canditate for Mannipal election. A Municipal Commissioner sitting as an election Court under the U.P. Municipal city of 1916 is not also a Court captect to the appellate principation of the High Court within the meaning of this section.
- 5 Rent controller --It has been held by the High Court of Calcuttal that the Controller und the President in discharing their duties under Sa 15 and 17 respectively of the Calcutt Rent Act 1200 act as Cuil Courts and see subject to the appellate and consequently straightfound the High Court of High Court of Rangons? his on the other hand held that the controller under the Rangoon Rent Act 1200 is not acting as a Court and the High Court that he High Court the High Court with the High Court has no power of superintendence over him. It has further held that the Chief Judge of the Rangoon Small Cruss Court when excessing his powers in reference under S 18 of the Rangoon Rent Act does not act as a Court but only as a persona de signate and is therefore not subject to the appellate or revisional jur sciiction of the High Court under this Section 3
- 6 Land acquisition proceedings A collector refusing to refer a matter to the Court under S is of the Land acquisition Act to runking an award under S is I of that Act 3 does not act as a Court and is not subject to the appellate juried ction of the High Court. The High Court has therefore no power of superintendence in such cases
- It has been held by the High Cont of Calcutta in the underment ones case! that is he Calcutta Improvement Trust Tribunal acting under S 37 of the Lend Acquisition Act is a Court subject to the revisional jurisdiction of the High Court under S 115 of the Code of Cril Procedure as also under the Section The High Court of Bombay<sup>1</sup> has held that the District Court acting under S 135 of the Bombay City Municipalties Act 1925 and excressing its provers in Land Acquisition proceedings is subject to the appellate and superintending jurisdiction of the High Court.
- 7 Subject to its appellate jurisdiction—In order that the present section may apply its estential that the decay on sought to be revised should be that of a Court subject to the appellate jurisdiction of the High Court? The two things necessary to constitute appellate jurisdiction are the extience of the relat on of superor and inference Court and the power on the part of the former to review dees one of the latter? It is not however necessary that the particular decision sought to be set assignment that Court? The words subject to its appellate jurisdiction in that particular decision of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the present of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the contro

1 (1923) 1923 Mad 169 (1°0) (1933) 1933 AH 764 (168)

2 (1915) 1915 Mad 360 (362) 25 Ind Cts 345 (347) 38 Mad 581

3 (1925) 19.5 All 380 (382 383) 47 All 513 (F B) Note 5

1 (1923) 1923 Cal 160 (175 176) 49 Cal 931 (1923) 1923 Cal 311 (312) 2 (19%) 1926 Rang 33 (41) 3 Rang 410

2 (19%) 1926 Rang 33 (41) 3 Rang 410 (F B) 3 (1924) 1927 Rang 1 (3) 4 Rang 304 (F B) and not judicial 3 (19a2) 1932 Cal 660 (661) 4 (1931) 19a1 Bom 582 (586) 55 Bom 544 Note 7

1 (1914) 1914 Cal 452 (454) 41 Cal 91a 2 (1922) 1922 Mad 337 (338)

3 (1918) 1918 Pat 103 (112 119) 3 Pat L Jour 581

(187a) 15 Beng L R 197 (204 207)

APP

that the Court is normally subject to its appellate jurisdiction or even in cirtum specifica is only 4

The following have been held to be Courts subject to the appellate jurisdiction of the High Court (1) The special Court acking under the Emergency Ordinance 2 of 1932 or the special

Magistrate acting under the Bengal Emergency Ordinance 1931,6

(º) The special Judge proceeding under S 103 of the Bengal Tenancy Act ?

(3) The Court of the Recorder of Moulmein established under Act XXI of 1963 8 (4) Special Courts under the Emergency Powers Ordinance 1932 82

The following have been held not to be subject to the appellate jurisdiction of the light Court within the meaning of this Section

(1) The Board of Revenue acting under S 172 of the Madras Estates Land Act of a Bevenue Officer when making a settlement of rents under Chapter 11 of this

(2) A Revenue Divisional Officer acting under S 7 of the Madras Hereditary Village

Officers Act III of 1895 11 (3) The Court of a Revenue Divisional Officer in a processing for settlement of last rent under S 85 of the Chota Nagpur Tenanca Act, 1908 13

(4) I Judge of the High Court making an order in the exercise of Original Crim asi Jurisdiction 13

8 Agency Commissioner - A Commissioner noting under the Ganjam and I magintim Agency Act1, and the Mewes Agent in the Bombay Presidency2 are Courts subject to the ap pellate jurisdiction of the High Court

9 Commissioner acting under the Defence of India Act -The special tribunals created under the Defence of India Act, 1915 are by the very Act which created them sub . to no appellate jurisdiction whatever and the High Court cannot therefore exercise and superintendence under this Section over such Courts 1

10 Proceedings under the Legal Practitioners Act -- Proceedings under S 36 of the Legal Practitioners Act are judicial proceedings of a Court subject to the appellate jurisdiction of the High Court and can be revised under this section where such proceedings are not in conformity with the requirements of S 36 1 But the mero fact that the order of the Dietr t Judge is against the weight of evidence or is erroneous in law cannot afford a ground !: interference under this Section 3

The High Court of Lahore3 has held that it can in the exercise of its general powers of superintendence send for the records of a proceeding under S 14 of the Legal Practitioners Act and direct a transfer of the proceedings to another Court The High Court of Patas his on the other hand, taken a contrary new in the case cited below and refused thousand

3 transfer 1 (1916) 1918 Pat 103 (105 113 124) 45 Ind Cas 977 (983, 934) 3 Pat L Jour 5 1 (1033) 1933 Bom 1 (4) (1985) 9 Bom 333 (343) appellate paras diction includes superintending

(1918) 1918 Pat 155 (162 164) 41 Ind Car (F B) . 4 185 (200, 201, 203) 3 Pat L Jour 5.7 (F B) Note 10 1 (1932) 1932 Bom 598 (597) 56 lam 511

(1932) 1932 Nag 50 (51) 23 \ag L R 4 (1890) 4 Cal W N 36 (39) (1930) 1930 th 611 (612) Following 17 1 9 (1932) 1932 Mad 612 (639, 640) 55 Mad 893 (F B) (1928) 1926 Mad 1032 (1039) A11 69 2 (1924) 1921 All 69 (69) 45 111 6"0

10 (1932) 1932 Mad 612 (639, 640) 55 Mad (1899) 21 All 181 (153) (1930) 1930 Lah 859 (891) S83 (F B) 11 (1922) 1922 Mad 337 (838, 341) 12 (1914) 1914 Cul 890 (892)

13 (1871) 15 Suth W R Cr 60 (61).

3 (1926) 1926 Lah 199 (200) 1 (1916) 1916 Pat 115 (116, 117) 37 Ind Cat 491 (160) 1 Pat L Jour 5 to He J proceedings under S 14 are adia metrative and disciplinars and n 1 (1923) 1923 Mad 604 (601) 46 Mad 726 (1,000) 23 Mad 323 (849) 2 '(1927) 1927 Lom 272 (274) 51 Bom 416 C1711

C

In.

Where protracted examinations of witnesses were held which were quite irrelevant to the suit it was observed by their Lordships of the Pray Conneil that it amounted to au abuse which erroneously increased the cost of intestion without any corresponding benefit to the parties and that it was within the power of the High Court to direct an inquiry with a view to disciplinary action being titlen.

11 Criminal proceedings — As his been seen in Note 2, onte the power of superint tendence under this Section can be exercised in Guil as well as Ginmail proceedings. Thus the High Court can direct a Se, ions Judge to re hear in appeal after taking additional evidence, on the ground that there is a failure of duty.

The High Court has exercised its powers of superintendence in the following cases -

(1) Order dismissing a complaint under S 203, Criminal Procedure Code 2

(2) Order reviving a complaint after discharge 3

(1988) 19.3 Bom 1 (7) Conviction under Emergency Ordinance II of 1932—

(3) Order refusing a or granting a sanction to prosecute

(4) Order under S 435 of the Criminal Procedure Code 6

(a) Order under S 476 of the Criminal Procedure Codes 7
 (b) Order of a panchayat Court under Madras Panchayat Courts Act II of 1920 8

(7) Conviction by the Union Bench under the Bengal Village Self Government Act, V of 1919 4

(8) Conviction under the Bengal Emergency Ordinance 1931 16

Wy Construction function the superstraints of the Code of Crimmurl Procedure in 1921 orders under St. 148.

and 141 increte the amendment of the Code of Crimmurl Procedure in 1921 orders under St. 148.

and 141 increte and proceedings under Chapter Climber St. 145 to 131 was excluded from the residence of the state of the state of the state of the state of the state of the state of the state of the state of the subordinate Magnitrates II or amounted to an abuse of their powers of the jurisdiction of the subordinate Magnitrates II or amounted to an abuse of their powers or resulted to something abus to the density of fair trivil 2 Under the Amending Act AVIII of 1923, Cl. 2 has been comitted in S. 435 and the bar to the revisional jurisdiction of the High Court has thus been removed But still the High Court can excress the extra ordinary powers under this Section as for instance where an order under S. 144 amounts to an abuse of the process of Law 2.

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Held High Court has power to revise
a (1932) 1932 P O 69 (70)
  uuder S 107-But held conviction
                   Note 11
1 (1916) 1918 Pat 272 (273) 47 Ind Cas 274
  not illegal
   11 (1920) 1920 Mad 847 (847 851) 53 Ind Cas
          (275) 3 Pat L Jour 632
  483 (484)
2 (1916) 1916 Mad 303 (303) 21 Ind Cas 691
  (682) 38 Mad o12
(1900) 27 Cal 126 (130)
  (1923) 1923 Mad 60 (62)
   (1912) 17 Ind Cas 65 (6J) 86 Mad 270
  (1923) 1923 Med 24 (20) Order under S 145
           But see (1909) 3 Ind Cas $61 (861)
          36 Cal 994 Order of discharge can be
  —No finding as to possession—Order
          interfered only under S 439 Cr
  set aside
   (1921) 1921 Cel 30 (31 32) 48 Cal 529
          P C 1
   (1681) 7 Cal 447 (401 452)
   (1900) 27 Cal 892 (918)
3 (1896) 1 Cal W N 49 (51)
   (1899) 26 Cal G25 (629)
4 (1899) 26 Cal So2 (858)
   (1876) 2 Cal 2JS (295)
   (1906) 83 Cal 33 (45),
5 (1906) 28 111 554 (563)
6 (1899) 26 Cal 168 (193)
   (1916) 1916 Pat _92 (291) 35 Ind Cas S01
(803, 805) 1 Pat L Jour 336
7 (1930) 1930 Cal 721 (722)
(1921) 1921 All 365 (366) 43 All 180
   (1918) 1916 All 186 (187) 44 Ind Cas 673
   (1913) 19 Ind Cas 197 (204) 40 Cal 477 (F b)
(1931) 1931 Pat 411 (413 416) Order stay
ang proceedings under S 476—Can
  (673) 40 411 364
   (1917) 1917 411 220 (222) 41 Ind Cas 652
  (65a) 39 411 G12
  [But see (1J19) 1919 411 357 (959.
           be revised it made without inris
  360) 51 Ind Cas 337 (339) 41 All 302
           diction
    (1926) 1926 Pat 25 (25, 26)
  Held High Court cannot revise under
 8 (1925) 1925 Vad 1144 (1144)
  this section !
 9 (1932) 1932 Cal 867 (867) 53 Cal 1080
   (1909) 1 Ind Cas 762 (763) 81 411 150 (Do)
10 (1933) 1933 Cal 132 (136) Conviction under
the Bengal Emergency Ordinance
   (1917) 1917 All 396 (396) 38 Ind Cas 978
  (979) (Do)
           1931 set aside as resting upon no
           foundation in evidence
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12. Power to expunge from record - The Illah Court has power under this souls to delete irrelevant matter in the sudgment of the lower Court. 1 Thus where a Magnitude found on a discussion of the exidence that the case for the prosecution was false, and west on to remark that his own impression was that the case was true, the High Court ordered the romirk to be expunsed from the judgment. 2

: - ::.1 +.+ .- .4 provail 1 As to the effect of the amendment, see Note 12 to 8, 98

14. Power of superintendence-if can be exercised by Judge sitting in the inid vency or Original Side of the High Court -A single Judgo of the High Court exerting Insolvency Jurisdiction has no power under this Section to stay insolvency proceedings pending before the District Judge in the moffussel 1 Per such a power see S 18 t of the Pres same

tion tho

15 Power to transfer-Cl (b) -The High Court has power to transfer a case pendici on the file of a Court subject to its appellate jurbdiction to any other Court of equator super jurisdiction 1 Thus, the High Court can transfer a case pending on the file of the tgen ! Commissioner in the Madras Presidency or the Mon as agent in the Bombay Presidency lat according to the High Court of Madraste the Iransfer cannot be made to the District Co. as that Court is not of equal or superior inti-diction but should be made only to the lish Court; whereas, according to the High Court of Bombes the transfer can be made to the Battal Court 1

The High Court can exercise its powers of transfer under this section seen where as appliention has been made to the District Judge under S 21 of the Code of Cuil Pro clan act he has refused it 3

16 Power to punish contempt of Court's authority .- The Chartered High Courts in India are superior Courts of Record and have the power to punish in a summary manuel enter

the Court of the King's Bench in England 2

Prior to the passing of the Contount of Courts Act, XII of 1926, there was a out to judicial opinion as to whother the High Court had power to punish a contempt not of the but of the subordinate Courts

In Governor of Bengal v. Mots Lat. (L. L. R. 41 Cal. 173), the High Court of Calcula bell that the common has prisidetion of the High Court to punish contempt did not extend punishing a contempt of the subordinate Court In rel'entat Bas, [21 Mad L Jour 8] the

Note 12. 1. (1922) 1922 Pat 97 (100) (1919) 1919 Vind 655 (655, 656) . 47 Ind Cas

941 (941, 942) Per Abdur Rahim, J. Oldfield, J., dissenting

(1925) 1925 Mad 401 (402) High Court cannot expunge matter al The Instance of third party

2. (1922) 1922 Pat 97 (100) Note 13

1, (1920) 1920 Cal 417 (419) - 54 Ind Cas ICO (171, 172) 47 Cal 494

> (411) Nate 14

(1920) 1920 Cal 824 (829) . 51 Ind Can 403

(See also (1883) 9 Cal 205 (20) 1 Ind App 174 (P.C.) Note 16 3 (1926) 1926 Cat 326 (327) 2 (1884) 10 Cat 100 (131, 133) 10 led MI

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Agency Itules

171 (P C). (1921) 1921 Cal't (6) 44 Cal 283 (See also (1985) 1935 All 811 (419)

560 (562) 39 Ban 601

Note 15 1 (1901) 29 Cal 703 (711). 1a (1927) 1923 Mad 601 (60a) 46 Mad 12.

2 (1927) 1927 Hom 272 (276, 278). 51 los

Distinguishing 23 Mad 529 what was a case decide! under the . ! High Court of Madrie on the other hand, held that the High Court had power to punish such a contempt under its common law jurisdiction though not under S 15 of the Charter Act In Emperce v Balkrishna (1322 Bom 52), the High Court of Boinbay held that where a certain publication in connection with the proceedings of a subordinate Court had the effect of impediog the administration of justice it amounted to a contempt of the High Court and that it could punish such contempt under its superintending powers under this section. The High Court of Allahabad has also held that it has, as a Court of Record, jurisdiction to punish acts of contempt committed against Courts subordinate to itself 25 The conflict has now been set at reat by the aforementioned Act \II of 1926 which empowers the High Court specifically to punish a contempt of the subordinate Court where such contempt does not amount to an offence | unishable under the Indian Penal Code 3 The Let besides defining and fixing a limit as to the punishment to be impose I in such ex-es, also empowers the Chief Courts (which do not po te sany common law powers of the Court of the King a Bench in England as the High Courts do) to punish a contempt of its authority The let does not, however, apply to the Judicial Commi stoner's Court of Sagpur and the latter eaunot therefore punish a contempt of its subordinate Courte & See also the cases cited below \$

any act or writing tending to undermine the authority of Courts of justice or to influence the result of pending litigation is a serious contempt of Court 6 It is however not necessary that the contempt must be in respect of a case that is ponding or which has been heard?

17 Power to usine writ of certiogram -" The writ of certiorars is the process by which the King & Bench Division in the exercise of its superintending power over inferior prindictions requires the Judge or such officers of such jurisdictions to certify or send proceedings before them into the king's beach Division whether for the purpose of examining into the legality of such proceedings or for giving fuller or more satisfactory effect to them than could be done by the Court below 1 The jurisdiction of the High Courts in India to issue such write, as already noticed in Note 2, ante, is derived from the Supreme Courts which had and exercised the jurisdiction and powers of the Court of the king a Bench in England Being a power derived from the English common law, the High Courts in India should be guided by the principles laid down by the English authorities as regards the scope and limitatious of their jurisdiction to issue such write? Such jurisdiction is original jurisdiction, but extends over all inferior tribunels amouable to its authority 3 It, however, applies to the judicial acts and not to the ministerial acts of such tribunals 4 The term "judicial" does not mean only acts of Judges or legal tribunals ' ' line questions affecting the

right excess of their legal authos Bench division exercised in these write's But the High Court has no power to issue the writ against the Governor acting with the minister of public health, for the latter can claim exemption from the juris-

diction of the High Court for any act counselled or ordered by them in their public capacity

under S 110 of this let 5 The issue of the writ of certiorars is in the exercise of the discretion of the High Court and the High Court will decline to exercise it in favour of an applicant who " armed

with a point either of law or of fact which would oust the jurisdiction of the lower Court has elected to argue a case on its ments before that Court ?

18 Appeal - in order of a single Judge of the High Court in the exercise of its powers of superintendence under this section is not appealable to the Privy Council by

asa

(1935) 1935 Lah 212 (z13) 16 Lah

266 7 (1 135) 1980 Call 413 (424)

Note 17

1. Short and Mellor & Crown Practice cited in (1930) 1930 Vad 896 (697) 53 Mad 97J

C P C 388 & 389

5 (1121) 1 h B 171, Rex v Electricity Commissioners cited in 1930 Mad 896 (897) Per Athin L J. (19°0) 1990 Mad 896 (902, 911) 53 Vad 979

7 (1927) 1987 Mad 180 (181) 50 Mad 120

Note Na.

virtue of S 111 of the Code of Civil Procedure 1 Nor is the order appealable under Cl 15 of the Letters Patent (See commentaries under Ct 15 of the Letters Patent)

108 Exercise of jurisdiction by single Judges or divi sion Courts

(Ch Act. Ss 13, 14) -(1) Each High Court, may by its own rules provide as it thinks fit for the exercise, by one or more Judges, or by division Courts constituted by two or more Judges of the High Court of the original and appellite jurisdiction vested in the Court

(2) The Chief Justice of each High Court shall determine what Judge in each case is to sit alone, and what Judges of the Court, whether with or without the Chief Justice, are to constitute the several division Courts

#### Sunovsis

Division Court

Note No Rules <u>.</u> | Original jurisdiction Sec S 115 Powers of the Chief Justice

1 Division Court -The Division Court must consist of at least two Judges of the High Court 1

2 Original jurisdiction -See S 110

Rules -This section empowers the High Court to make rules for the exercise of original and appellate jurisdiction by the High Court through its Judges But this does not enable the High Court to make a rule which is in contrivention of the provisions contained in the Letters Patent Such a rule if made is ultra tires 1 Where rules see made dolegating powers to the various Judges, the jurisdiction of the latter is fired and limited by such rules and any order made by a Judge or Judges in excess of this authority would be void as being without jurisdiction 2

Powers of the Chief Justice -It is the province and duty of the Chief Justice to determine what Judgo or Judges shall decide each case. If two Judges are appointed by him to hear an appeal no single Judge has jurisdiction to hear it 1 When a Judge of the ligh Court chosen to sit in the sessions if taken ill as soon as the case is begun the Chief Justice has power to direct another Judge to preside over the sessions 2

Power of Governor General in Council to alter local limits of jurisdiction of High Courts

(28 & 29 Vict , C 15, Ss 3, 4, 6)-(1) The Governor General in Council may, by order, transfer any territors or place from the jurisdiction of any other of the High Courts, and authorize any High Court to exercise all or any por tion of its jurisdiction in any part of British India not included within the limits for which the High Court was established, and also to exercise any such jurisdiction in respect of any

British subject for the time being within any part of India outside British India

Note 18 1 (1924) 1924 Wad 399 (399) 46 Mad 958 Section 108-Note 1 1 (1022) 1922 Pit 13 (13) 1 Pit 384

Note 3 1 (1926) 1926 Rang 1 (2) (F B) 3 Rang 546 R 23 of the appellate rules is ultra tires as being inconsistent with Cl 13 Letters Patent

2 (1915) 1915 Bom 146 (147 148) 30 Ind Cas 560 (562) 39 Bom 604 (B B) (See also (1911) 9 Ind Cus 509 (511) (Cal) The powers of the Judges of the Indian High Court are governed by the Letters Pitent the Rules of the Court and the orders pre ed to the Chief Justice under the provi

sions of the High Courts let] Nole 4 1 (1 2) 6 ( 4) (3 (7)) ar 1

14 3 Division Bench can application for revision again to der

2 (1327) 1927 Born 161 (162) Distingd hing (See however (15,00) 2 ( if W V 451

(183)

- (2) The Governor General in Council shall transmit to the Secretary of State an authentic copy of every order made under this section
- (3) His Majesty may signify through the Secretary of State in Council, his disallowance of any such order and such disallowance shall make youd and annul the order as from the day on which the Governor General notifies that he has received intimation of the disallowance but no act done by any High Court before such notification shall be deemed invalid by reason only of such disallowance
- 1 Legislative changes The words any British subject for the time being within in Sub S (1) have been substituted for the words. Christian subjects of His Wayett resident in by S 1 of the Government of India, (Amendment) at 1916 (5 & 7 Geo V C 3()
  - 110 (13 Geo III C 63 Ss 15 17 21 Geo III C 70 s 1 37 Geo III C 142 s 11 39 and 40 Geo III, C 79, s 3, 4 Geo IV,

Exemption from juris C 41 s 7) -(1) The Governor General, each Governor diction of High Court Lieutenant Governor and Chief Commissioner and each of the members of the Executive Council of the Governor General or of a

Governor or Lieutenant Governor and a minister appointed under this Act shall not-(a) he subject to the original jurisdiction of any High Court by reason

- of anything counselled ordered or done hy any of them in his public capacity only nor
- (b) he hable to be arrested or imprisoned in any suit or proceeding in any High Court acting in the exercise of its original jurisdio tion nor
- (c) he subject to the original criminal parisdiction of any High Court in respect of any offence not being treason or felony
- (2) The exemption under this section from hability to allest and im prisonment shall extend also to the Chief Justices and other Judges of the several High Courts
- 1 Legislative Changes -The follo ving change, have been effected in Sub S (1) of the present sect on by Sch I of the Government of India (Amendment) Act 1916 -
  - (1) The words Lieutenant Governor and Chief Commissioner have been newly added
  - (2) The words The Executive Council of the Governor General or of a Governor or Lieutenant Governor have been substituted for the words the respective Executive Councils

the exercise of its original purisdiction be a full justifica

By the Government of India (imendment) Act 1919 (9 & 10 Geo \ C 101) the words and a min ster appointed under this Act in Sub S (1) have been ne vly in erted

111 (21 Geo III C 70 Ss 2 3 4)-The order in writing of the Governor General in Council for any act shall in any Written order by Gov nor General Justifica proceeding civil or criminal, in any High Court acting in ernor General

tion of the Act except so far as the order Extends to any in India European British subject but nothing in this section shall exempt the Governor General, or any member of his Executive Council or any person acting under their orders from any proceedings in respect of any such

act before any competent Court in England

tion for act in any Court

# LAW TO BE ADMINISTERED

112 (21 Geo III, C 70, S 17, 37 Geo III, C 142, S 13) -The High Courts at Calentta, Madris and Bombay, in the exercise Law to be administered of their original jurisdiction in suits against inhabitants

in cases of inheritance and succession

of Calentta Madras or Bombay, as the case may be shall in matters of inheritance and succession to lands rents

and goods and in matters of contract and dealing between party and party when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom, and when the parties are subject to different personal laws or customs baying the force of law to dec de according to the law or custom to which the defendant is subject

## ADDITIONAL HIGH COURTS

His Majesty may, if he sees fit, by letters patent, establish a High Court of judicature in any territory in British Inda to establish whether or not included within the limits of the local addit onal High Courts junisdiction of another High Court and confer on any High Court so established any such jurisdiction, powers and authority as are vested in or may be conforred on any High Court existing at the commencement of this Act and where a High Court is so established in any area included within the limits of the local jurisdiction of another High Court, His Majesty may be lettors patent alter those limits and make such incidental consequential and supplemental provisions as may appear to be necessary by reason of the alteration

#### ADVOCATE GENERAL

114 (53 Geo III, C 255, S 111, 21 and 22 Vic C 106, S 29)-(1) His Majesty may, by warrant under His Royal Sign Manual appoint an Advocate General for each of the pres deac es Appointment and powers of Advocate General of Bengal, Madras and Bombay

(2) The Advocate General for each of those presidencies may take on behalf of His Majesty such proceedings as may be taken by His Majesty's Attornet General in England

(3)  $O_{\rm H}$  the occurrence of a vacancy in the office of Advocate General or during iny absence or deputation of in Advocate General the Governor General in Council in the case of Bengal and the local Government in other cases me) appoint a person to act as Advocate General and the person so appointed may exercise powers of an Advocate General until some person has been appointed by His Majesty to the office and has entered on the discharge of his duties of until the Advocate General has returned from his absence or deputation as its case may be or until the Governor General 1a Gouncil or the Local Government as the case may be, cancels the acting appointment

Acting Advocate General -Sub S (3) has been newly added by Part III of 3 of the Government of India Act 1919 (9 and 10 Geo \ C 101) The acting Advocate Catheles and the Control of the Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of Control of is outstilled to a right of pre audience over all other Advocates in respect of all business white

of a private nature or on behalf of the Crown 1

#### SAVINGS

131. (1)

(2)

(3) Nothing in this let shall affect the power of the Indian Legis liting to reped or after my of the provisions mentioned

Saving as to certain rights and powers the first the Schedule to this Act or the validity of any previous exercise of this power.

- 1 Legislature changes—The words Indian Legislature were substituted for the words to remor Currial in Legislature Council by Part II of Sch. JI of the Government of India vot 131(3,2:10 Geo. V. C. 101)
- 2. Power of Superintendence of subject to the Indian Legislative Acts —This section revokes that nothing in this Act shall affect the power of the Indian Legislative to reaped or alter any of the provisions mentioned in the fifth Schedule to this Act. The fifth Schedule refers to S 100 but not to S 10. It has however been held that a measure affecting the appellate jurisdiction under S 100 will affect the power of superintendence under S 107 and that therefore the Local Legislative has power to pass laws affecting the 10 vers and jurisdiction of the Hab Court under S 10.

# THE FIFTH SCHEDULE

#### Section 131 (3)

# PROVISIONS OF THIS ACT WHICH MAY BE REPEALED OR

Subject

# ALTERED BY THE (INDIAN LEGISLATURE) 2

Jurisdiction Powers and Authority of High Courts

108 (1) Exercise of jurisdiction of High Court by single Judges or division Courts

Power of Governor General in Council to after local

limits of jurisdiction of High Courts etc

Exemption from jurisdiction of High Courts

Written older by Governor General in Council justi

fication for act in High Court

Law to be administered in cases of inheritance squees sion contract and dealing between party and party

114 (2) Powers of Advocate General

Section

<sup>1</sup> This schedule vas substituted by Sch 1 of the Government of Ind a (Arie idment) Act 1316 (6 & 7 Geo V C 3)

## APPENDIX III.

# DESPATCH FROM THE SECRETARY OF STATE.

SIN CHARLES WOODS DESPATCH ACCOUNTING FIRST

July at No 14

India Offich London 14th Maj 1862

THE GOVERNOR GENERAL OF INDIVEN COUNCIL

# To Mi Lond

I licravith transmit to you the Lelters Patent or Charter! under the Royal Sigu Vianual for the High Court of Judiciture to be established in Length in recordance with the Injair in of the Act 72 and 2. Victoric Chapter 104 for establishing High Court of Judicature is India and request that you will take immediate measure for instituting the Court for Injair of the Injair of the Charter Those appointed under the Set dection of the Act are designed in the second clause of the Charter Those appointed by the Crox u will be severally informable me of their are positioned.

- 2. This Charter will accomplish the great object which has so long been contain lated of substituting for the Supremo and Sudder Courts stollabled by the Act of High Court of Judit attree possessing the combined powers and authorities of the abolished Courts and exerc in jurisdiction both over the I roriness under the Sudder Court and over the I residency Town which forms the local jurisdiction of the Supremo Court
- 3 Leforo I review the provisions in detail it is necessary that I should direct your attent in to the general score and main provisions of the Act in question
- It abolishes in the first stace (as soon as the Charter shall issue) the Supreme Court and the Court of Sudder Dewan, Advalut It vosts to the High Court (by the last | toyl on of section 9 the lowers and authorities of those Courts respectively except so far as the Cown may be such Charter otherwise direct And (by the first part of the same section) it inve to the High Court with such Civil Criminal Admiralty Vice Admiralty, Testamentary lutestate and Matrimonial Jurisdiction and all such lowers and authority in relation to the admini tration of justice in the Presidency as the came Charter may confer With sespect. therefore to the fusion of the Supreme and Sudder Courts at appears obvious that the act itself | talks and that to assume and effect the same purpose by affirmative declaration in the Charter would be superfluous. It has been consequently deemed unnecessary that the Charter should exhibit on the lace of it an explicit statement of the powers and jurisdiction to he pos es el by the new Court in consequence of the fusion as would have been the proper cour e if these powers and jurisdiction had been entirely new Recourse has been had in some places in hen of such explicit statement to reference to statutory provisions and in others to the Charter of the Supreme Court when the object of elearness appeared to require it wherever the Charter does not otherwise specify the High Court will use the powers and administer the juiss judence appertaining to those Courts respectively to whose authority it now succeeds
- 5 But the Charter's sufended positively to declare all such Civil, Criminal and other pursals tions above specified as the Crown thinks projer by this Charter to confer out supple mentary or additional to its many purpose namely, the fusion of the aforesaid Courts
- 6 Moreover the words giving authority to confer on the Court such prisadiction and such powers and authorities for the administration of justice as the Crown may direct appear

<sup>1</sup> This Letters Patent dated the lith May 1862 was revoked by further Letters P dated 25th December 1865

very large and such as, in point of fict invest the Crown with extensive legislative powers, so far as "the administration of justice," within the meaning of the sections, may require it has been, however, thought best to use this power very spaningly and simply as ancillar; to the real purpose of the Act, namely, the establishment of new Courts

- 7 Another reason for the form which the Iresent Letters Prient asymme is to be found in the provisions of S 17 of the Act of last Sessions. By that section power is given to the Crown to recall the Letters Prient establishing the Court at any time within three years after its establishment, and to grant other Letters Patent in their stend. This provision was marketed in the Act mainly with the view of enabling Her Magety & Government to avail themselves of the advice and assistance of the Judges of the Court in framing the more perfect. Charter by which the jurisdation and authority of the Court is to be paramently fixed. On this point, I request you will put yourselves in communication with the Judges of the Court, and, at any time previous to the expraision of two years from the date of establishment of the Court, firtuish me with any suggestions they make or any amendments they may propose in the Letters Patent now transmitted, and I shall be glad if is propouse alterations the Judges will put their recommendations as nearly is possible in the form in which they wish them to appear in the future Letters Patent.
- 8 I proceed to notice, in order, such of the provisions of the Charler is appear to me to call for special romark
  - 9 By clause 6, power is given to the Chief Justice to appoint the offices of the Court
    and to fix their salaries subject however, in both cases to the
    Clause 6 approval and confirmation of the Governor General in Connui
    This provision does not refer to the setting of tables of fices where

fees are allowed, which under S 15 of the Act, is required to be done by the Court

10 The Supreme Courte recruses an authority entirely independent of the Covernment in regard to its ministerial officers. The Government, however, has always considered it silt at liberty to recover representations from any of the officers of the Sudder or Subordanste Courts who felts themselves aggreered by the orders of the Judicial Authorities, and to expless its opinion on the propriety or otherwise of the proceedings of the Courts in such cases. It will be expedient for you to take the question into your consideration, and, after communication with the Court, to adopt some rule in regard to it which of course must be uniformly applicable to all the officers of the Court.

all the confidence you can repose in it, but as a q

11 In regard to the admission of Advocates Valeels, and Attorness the recommendar Clauses 7 10

Clauses 7 10

chins of the Law Commissioners have been followed Indee the existing practice, the Advocate pleads, and the Attornes acts, for the suitors of the Supreme Court and the Valeel both pleads and extereme Court are ex-option Valeels. These terms are employed in the Charter of the express the functions of these saveril classes of practitioners. The Advocate and Attorney is only if respectively pleads and act in the High Court and the Vakesl will both plead and att in the High Court as he did in the Sudder Court. Any person may apply to be admitted either as an Advocate, or valeed or Attorney to de also Valeels of the High Court, should the Dadge consider such a court eto be

expedient

12 The provisions in the Act. S. 2 Cl. 4, which declares that Pleader of the Sudder Court, "who shall have been admitted as Pleaders of the High Court," shall be eligible under certain conditions, to the Bench of the Court, mplies that a discretionary power may be estrated as to the admission of the present Pleaders of the Sudder Court to the Bar of the High Court. This enactment will account to post or the omission from the Charter of any provision appointing all the present practitioners of the Supreme and Sudder Courts to the High Lourt Councild, however, that unless in any special cases, there are strong reasons to the contray, the Court will admit the whole of the practitioners in the abolished Courts at the date of their abolition, to be the first theoretics, and Attorneys of the High Court.

111

13 With reference to the concluding sentence of Clanco 10 it is to be observed that the Letters I stent contain no provi ion reserving to the Attorneys of 6 lause 10 the present Supreme Court the right of pleading after the issue of this Charter in the Insolvent Court as newly regulated by

this el? No such provision, honever is necessary as the Insolvent Court is a sepirate tribunal ne affected by the let anthonying the Letters Patent and will continue a serarate Court though for the future presided over by a Judge of the High Court. The Altorneys there'te will a heretofore practise in meardance with the rules of the Insolvent Court it elf

14 ly the important provisions continued in the clauses of the Charter II to 38 inclu are of the course to the 9th action of the act respecting the jurisdictions and powers to be exercial by the High Court

anal civil jury diction now exercised by the Suj reme Court within the limits 15 Tle of the Presidence Town will henceforth be excressed under the Charter by the High Court including in that term (Clause 36 of the t v 1 Jr tion to if therter) , Judge or Division Court of the High Court appointed or i lan constituted under the provisions of the 13th section of the 1ct

16 As it is very de irable that every smit should be mustifuled in the Court of the dis trict in whi hi the ne lecta forming the subject of dispute is situated or in which the cause of action has its origin or in which the defendant resides or cirries on business, the juried et on bitherto exercised to the but reme tourt (on the ground of con tractive inhabitancy or other wise) over per one and projects terond the local limits of the bresidency Town but within the limit f he I residen a or lavision subject to the authority of the High Court has not been vested in the High Court. The concluding provision of Gl. 11 provides that the exercise of the ordinar original civil purisdiction of the Court shall be confined to the local limits of the I re idence Town with power however to the Court nuder Clause 13 to call for aud try any built in tituted in any Court subject to its superintendence when for reasons to be re corded at shall think proper to do so

17 The terms of Clause 12 defining the original surreduction of the High Court as to suits are nearly similar to those employed in 8 5 of the Code of Clause 12 Livil Procedure (Act \ III of 1659) and are intended to include every description of case over which the Mofussil Courts have juris

du tion By the 5th section of the 21st George III C 70 the Supreme Court is precluded from exercising any jurisdiction in any matter concerning the revenue further a decision! of the Judicial Committee of the Privy Council propounced in April

1856 ruled against the exercise of the Ecolesiastical jurisdiction of 14rdaseer Cursetji v the Supreme Court in matters matrimonial between others than Perozeboje Christians and even expressed some hesitation as to whether that Court of uld admin ster a remed) in such cases on the Chil side. It is one object of the resent

Charter to do awa with all such restrictions and limitations as far as this can be done without trenching in the proper province of legislation. It has therefore been sought to invest the High Court in the exercise of its original civil jurisdiction with as ample powers in receiving and determining cases of every description and in applying a ramedy to every wrong as are exercised by the Courts not established by Royal Charter and thus to place the Courts of first instance in the fires dency Towns and in the interior of the country in this respect as nearly as may be on the same footing

18 I shall be glad to be furnished with your opinion after consultation with the Judges of the Courts as to the concluding portion of Clause 12 excluding the jurisdiction of the Court in regard to cases falling within the jurisdiction of the Small Cause Court of Calcutta in which the debt or dimage or value of the project, shed for does not exceed 100 Runees Hitherto I believe there has been no tendency to bring into the Supreme Court cases cognizable by the Small Cause Court but should it appear that under the new system the time of the High Court is unnecessarily taken up with trying cases which might be insti tuted in the Small Cause Court it may become a question for consideration whether the sum excluding the jurisdiction of the High Court might not be raised to say 300 or 500 Rupees

> ald be placed on the same ourt of appeal and general the Act of Parliament of

last Session that the Crown, in framing a Charler under it for the High Court, should interfere with the present position and jurisdiction of other and independent Courts. This subject, it is properly to be attained.

Cure Court count to be placed as any other Court subject to its Appellate jurisdiction in the fixed count count in the fixed count count in the count count in the count count in the count count in the count count in the count count country in the country country in the country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country country countr

by an Act of the Governor General in Conneil

20 As already observed the effect of Clause 12 will be to confine the ordinary original civil jurnsdiction of the High Court within narrower limits than Clause 13 the Civil jurnsdiction exercised by the Supreme Court By Clause 13, however, the High Court is empowered to call for and to try as a

Court of first instance any ant which the law requires to be instituted before some other tribunal. By the exercise of the power thus conferred on it the ligh Court will be enabled to obvate all reasonable grounds of complaint, when it shall deem that any hardship or injective is likely to result from the compelory institution in a Zillah Court of a sait which but for the clumps in the system might have been instituted in the Supreme Court

- 21 The introduction of the words whether within or without the Bengal Division of the Presidency of Fort William in this and in several other clauses, may appear to require explanation The Court about to be established is called in S 2 of the Act 24 and 25 Victoria C 101 a Court for the Bengal Division of the Presidency of Fort William That title is of course preserved in the Charter By S 8 the Supreme and Sudder Courts are alolished and by S 9 all their jurisdiction power, and authority except when otherwise provided are vested in the High Court But the Supreme Court has various original jurisdictions extending over the whole of the Presidency of Fort William, and also over some of the Non Regulation Pro vinces under the Government of India and the Sudder Court has various appellate juris dictions extending over the Bengal Division of the Presidency and also over the Province of Assam and others which are not properly parts of the Presidency. The result is that the High Court for the Leugal Division succeeding to the powers of both the Supreme and the Sudder Courts has to several respects purisdictions in territories not within the Bengal As this is the result of the Act it might not have been necessary to notice it in the But for the sake of clearness and in order to show distinctly that the Charter is meant to apply to these extra local purisdictions as well as to the strictly local purisdiction within the Bengal Division it has been deemed advisable to introduce these words
  - 22 Clines 14 and 15 gree effect to the recommendation of the Law Commissioners that Clauses 14 and 15
    Clauses 14 and 15
    Clauses 14 and 15
    One exercised by the Sudder Dewary Adawlint, and a new appellate principle of original jurisdiction in early cases from the Courts of original jurisdiction.

constituted by one or more of its own Judges, except that in the case of a doction which has been passed by amajority of the full number of the Judges of the Court, the appeal shall he to the Yugest yn Council

23 It will appear from a subsequent clause on the Letter Fatent that the proceedings in the High Contrin civil cases are to be regulated by the Code of Civil Procedure coacted by the Legislature of India of which Act VallI of 1861 forms a part. By \$ 23 of the last mentioned Indian Act provision has been made for a difference of opnoion on the hearing of an application. Our to the contribution of the contribution of the contribution of the contribution of the contribution of the contribution of the contribution.

m differ as to the judgment to be given adapted to Courts of first loctance pro-To call in a third Judge and to re five may be an appeal to the High Court

re may be an appeal to the High Court

- 3 and expense to the parties, and 1 am

of opinion that the Court should make provision for such a contingency, by a rate made under the 13th section of the Act of Parliament, providing either that the judgment shall be in accordance with the opinion of the senior of the Judges constituting the Division Court, or that the first judgment shall be entered pro forms, according to such opinion such judgment being a judgment for the purple of an appeal agriest the same, but not for any other purples.

The purple of an appear agrees an ame, one not to any other purples.

A The substitutive critical law to be administered by the fligh Court within the purcular tion of the Supreme and Sudder Courts, respectively, will, until Clauses 19 19 and 20 of the review provided, continue as at present This, as I have all, it

was no part of the purpose of the Act of Pailiament or Charter to effect. And the classes on which I am now commenting are probably superfluous. But they

performing their dutie

have been introduced to obviate any apprehension which might have been entertained that in hunging the two Court together it was infended to five above that which they have respectively hitherto administrated, and thus to make a substantial innovation not only in the tribunule for administration of the law but in the law itself. I trust however that measures may be taken rea long for effecting great improvements in this respect by enacting for the Dritch p. e. some in India above of substantia law by which all classes shall be governed and all trustices shall be regalized except in every to which all classes shall be governed apply. All type or and laws of any classes, so for inhalis subject.

- 25 Under Ct. 21 22 and 23 no change will be effected by the Clariter in the admining that on the content protein in the Presidence Town or in respect to the criminal particle from the property of the country. If appears to however to Bire Magnets of Government that ct. 1 reduction of the country. If appears to however to Bire Magnets of Government that ct. 1 reduction of the country is a processing practice both at the capital and in the provinces is not ct. 1 reduction that the superior despited on the country fault values you may experted despited.
  - 26 The Sudder Court exercises no original pure-dection but by Cl 23 original criminal its authority has

thur e 29 theng to enable out of the Press

dency Town at which from their amjortance of for other specific cause at mix be expedient that a Jil eor Jug | the High Court should preside | 27 The remuning chuses of the Esters Patent on the subject of the climinal jurisdice

- ton of the ligh Court do not call for any particular notice. They contain no special provisions respecting the transfer to that Court of the enumed jurisdiction exercised by the Snyrum Court over inhabitants of such parts of India as are not comprised within the local limits of the Letters Patent that having been fully provided for by S 10 of the Act undoct the authority of which
- the High Court is established.

  28 4, in the case of the Small Cause Court you will consult the Judges in regard
  to the relation my which the High Court is to stand to the Manistratos of Calcutia
- 29 Clau e 30 respecting the exercise of the jurisdiction by the High Court elve where than at its ordinary place of witing is very im Clau e 0 jurisdictions and one which I have no doubt if judiciously all the judiciotories subject to the superintendence and authority of the High Court Circum tances may frequently arise when the deputation of a Judge or Judges of the High Court would be a measure of the highest erged ency For such case the lue cunder consideration will enable the Government to provide by deputing one or in J J if from the High Court who would vanil themselves of the opjoutunty thus
- 30 With reference to this clause it has been considered whether the precedence of 5.1 if the act of Partiment should not be followed and the authority to make the nece say verangement for the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of an administrative character might be more peafertly performed by approximate of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the cont

afforded them of making a searching inquiry into the manner in which the local Courts were

31 The Supreme (ourt exercises at present identified by the Chairer The Chief Justice has Vice Admiralty Jurisdiction Clauses 31 and 32 under the commission of the 19th July 1622 and all or any of the Judges of the Supreme Court may be appointed Commissioners under the provisions of 39 and 49 George III 6 07 9 S 20 for the trial and adjudication of price causes and other marking questions arising u India By the present Chairer the whole of these pursisdictions and power will be vested in the High Court and as in the left above cited by the expression of the marking questions in general mention is made of all the jurisdictions conferred as above mentioned in the clauses of the

Charter, providing both for the civil and criminal maritime jurisdiction of the High Court

Clauses 33 and 34 32 The clauses respecting testamentary and intestato juris diction do not call for any remark

33 Her Wriesty's Government are deshous of placing the Christian subjects of the
Cronn within the Presidency in the same position under the
High Comrt us to matters matrimounal" in general as they
new are under the Supreme Court, and this they believe to be

effected by Cl. 35 of the Chriter But they consider it expedient that the High Court should posses it and addition the power of decreening shore which this Supreme Court does not posses, in other words that the High Court should have the same purisdiction as the Court for Divorce and Untimourn't Guess in England, exhibited in writee of 20 and 21 Vic. C 55, and in regard to which further provisions were made by 22 and 37 Vic., C 61, and 23 and in regard to which further provisions were made by 22 and 37 Vic., C 61, and 23 and 21 Vic. C 141. The 4ct of 1 arhament for estiblishing the High Court however does not purport to give to the Crown the power of importing into the Chairer all the provisions of the Divorce Court tet and some of them the Crown clearly could not so import such for instance as those which presented the period for mirrings or those which except from punishment clergymen reliving to re marry adulterers. Mr these are, in truth, matters for Indian Englathon and I request that you will mannedrively tale the subject unto your counteration and introduce into your Council a Bill for conferring upon the High Court the jurisdiction and introduce into your Council a Bill for conferring upon the High Court when the provided in the provisions of which should be to give an appeal to the Privy Connell in those cases in which the Divorce Court let gives an appeal to the House of Lords.

- 34 The object of the provise it the end of Cl 25 is to obviste any doubt thit may possibly type as to whether, by resting the High Court with the power of the Court for Divorce and Vitrimouni Cruses in England it was intended to take away from the Courts within the divisione of the Presidency not established by Popal Charter unj purudiction which they might have in matters Vituinousia as for instance in a suit for almony between Armonians or Avitive Christians With any such jurisdiction its su on intended to interfect
- 35 Clause 36 refers to the powers of augle Judges and Davision Courts a jointed or Constituted under the provisions of the 18th section of the 4ct Us S ts of the vet the jower of determining from time to time what Judges or each case shall sit alone and what Judges shall constitute Davision Courts as placed in the brudes of the Chief Justice. It will be observed that the law does not require that a Judge selected from the Darishall necessarily form a part of every Davision Court, and it will be for the Chief Justice to consider whether in cuse exclusively between Astives, it will not be desirable to follow, as far as possible, the courts which has already been resolved upon in regard to the cases under appeal to the Sudder Court as the time of its abolition, and to constitute the Davision Court of Judges trained in the courts whose knowledge of the Artic language will obvite the capones and delay of time shalling the
- proceedings

  36 Clause 37 is a very important one and these is little doubt, will prove a very substant it has therefore, been inserted although the change introduced is somewhat greater and more substantial than is generally aimed at in this Chaiter I textends to the High Court the Code of Ural Procedure cancel by the Legislature of india for the Court not

since the date of its establishment

- 37 In regard to the rules respecting appeals to the Pray Council the object has been to avoid unnecessity innovation where so much of change, with its necessary inconscience is manoidable. The caucing rules which regulate these appeals are, therefore left in force with one or two additions only, which represence in the Count of the Judicial Committee has found advisable. For instance Cl 40 is introduced, as it had been commonly introduced, of late years in the appeal sules of other dependencies of Great Britain in order to income all doubts as to the power of the High Court to allow an appeal to the Council from interio, utory sudements.
- 38 It will, however be obvious to you that the Rules, as now hamed, will be liable to the retroach of containon and perhaps of uncertainty. They will be compounded of those contained in the Charter and those already in force which will necessitate reference to several

documents. You will agree with me that a simple and intelliguale. Code of Rules, to regulate affects to the Privy Council from the new High Courts or rather from the High Courts in general which have become from that the later to add the just in 1-3 ould wish therefore that one of the first objects of the Judges, is not in the mount of later of throwing them is their new position must allow it might be to a spine ungestions for such a color of Rule which sught then be reduced into a complete state is the authority of the Privy Council at Home.

- 39 In forwarding the Latters Patent to the Judges of the High Court von its requested to far a hit time with a cip of this de patte. I true that the Letters Patent taken in con in the matth the vet for c table hing the Count to ji. cold it once to the dicharge of its important duties. It is possible that comes may be discovered by the legal nutborities to India which may implied the Important in of the Court is and should the Judges represent to you that such is the case you will tai immediate a first preparation of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts of the Courts o
- 40 I cannot a lade this despately without expressing the deep interest felt to liter May to "Concinnent in the success of this important measure "the Grown is its betters. Patent has sometion thee catalogue of its returnal as the Chief Court of Justice in India, which in the trunch arizing of the Judges selected from the Bir and in the knowledge of the language feelings, in India to the Natives of that counter possessed by the other members of the Court is alone the most material elements of success. And life Mayoria Sovern ment lost with confidence to the sealous exertion, and cordial conjection of the Judges to lace the damn train of Justice in India under the controlling authority of the Court in such a site of their in a will reader in court separate to the only and active feeling in the Court of the Judges to the sealous exertion.

I have the houour to be

My Lord
hour Lordship's most obedieut humble Servant,
(Signed) C \\ OOD



## LETTERS PATENT [CALCUTTA, MADRAS AND BOMBAY]

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# LETTERS PATENT [CALCUTTA, MADRAS AND BOMBAY.]

[NB-As the Letters Patent for Calcutta, Madras and Bombay are all in very similar terms, the Letters Patent Calcutta, is given as the main one and like differences in the wording of the other two Letters Patents are indicated within square brackets ]

For the High Court of Judicature for the Presidency of Calcutta

Victoria, by the Grace of God, of the United Kingdom of Goat Bittun
Recital of tets 24 & 25
Vict c 104

The Control of tets 24 & 25
Vict c 104

The Control of Payliament passed in the twenty fourth and an Act of Payliament passed in the twenty fourth and

twonty fifth years of Our Reign, entitled "An Act for establishing High Courts of Judicature in India " It was, amongst other things, enacted that it should be lawful for Her Majesty, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature fat Madras, for the presidency of Madras aforesaid at Fort William in Bengal, for the Bengal division of the Presidency of Fort William aforesaid [at Bombay for the Presidency of Bombay aforesaid and that such High Court should consist of a Chief Justice and as many Judges, not exceeding Fifteen, as Her Maiesty might, from time to time think fit to appoint, who shall be selected from among persons qualified as in the said act is declared Provided always that the persons who at the time of the establishment of such High Court were Judges of the Supreme Court of Judicature and permanent Judges of the Court of Sudder Dewany Adamlut or Sudder Adamlut of the same Presidency, should be and become Judges of such High Court, without further appointment for that purpose, and the Chief Justice of such Supreme Court should become the Chief Justice of such High Court, and that upon the ostablishment of such Righ Court as aforesaid, the Supreme Court and the Court of Sudder Dowany Adamiut and Sudder Nizamat Adamlut at [Midias], Calcutta [Bombay] in the said Presidency should be abolished

and that the High Court of Judicature so to be established should have and overcise all such civil, criminal, admirally and vice admirally, testimentary intestrite and matrimonal jurisdiction, original and appellate, and all such power and authority for, and in relation to the administration of justice in the sud Prosidency as Her Majesty might, by such Letters Patent as aforesaid, grant and, direct, subject, however, to such directions and finitiations as to the exercise of original, civil and criminal jurisdictions beyond the limits of the Picsidency town, is might be prescribed thereby, and, sive as by such Letters Patent, might be otherwise directed, and subject and without projudice to the legislative powers in rolition to the matters aforesud of the Governor General of India in Council, the High Courts to be established should have and exercise all jurisdiction, and every power and authority whatsoever, in any manner vested in any of the Courts in the same Presidency abolished under the said Act at the time of the abolition of such list mentioned Courts

And whereas We did, upon full consideration of the premises, think fit to Creet and establish, and by Our Letters Patent under the Gicit Seal of the United Kingdom of Greit Britain and Ireland bearing date at Westminster, the twenty sixth day of June in the Twenty-fifth Year of Our Reign, in the Year of Our Lord, One thousand eight hundred and sixty-two, did accordingly for Us, Our heirs and successors, erect and establish fat Madias, for the Presidency of Midras aforesaid, a High Court of Judicature, which should be called the High Court of Judicature at Madras at Yort William in Bengal for the

Bergal Division of the Presidency of Fort William aforesud, a High Court of Judicature which should be called the High Court of Judicature at Fort William in Rengal [4] Blombry, for the Pre-idency of Bombay aforesud, a High Court of Judicature which should be called the High Court of Judicature at Bombay] and did thereby constitute the said Court to be a Court of Record: and whoreas Would thereby appoint and ordin that the said High Court of Judicature at [Madras] Fort William in Bengal [Bombry] should, until further or other provision should be unded by U.S. or Our hears ind successors on that bohalf, in econdance with the recited Act, consist of a Chief Justice and five Judges, and did thereby constitute and appoint certain persons, bourg respectively qualified as in the said Vet is declared, to be Judges of the said High Court:

and whereas by the said received let it is declared lawful for Her Majesty, at any time within three wars after the establishment of the said High Court, by Her Letters Pitent, to revoke all of such parts or provisions as Her Majesty might think fit of the Letters Pitent by which such Court was established, and to grant and make such other powers and provisions as Her Majesty might think fit, and as might have been grunted or made by such first Letters Patent.

And whereas he the Act of the twenty-eighth year of Our Roign, chapter fitness, entitled An Act to extend the term for granting fresh Letters Patent for the High Courts in Indra, and to make further provision respecting the territorial jurisdiction of the said Courts, the time for issuing fresh Letters Patent has been extended to the first of January, Oue thousand eight hundred and sixty-six.

And whereas, in order to make further provision respecting the constitution of the said High Court, and the administration of justice thereby, it to expedient that the said Letters Patent, dated the twenty-sixth of June, One thousand eight hundred and sixty-two, should be revoked, and that some of the powers and provisions thereby granted and made should be granted and made with amendments and additional powers and provisions by fresh Letters Patent

1. Now know ye that We, upon full consideration of the premises and

Revoration of Letters Patent of 1502

of Our special grace, certain knowledge, and mere motion s have thought fit to revoke, and do by those presents (from and after the date of the publication thereof, as bereinafter provided, and subject to the provisions

thereof) revoke Our said Letters Patent of the Fourteenth of May, [Twenty-saxth of June ] One thousand eight hundred and sixty two, except so far as the Letters Patent of the Fourteenth year [Forty-first year] of His Majesty King Georgo the Third, dated the Twenty sixth of Mirch, One thousand seven hundred and seventy-four [Twenty sixth of December, One thousand eight hundred], establishing a Supreme Court of Judiceturn at Fort Wilhrum in Bengal [Madras] [Bombay] wern revoked or determined thereby

2 And We do by these precents grant, direct and ordain that, notwithfligh Court at Calentia to be continued standing the revocation of the said Letters Patent of the Fourteenth May [Twenty-sixth of June,] One thousand eight hundred and sixty-two, the High Court

thousand eight hundred and sixty-two, the High Court of Judicature at Fort Wilham in Bengal [Madras,] shall be and continue, as from the time of the original erection and establishment thereof, the High Court of Judicature at (Madras) Fort Wilham in Bengal [Bombay] for the Presidency of [Madras aforesaid] Bengal division of Fort William aforesaid [Bombay aforesaid], and that the sud Court shall be

and continue a Court of Record, and that all proceedings commenced in the said High Court prior to the date of the publication of these Letters Patent shall be continued and depend in the said High Court as if they had commenced in the said High Court after the date of such publication and that all rules and orders in force in the said High Court immediately before the date of the publication of these Letters Patent shall continue in force except so far as the same are altered hereby until the same are altered by competent authority

Judges of the said High Court to be continued of those Letters Patent be the Chief Justice or Judges or Acting Chief Justice or Judges if any of the said

High Court of Judicature at [Madras] [Bombas] Fort William in Benjal shall continue to he the Chief Justice and Judges of Acting Chief Justice or Judges of the said High Court until further or other provision shall be made by Us or Our heirs and successions in that behalf in accordance with the said recited Act for establishing High Courts of Judicature in India

4 And We do hereby appoint and ordain that every clerk and ministerial officers of the end ligh Court to be continued [Bomba,]-Fort William in Bengal appointed by virtue of the said Letters Patent of the Fourteenth of Maj sixty two shall continue to hold and enjoy his office and employment with the

sixty two shall continue to hold and enjoy his office and employment with the salary thereunto annexed until he he removed from such office and employment and he shall be subject to the life power of temoral regulations and provisions is if he were appointed by virtue of these Letters Patent

5 \ \text{nd We do hereby ordain that the Chief Justice and erea Judgo who shall be from time to time appointed to the sub-by Judges \text{ high Court of Judicature at [Madris] Fort Willium in Ben\_al [Bombas] previously to entering upon the oxeention of the duties of his office shall make and subscribe the following declaration before such authority or person as the Governor Geograf in Council may commission to receive of t

I A B, appointed Chief Justice (or a Judge) of the High Court of Judicature at Fort William in Bengal [Madras] do solemnly declare that I will fruthfully perform the daties of my office to the best of my whilst I now ledge and will ment

6 And We do hereby grant, ordain and appoint that the said High Court of Judicatine at [Wadius] [Bombas] Fort William in Bengal shall have and use as occasion my require and

bearms a device and impression of our Royal Arms with an oversue of libel surrounding the same with this inscription. Tho Seil of the High Cent at
Wadris! [Bombay] Fort William in Bengil. Mad We do further gainst oiden
and alpoint that the said seil shall be delivered to and kept in the castely of the
Clinef Justice and in case of the vieines shall be delivered one and kept in the
custedy of the person appointed to set as Chief Justice under the previous shall be delivered one and kept in the
custedy of the person appointed to set as Chief Justice under the previous of
Section 7 of the rectical 4x. And We do further gainst ordain and arguments that
the other of Chief Justice or of the Indian

whom the custody of the and seal be committed shall be areant, the sud High Court shall be and is hereby inthoused and empowered to domaind, soize and take the said seal from any person or persons whomsoever, by what ways and means soever the same may have count to his her or their possession

7. And We do hereby further near ordain and appoint that all writs, winter eteror use in name of the Grown and under the cut. Court of Judicature at [Madras | Bombay] Fort William in Bengal shall run and he in the name and style of Use

in Bengal shall run and ho in the numeral style of Us or of Our heirs and successors and shall he scaled with the seal of the said High Court

8 And Wo do hereby authorise and empower the Chief Justice of the said High Court of Judiciture at [Madias] [Bombay] Fort

App intracest of officers William in Bengal from time to time, as occasion may be quied and astructions which may be prescribed by the Governor General in Council to appoint so many and

may be prescribed by the Governor General in Council to appoint so many and such clerks and other ministerial officers as shall be found necessary for the administration of justice and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent

And it is our further will and pleasure and We do hereby for Us Ou heurs and successors are given in the drect and appoint that all and every the officers and clorks to be appointed as aforesaid shall have and receive respectively such are sensible salaries as the Chief Justice shall, from time to time appoint for each office and place respectively, and as the Governor General in Council shall approve of Provided always and it is Our will and pleasure that all and every the officers and cirks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court, so long as they shall hold their respective offices but this provise shall not interfere with or prejudice the right of any other officer or clerk to avail himself of leave of absence under any rules presented by the Governor General in Council and to absent himself from the said limits during the term of such lows on accordance with the said rules

Idmission of Idiocates Valils and Ittorneys

9 And We do hereby authorize and empower the said High Court of Judicature it [Maduis] [Bombay] Fort William in admitting Advo test Dengal to approve admit and emiol such and so many Advocates Valids and Attorneys as to the said High

Court shall seem meet and such Advocates Valuls and attorneys shall be and are bereby authorized to appear for the suntors of the said High Court and to plend or to act or to plend and act for the said suntors according as the said High Court may by its rules and directions determine and subsect to such rules and directions.

10 And We do hereby ordain that the said High Court of Indicature at In making rules for the qualifiest rules for the qualifiest rules for the qualifiest rules and thought a factor of Advocate Val.1s and Attorneys at Law of the said High Court and Shall be emboured.

to remove or to suspend from practice on reasonable cause, the said Advocates, Valuis or Attorneys at Law and no person whatsoever but such Advocates Valuis or Attorneys shall be allowed to act or to plead for or on behalf of any suitor in the said High Court, except that any suitor shall be allowed to appear plead or act on his own behalf or on behalf of a co suitor

#### Sunopsis

| Bar Councils Act I Authority of Advocates Vakils and Attorneys 2 | over Advocates Attorneys<br>Vakils<br>Reasonable cause meaning of<br>Recognized agents | Note No<br>and<br>3<br>4<br>5 |
|------------------------------------------------------------------|----------------------------------------------------------------------------------------|-------------------------------|
| l Bar Councils Act -Clauses 9 and 10 a                           | and the rules made thereunder should                                                   | be read                       |

as subject to the provisions of the Indian Bar Councils Act XXXV III of 1925 to the extent to which such provisions have come into force with reference to any High Court See S 19 (2) of the Act Thus it has been held that Rr 123 and 129 of the Insolvency Rules of the Madras High Court made under the Letters Patent which precluded advocates from acting as distinguished from pleading on the Insolvency side of the High Court are no longer in force as they are repuguant to the provisions of the Bar Conneils Act! Sin larly a complaint of misconduct against an advocate must first be referred to the Bar Counc ! for inquiry?

- 2 Authority of advocates vakils and attorneys —The authorities of advocates vakils and attorneys to practise in the High Court is subjet to the rules and directions made by the High Court under Cl 9 in so far as such rate, and directions are not repugnant to the provisions of the Bar Councils Act of 19261 The following cases2 are illustrative of the rules which the High Court is empowered to make under Ol 9
- Disciplinary jurisdiction of High Court over advacetes attorneys and vakils -The High Court has power under Cl 10 to remove or suspend from practice on reasonable cause any advocate vakil or attorney practis ng before it. Under the provisions of the Bar Councils Act of 1926 a compla at of misconduct against au advocate must first be referred to the Bar Council for inquiry 1 It is not ne essary und r Cl 10 that cases of professional misconduct must be dealt with only by the full Court cons sting of all the Judges of the High Court for the time Leing and it is competent to a Ben h of Three Judges to dispose of such cases 3 In proceedings under Cl 10 the High Court exercises a special jurisdiction and that inherent power to apply such rules of procedure as may ensure a fair trial 3. The proceedings are not of a criminal nature and the rules of pro adure apply able to a criminal trial such as the filing of a written statement by the accused are not applicable to them . Nor are such pro ceedings in the nature of civil suits and the provisions of the Civil Procedure Code do not apply to them 5

Though it is not incompetent for the High Court to deal under Cl 10 with charges of a criminal nature against a practitioner unless and until they have been investigated by a criminal Court it is eminently fitting that in such cases the criminal prosecution should precede any disciplinary a tion under 61 106

An order of disbarment is not necessarily final or conclusive for all time and it is open to the Court to readmit a practitioner after a lapse of time if it is satisfied that he has in the interval conducted himself honourably and that the sentence of exclusion has had the

salutary effect of awakening in him a higher sense of honoai and duty? Iosolvency Court before Bar Counc ! Clauses 9 and 10- Note 1

1 (1928) 1923 Vad 1182 (1185) 52 Mad 92 2 (1928) 1928 All 433 (433) (F B) Note 2

Calcutta High Court (1876-78) 1 Mad 21 (36) (5 B) Valuts of Madras High Court can practise on Original Side before Bar Councils

Act (1917) 1917 Mad 49 (54 56) (Do) (1925) 1925 Mad 385 (887 395 397) 49 Mad 331 Vakils of Madras High Court have no right of audience in the

Note 3 1 (1928) 1929 All 439 (439) (I B) 2 (1932) 1932 Mad 131 (133) 54 Mad 857 3 (1924) 1924 Lab 123 (121) 4 Lab 271

4 (1924) 1924 Lah 123 (124) 4 Lah 271 5 (1930) 1930 Rung 1.0 (151) 8 Rang 40. Order of disbarment-Provisions of

Code relating to granting of corti ficate of fitness for appeal to Privy

An atterney is an effect of the Court and any person aggreeted by his misconduct can bring it to the notice of the Court a

4 'Reasonable Cause' meaning of -What is 'reasonable cause' for the removal crisspecision of a legal practitioner depends in the firsts of each case! It is not restricted to misconduct to the strict coorse of a practitioner soluties or to cases of moral turpitude but embraces all causes which may afford revenable ground for this removal or suspecision? Nor ist occessor for totaking the disciplinary parisdiction of the fligh Court that any officee should have been committed by the legal practitioner or that his act should have been such as to spheet him to snything the general infamy or imputation of Sud character?

Disciplioary actico against a practitioner under the Letters Patent rests on the principle

8. (1914) 1914 Cal 192 (133) 41 Cal 113 Note 4

1 (1900) 29 All 95 (10-) Coofirming 3 VII L J 5J2 (593) See the following cases for instances

of e seconduct —

(1914) 1914 Mad 635 (630) Suggesting that
the is in a position to influence a

Judge in his favour by indirect and improjer means

(192-) 1°23 Lom 3 5 (^66) 52 Bom 559

(1909) 4 I C 1072(1075 10 6)(Mad) lesuing falso notice with a fraudulent object (1909) 2 1od Cas 204 (205) 33 Bom 252 Las

sing resolutions condemning judg ment passed by a Court (1923) 1923 Pat 185 (187) Conviction under

Criminal Law Amendment Act (1932) 1932 Lah 584 (595) Allowing clerk to enter into agreement for sharing

enter into agreement for sharing fors (1910) wind Cas 313 (316 317) 34 Mad 29

Accepting directorships of fraudu lent companies (1913) 19 Ind Cas 529 (529) 37 Dom 354

1 aying it (1910) 6 Ind Cas 310 (313) (Mad) Receiving money on client's behalf and using

it for his own use (1911) 21 Mad L Jour "6 (72) Filing petition cootaining unfounded allega

(1918) 1J18 All 136 (149) Intimidating and trying to prevent witness from giving evidence

giving evidence
(1925) 1925 Bom 1 (6) Disclosing confidential information

(1922) 1922 Bom 361 (364) 47 Bom 117 Criticism of pending trial

(1918) 1918 Mad 788 (791) 40 Mad 69
Taking advantage of the ignorance
and needy position of his clients
and obtaining conveyance from
them of an equity of redemption for

much less than its value (1914) 1914 Mad 635 (636) Singgesting to client that he was in a position to influence Judge by improper means (1920) 1920 All 1 (6) 42 All 450 Putting in statement of his own but pur porting to issue from the clients and drafted on their instructions

(1933) 1933 Lah 5:7 (5°9 580) 14 Lah 532 (S B) Lawyer assisting to celebration of independence day by Congress Committee—in unlawful assoeation—No evidence of acts done— No ground for punishing under this

(1908) 8 Call Jour 165 (167) (FB) Attorney, solo partoer of a firm appearing in the firm e name for the plaintift and in his own name for the defen

(1925) 1928 Cal 820 (823 824) (F B) Pleader accepting about a valuatnama and

papers but not filing the appeal (1925) 1925 Cal 1084 (1085) 52 Cal 79a Detaching client from another solioi tor—Reprehensible but not sufficient

(1931) 1931 Oudh 161 (166) (FB) Conviction for criminal offence

(1895) 17 All 498 (510 511) 22 Iod App 138 (PC) Writing to another valid asking for brofs to be sent and offering to share the fees

(1907) J All Jo (109) 34 Ind App 41 (P C) Confirming (1900) 3 Ml L J 592 (593) Publication of libel on judges

(1907) 31 Cal 129 (141) 84 Ind App 55 4 L B R 27 (P C) Advising client to bribe witoesses

(1907) 34 Cal '29 (733 '744) Having settled plaint and afterwirds saying to his chent that he would take the case against him ucless he is paid five times the ordinary fee

(1906) 4 Cal L Jour 2.3 (262) Accepting

shalo of property sued for (1926) 1526 Mad 553 (568) 49 Mad 523 Negligence by itself oot professional

misconduct

2 (1920) 1920 Bom 168 (169 170) 44 Bom 418
Sigoing pledge to disobey an 1ct

(1931) 1331 Lah 251 (201) Cooduct need not be connected with professional activity

(1900) 27 Cal 1023 (1037 1038) (1902) 29 Cal 890 (894 902 903)

(1902) 29 Cal 890 (894 902 903) (1924) 1924 Lah 123 (124, 1°6) 4 Lah 271 3 (1920) 1920 Bom 168 (169, 170 172, 174) 44

Fom 418 (1914) 1914 Cal 192 (193) 41 Cal 113 punishment 4

Where proceedings are taken against a practitioner under Cl 10 on the ground of b s having been convicted of a criminal offerce the propriety of the conviction cannot be questioned in such proceedings but the practitioner can show that the degree of his culpability was not such as to make him an unfit preson to be a member of the profession?

An offence committed by an advocate prior to his enrollment may be reasonable cause for his immoral or suspension from practice if the offence implies a jermanent defect of character of a dismunifying hand 6

5 Recognised agent —Tho list portion of CI 10 provides that no person other than undocate within a titoring can not or plend on behalf of a suntor excepting that a suntor an plend or not on behalf of himself or co sinter. Thus a recognised agent of a party cannot present an appeal to the High Court 1. It has however been held in the case cated below that an application by a paradamathus lady for leave to appeal in form a party can in view of \$5:132 and 130 of the Code be presented by her recogn send agent 2.

#### Civil surisdiction of the High Court

11 And We do hereby ordam that the said High Court of Judicature at
Local limits of the ords
[Medias] [Bombay], Fort William in Bengal shall have

and exercise ordinary original out jurisdiction within any original jurisdiction within such local limits as may from time to time be declared and prescribed by any lw made by competent legislative

authority for India and until some local limits shall be so declared and prescribed within the limit declared and prescribed by the proclamation fixing the limits of Calcutta issued by the Covernor General in Council on the 10th day of September in the year of Gui Loid One thousand seven hundred and ninty four and the ordinary original civil jurisdiction of the said High Court shall not extend beyond the limits for the time being declared and prescribed as the local limits of such nuisdiction.

Synopsis

Local limits 1 Power 10 transfer or stay suit in the 1 lesse of process outside jurisdiction 2 moffensil 3

#### Other Tomes

## Power of High Court to issue warrant See note 2 Pt (1)

1 Local Limits —The local limits of the original civil jurisdiction of the High Courts of bombay and Madius treto be declared and presented by the Governor in Council of the respective provinces whereas in regard to the Calcutt High Court the power is in the "competent Legislative Authority for India" i High Court cannot exercise its ord may original civil juris diction legislative from the key limits so presented except in or first provided in Cl 44 of the Letters Patent read with S 109 of the Government of India Act 1915. Thus the Indian Legislature cut confer on a high Court jurisdiction in any particular suit or class of suits arising out not the local limits presented under this clause?

The lumits of the ordinary original civil jurisdiction of the High Courts of Bombil Calcutti and Madras I no been declared and prescribed by the following Acts re pectuals

let 15 of 1919 (For Calcutta)

(993) 41 Ctl 113 5 (1924) 1324 Mad 265 (266 267 268) 46 Mad 903

7(1924) 1,124 Lah 123 (121 125) 1 Lah 271 (5 15) (1,100) 23 1,1149(52 53) 26 Lad 1,pp 242 (PC) (18-6) 15 411 174 (176) Note 5
1 (1 100) 22 All 331 (332)
2 (1 02) 24 MI 172 (173)
Clause II—Note I

(1) Such extended jury diction cannot follow to maj hection but it express enactment (1.310) 5 Ind Cas 723 (1.31) (3fad)

- 2 Issue of process outside jurisdiction—), whereast of attest issued by a High Court on the Original Court should be uthorising the lathful to execut it against the judgment debtor is effected by the weight of the original and the first of the original and the first of the first factor search outside the local limits of the original juri diction of a light Court is allegal? According to the little Court of Bombay in order for execution of a decree passed by it involves within the Presidency is not ultra iters? Builty of this junction is against jurison guilty of contempt of Court to be executed outside such local limits? as froceedings in contempt of Court to be executed outside such local limits?
- 3 Power to transfer or stay suits in the moffussil—It has been held by the High Court of homber that a unifer Judge sitting on the original side cannot the essuit pending left reas to format. Judge in the moffusil except under rules of enabling 1
  - 12 And We do further ord in that the sud High Court of Judicaturo at Fort William in Bengal [Midras] in the execution of its ordering ordinary ordinal civil junisdation shall be empowered to receive its and determine suits of every description if in the cise of suits for land of other immorable property

such land or property shall be stunted or in all other cases if the cause of action shall have are enrither wholly or in case the leave of the Court shall have been first blanded in part within the local limits of the ordinary original justisdation of the said High Court or if the defendant at the time of the commoncement of the said High Court or if the defendant at the time of the commoncement of the said divided or carry on business, or personally work for gain within such limits except that the said High Court shall not live such original jurisdation in cases falling, within the purisdation of the Small Cause Court at [Madras,] [Bombax Calcutta, in which the debt or dama, e or value of the property such for does not overed one hundred supers

|         |                                                                                                 | Syn         | opsis      |                                                                                    |
|---------|-------------------------------------------------------------------------------------------------|-------------|------------|------------------------------------------------------------------------------------|
|         | Scope of the Clause Ordinary jurisdiction                                                       | No<br>1     | ٧t         | Leave of Court 9 (a) Water of want of leave 10                                     |
|         | Suit for land or other immovable properly                                                       | 3           | цу         | (f) Recision of leave 13 Meaning of the word defen dant 12                         |
|         | in) All other cases - Suit for<br>part tion of property const ting<br>I moveable and immovibles |             | VIII<br>IX | Dwell 13 Carry on business 14 (a) Suit against companies — See                     |
|         | the latter being situated wholls<br>out ide jurisdiction<br>(b) Suit for land partly a thin and | 4           | 1          | (b) Suit against non tenders<br>foreigner — See Note 32 to S. 2.                   |
| ıv<br>V | partly without jurisdiction Suits of every description Cause of action                          | 5<br>6<br>7 |            | Personally works for gain - St<br>Note II to S 20<br>Suit against the Secretary of |
|         | (a) If the cause of action shill have an en in part                                             | 8           |            | State—bee Note 10 to S 20 1                                                        |

1 Scope of the Clause — Clause II defines the territorial limits of the ordinaria — civil purisdiction of the High Court while this Clause frequities the classes of the transfer conditions under which they are truble by the High Courts

Classes of S ats - Suits of every description may be instituted on the one high Court excel t suits of the value of one hondred rules. Falling within the the Ireadency Small Cause Court

(1)1°] 1. I. I. I. C. 1; 342 (348) [Utd] Note 2
1 (1903) 20. Vid 129 (121)
2 (1875) 24 Suth W. R. 3.65 (3.65) The Old
21 (1924) 1934 Lom 225 (228)
3 (1954) 1934 Lom 225 (228)
4 (1924) 1934 Lom 225 (228)
5 (1924) 1934 Lom 225 (228)

Conditions -In suits for land or other emmorable property the property should be situated within the ordinary original civil jurisdiction of the High Court See Notes 8 to 5 below Suits not being for land or other immorable properly may be instituted in the High Court if the cause of action wholly arises within the local limits of the original jurisdiction or on husiness within such limits ! But if id limits, the leave of the Court is necessary

A proceeding commenced by taking out an originating summons in the High Court is a "Suit ' within the meaning of this Clause is

The restrictive provisions of this Clause do not control Cl 18 below 2 Nor do they apply to a defendant where therefore, in a suit on a mortgage, a subsequent mortgage of immovable property part of which is outside jurisdiction is impleaded as a defendant and he claims to have such property brought in sale the Court held that he could do so on the ground that the restrictions in Clause 12 apply only to a plaintiff 3

2 Ordinary jurisdiction - The expression fordinary jurisdiction embraces all such as is exercised in the ordinary course of law and without any special step being necessary to assume it, and it is opposed to extraordinary jurisdiction, which the Court may assume at its discretion upon special occasions and by special orders 1 Ajudgment entered up by the High Court under S 86 of the old Indian Insolvency Act (11 & 12 Vict , O 21) is "not by way of special or discretionary action, but in the ordinary course of the duty cast upon it by law, according to which every other case of the same hind would be dealt with 3 Matters falling under Clauses 12, 17 and 18 would thus appear to be within the ordinary jurisdiction of the High Court

3 Suit for land or other immovable property -On a review of the judicial decisions in India under this Clause, it cannot be said that the term 'Suit for land or other immovable property" has been satisfactorily defi-

cases. The only possible definition . Valliappa Chetty v Saha Gound Doss! A reference to the various classes or

to be suits for land or other immovable property or not

THE CALCUTTA HIGH COURT

The effect of the decisions of the Calentta High Court bearing on the construction of the term suit for land' may be stated as follows -Suits for the establishment of title to land? or for possession of land? or claiming any

enterest in land, such as a mortgage interests are suite for land

Clause 12-Nnte 1 1 (1900) 30 Bom 364 (390) Defendant earry ing on business within jurisdiction -Question of cause of action does not arise

(1901) 24 Mad 31 (33) 1a (1930) 1930 Cal 258 (250) 56 Cal 979 (1931) 1931 Cal 651 (653) 58 Cal 763 (192a) 1935 Cal 511 (513) (1925) 1935 Rang 267 (269)

2 (1917) 1917 Mad 832 (836) 40 Mad 810 (1925) 1923 Mad 732 (734) 51 Mad 540 (F 1)

3 (1897) 24 Cal 190 (192) [But see (1910) 8 Ind Cas 1142 (1144) 37 Cal 507 (Obiter)]

Note 2 1 (1889) 13 Eom 520 (533) 16 Ind App 156 (PC)

2, (1889) 13 Bom 520 (532, 533) 16 Ind App 156 (P C) Such judgment fall with in ordinary original civil jurisdie

[See also (1930) 1920 Mad 779 (780) 53 Mad 237 Ordinary original civit turisdiction confined to suits and matters under Uls 12 tn 21 - Per

Aumarasuamy Sattrs, Referring Judgment) Note 3 1 (1929) 1929 Mad 721 (721) 52 Mad 600 (F B)

2 (1876) 1 Cal 249 (263 251) (1875 76) 1 Cal 95 (100) 1931) 1931 Cal 651 (653) 58 Cal 768.

3 (1902) 23 Cal 315 (322) (1509) 1 Ind Cas 472 (473) 96 Cal 5) 4 (1323) 1923 Cal 373 (374) Suit for declara tion of equitable mortgage and for

usual mortgage decree (1929) 1923 Cul 227 (227) 56 Cal 224 Sunt for declaration of mortgage right

(1892) 13 Cal 351n (302) Suit for releasing mortgage right Suit for foreclosure - Boarke O C

(1877) 1 Ind Jnr N S 40 (1877) 1 Ind Jur N S 319 Suit for redemp-

> (See also (1914) 1314 P C 67 (69) 41 (al J72 41 Ind App 110 (P C) Suit for sale on mortgage) [See (1931) 1331 Cal 763 (767) 59 Cal

598 buit for sale on morigage] (1872) 18 Suth W R 200 (271) Suit for sale In suits for reliefs other than those enumerated above it has been fairly uniformly held

that a suit is for land or other immerable property if the title to or possession of immorable property is dire ilv and substitutially affected. The guiding temerple has been stated by Page, J, In Gocality v Chapmanis and in Proras Chantra v Ashulos a to be to see whether, having regard to

directly the 1 rol rietary or bo

111.

fact that land has somethin.

falling under this group the question therefore mainly turns on the view of the Court in each case as to whether title or 10 session is directly and a abstantially affected by the suit)

These cases may be divided into the following classes -

- (a) Suit fr a share in the sale proceeds of immorable property-In Goculdas v Clarantitie errel to above the plaintiffs claimed their share of the sale proceeds of a point family house wranefully sold by the defendants. The defence was sales alta that the plaintiffs had no title to the house Page J held that no issue are e in the case that could affect the title to the premises sold as the title of the our baser was not challenged nor the sale sought to be set aside both the plaintiffs and defendants approbated the sale and only claimed their share in the proceeds. The dispute did not therefore affect the title to the house but the real one tion was whether the plantiffs were members of a Joint Hindu Lamily at material times
  - (b) Suits relating t trust property Where the suit is only for the enforcement of a trust in accordance with the terms of the trust deed and no beneficial interest is claimed for the plaintiff the suit will not be a suit for land merely by reason of the trust property being land or other immovable property 6 But where the title to the trust property is in dispute it will be a suit for land ? (c) Suits for the altranstration of the estate of a deceased person -In a suit by a
  - legates for the admin stiration of an estate and to set aside various deeds of trust leases of land and en award brought about by the fraud of the executor tho Privy Council held that the suit was one primarily for administration and as such not a suit for lands 8 In Hera Lat v Nithambran 9 where the suit was for the construction of a will for the administration of the estate and for the present nos as an of ammorable property at was held that the suit was primarily for possession of immerable property the other reliefs being only ancillary Similarly a suit for a de liration of the plaintiffs title to the whole of the residuary estate of the testator and to aveid certain delications and for the construction of a will was held to be one for land the other reliefs being morely incidental to the above reliefs 10 (d) Suits for dama a syrrespect of unimovable property—In a suit by one colliery
  - owner against another for damages for cutting the barrier area in the plaintiffs colliery the substantial question was held to be one of title to the said barrier are, and the suit a suit for land 11 But a suit for the damages caused by the erection of certain workshops by the defendant and for an injunction restraining the nursauce caused thereby was held not to be a suit for land 12. Where in a suit for an injunction and damages for obstruction to the plaintiffs lawfully removing certain building, the defendants disputed the plaintiffs right to the buildings, the Rangeon High Court held that the real dispute in the suit was with reference to immovable property 13
    - (e) A suit f r the recovery of title deeds -Where the defendant demed the plantiffs

on mortgage Decision under S 5 of Code of 1859

<sup>5 (1927) 1927</sup> Cal 768 (771 "73) In appeal in 1928 Cal 887 (889 890) the suit was however taken to be one for tort 5a (1930) 1930 Cal 258 (251) 56 Cal 949

<sup>5</sup>b (1892) 19 Cal 358 (357) Per 7 revel jan J 6 (1875) 15 Leng L R 318 (322) Snit by a trusted to enforce point management with co trustee of debuttar lands

<sup>7 (1875 76) 1</sup> Cal 243 (263 264) [See (1927) 1J27 Cal 768 (771) Right

to possession of trust property) 8 (1906) 33 Cal 160 (191) 32 Ind 1pp 193 (PC)

<sup>9 (1902) 29</sup> Cal 315 (322)

<sup>10 (1930) 1930</sup> Cal 258 (251) 55 Cal 979 11 (1912) 17 Ind Cas 500 (502 503) 39 Cal

<sup>(1916) 1916</sup> Cal 557 (558) 42 Cal 942 (1675 76) 1 Cal 35 (100)

<sup>12 (1673) 10</sup> Deng L R 241 (248)

<sup>13 (1931) 1931</sup> Rang 109 (111) 9 Rang 18

title to the property was nevertheless held to be not a suit for land as no relief such as possession in respect of land was involved therein 14

- (1) Suit for specific performance A suit by a rendor for the specific performance of a contract of sale 13 not a suit for land as neither title nor possession or any other interest in land is substantially affected but a suit by a sender for specific performance of the contract of sale is a suit for land 16 Similarly a suit for the specific performance of an agreement to mortgage has been held to be one for land isa
- (g) Suits for dissolution of partnership -On an application to file an award by in arbitrator dissolving a partnership providing for the sale of immovable property of the partnership and for the execution of a mortgage by one partner to unother for the amount found due by the former it was held that the proceeding was not a stat for land but only for the discolution of a partnership and for the adjustment of the mutual claims between the putners out of the partnership property 17
- (h) Suris for sent -A suit for ront is not a suit for land though in determining the rate of rent an issue as to the nature of the tenancy has to be raised 18 but if a lessee sues the lessor for rents and profits on account of wrongful dispossession by the lessor the claim is one for possession by way of receiving rents and profits and the suit is one for land 19

#### THE BOMBAY HIGH COURT

Except in the case of suits for declaration of title and for possession of immovable pro perty 180 which were held to be suits for land the High Court of Bombay till recently ap r a particular suit was a snit for land within

t cognizable by in English Court of Equity or the specific performance of a contract to

execute a mortgage of property outside Bombay and for the recovery of the mortgage debt was within the original jurisdiction of the Bombay High Court The reasoning was that such a suit was one of the sind in which a Court of Equity in England could exercise jurisdiction in personant with respect to immovable projecty lying outside juriediction and that the High Court in India had all the purisdiction of the Equity Courts in England Clause 12 of the Letters Patent was held not to have taken away such jurisdiction from the High Courts in India The ratio decidends of the decision in Hollar scare was adopted in a number of subse quent cases and suits for forcolosure21 or for the specific performance of a contract to sell'1 were held to be in the bomby High Court notwithstanding that the immovable projects to ferred to in the mortgage or contract was outside jurisdiction. In 1921, in I enhatrace v Alamia -2 a suit on a mortgano of immovable property outside Bombas was held to be in the High Court But the Court in this case went further and laid down that such a suit was not a suit for land but only for a debt. The question was decided with reference to the term suit for land ' in Clause 12 of the Letters Patont rather than on the analogy of the Lugiish Louit puri diction. The authority of Holhar's case was not accepted by Fawcett J in lesk uadabat . Janardhan "s where he held that a suit for a declaration of a charge for mainten ance on immoval le property was a 'suit for land | But in a later case's the same Judge feel ing him elf bound by Veulairao v Khirings held that such a suit though a suit for land would be in the High Court in the exercise of the equity jurisdiction in personameten if the land was outside Bombay Lenlatrao v Khimpita nas followed in Jasraj v dinbai Chut 1 at dissented from in In ha Spinning and Wearing Company v Climas Sindicate" by a Bench cl three Judges who held

But ultimately on a ref

14 (187J) 4 Cil 972 (375

15 (18J2) 13 Cal 358 (°66 °67) (1322) 1922 Cil 443 (446) 49 Cil 670

16 Bourke 218

164 (1924) 1942 Cal 323 (329) 49 Cal 582 [See (1880) 5 Cal 52 (85) [Olater)]

17 (1970 77) 2 Cal 115 (403 465) 18 (15Js) 26 Cal 201 (21h)

1) (1909) 1 Ind Cas 472 (473) a6 Cal -9 194 (1 105) 'J Boni 219 258 (259)

(1J12) 17 Ind Cis 1J3 (201) 37 Lom 494 Suit in reality for declaration of

title and for possession though

26 (1324) 1324 Bom 419 (413 420) But with considerable refuctance in the light of (1914) 1314 1°C 67 23 LC 637(11) 27 (1926) 1J26 Boin 1 (3, 11 13) 50 Bom 1 (FB)

28 (1327) 1327 Lou 278 (280 331 341 515 331 356) 51 Bom 516 (F B) The tien give of lind is not a suit for land within the meaning of Clinice 12. This decision has been such expension followed 2. Culturates to priority between two or more mortgages raised in a state of linetricipe is a claim for the recovery of debts, in certain order and not a claim for land 2.

The Bunkay High Court also has held that a suit for administration of the estate of a deceared person is not a suit for land though the estate may consist of unmovable property di-

The view of the Bombas High Court may therefore be summed up as follows.—Sinth for de latation of title to and possission of immovable property are sintly for land. Sints on meaning are until the land. In regard to other eld sets of sints such as for the specific perforting of control to self, the mutherity of Hilbert serve must be considered to have been except which is fortune of control to the terms of Cl. 12 of the Letters. Patent rather than to the doctine of the county ward faction of the Charlest Court for the terms of Cl. 12 of the Letters. Patent rather than to the doctine of the county ward faction of the Charlest Court.

#### THE MADRAS THEH COURT

The Values High Court has taken very nearly the same view of the expic viou and to find a state Cilcuit High Court and have extended the expose of the term not only to spatis for title or possession but who taken taken directly information to no possession of immostible pion letter 2. I suit for shi can interprigate or for avoiding a mortgage enumerance of or for creating a charge for maintenance and acceptable properties. This been held to be a suit for hard. Assume for the arms of the catter of the trust of a decreased personal on far a truste? I must so the decreased personal on far a truste? I must so that the catter of the trust may concern hand. Smits for the recovery of aim 20 for the initing and removal of trees have however, been held to be suits for his covering of the catter of the history of the catter of the history of the catter of the history of the catter of the history of the catter of the history of the history of the catter of the history of the history of the catter of the history of the catter of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the history of the hist

I te alian ( tinha D of Full Bench has held that a suit by a furchase for tha a first man c fan agreement to sell land is not a suit for land bring in action in ferous different to definition in seconds.

4. All other cases —swit for partition of property consisting of moveables and immovables the latter being situated wholly outside jurisdiction—This climac divides suits in two main grout;

(1) Suits for land or other immortable property and (2) all other cases. The latter terms therefore excludes suits forummortable property. It is is only in regard to the juin hatton in all other cases that the test of cause of action or the residuce of the defendint falls to be considered. A suit for the partition of property consisting of both moveable and monotable after one full into the ris of all other cases. But it is just for land and cannot be read in the high court if the inmovable property is hold moutable up in a duty of the property of the light court of the inmovable property is hold moutable for the moveable property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property

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after 1927 Lenn 278 (k Hs) 39 (1929) 1929 Mad 721 (\* 22 725 727) 52 (1922) 1929 Eron 434 (448) (6 Lenn 772 (1921) 1923 Lon 313 (8)43 48 Prin 331 In State 1 (1921) 1924 Lon 313 (8)43 48 Prin 331 In State 4 (1921) 1924 Lon 314 (8)45 (48 Prin 351 In State 4 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (1921) 1924 (19

(1898) 22 Bom 922 (926) (1901) 29 Cal 315 (922) (1801) 29 Mrd 448 (450) 2 (1860) 4 Bom 482 (487, 488) (1890) 19 Mrd 448 (4.0) properties alone are concerned 3

S Sutt far land partly within and partly without jurnsdiction—The words, "either wholly, or, in case the leave of the Court shall have been first obtained in part," must be taken to upply not only to the words." If the cause of action shall have arisen, but also to the words. "property shall be situated." The operative words of this Clause in so far as they relate to suits for land or other immovable property should therefore be reproduced as follows—"It, in case of suits far land or other immovable property, such land or property shall be intuated, either wholly, in, in case the leave of the Court shall have been first obtained, in part, within the local binats, etc." It follows that in suits for land only prifty within the local limits, the Court has pursidation to try the whit is unit provided the leave of the Gourt is first obtained. But if no leave is obtained, the Court may entertain the suit only in so far as the property within the local limits is concerned."

The provision for leave contained in this Clause with regard to suits for land will not however, sanction the institution of a such which would offend the rise as to inspinder of parties and causes of action. Thus where a mortgages sub mortgaged his mortgage interact to the plaintiff over the mortgagers; property situated in the moffusial and included in the sub-mortgages sume of his own property situated in Calcutts, a suit in the Calcutts High Court, by the sub-mortgages against the original mortgage and the mortgages to enforce the sub-mortgage cannot he and no leave can be granted though one of the properties in the sub-mortgage is within the local limits of the original jurisdiction of the Calcutta High Court?

6 "Suits of every description"—The High Court has jurisdiction under this Clause in suits concerning natification bunkter among the Jews, 10 camong the Parsis except in matters coming within the jurisdiction of a special Court constituted under the Parsi Marriaca Act;

7 Cause of action -Ses Note to S 20 and also the following cases 1

(1905) 28 Mad 216 (221) (See (1887) 14 Cal 835 (838) A suit

for partition of land is a suit for land)

3 (190o) 28 Mad 216 (224) Note 5

1 (1983) 1938 Cal 295 (300) 60 Cal 54 In such cases each defendant need not be interested in land within purisdiction

(1931) 1921 Born 328 (330, 332) 16 Born 249 Suit for partition—Other property outside British India

(1871) G beng L R 686 (688)

(See also (1871) 6 Beng L R 131 (141)
Suit for pashtion of only the property within local lumits—Pastal
partition deemed unjust—Plaintiff
directed to include notiside properties
also and in apply for leave;

(1931) 1931 Cal 763 (761) 59 Cal a98 Suit

(1912) 13 Ind Cas 429 (420) as Cai SI.

Different debtors mortgaging for

gent debt ratt of mortgaged purperty

within local limits in the light

Courts—Suit lies though one of the

point debtors had no interest in that

property

[So a 185 (1857) 24 (24) 348 (349) Suit

on mortgage by deposit in fille deeds
—Property partly outside jurisdiction — Suit entertained by High
Court with leave]

(1921) 1921 Mad 701 (703) Sust on most gage ("beler) (1910) 8 Ind Cas 1142 (1144) 37 Cal 907

(1910) 8 Ind Cas 1142 (1144) 37 Cal 907 (1873) 11 Heng L R 301 (305) Smit for foreclosure
(1909) 1 Ind Cas 514 (516) 36 Cal 28 Sunt
by an executor for declaration and
injunction in respect of the eacht of
the textator
[See also (1868) 8 Reng L R O C 85
1877)

(1896) 19 Mad 448 (450) (Obiter) (See (1862 65) 1 Bom H C R App 76

(89 61) 1 DOM II O IS MPP (0

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in testoct of trust property

3 (1920) 1920 Cal 191 (134) Note 6

1 (1926) 1926 Born 16J (174) 50 Bran 369 [See also (1980) 1930 Cal 358 (555) . 57 Cal 108J]

2 (1889) 13 hom 302 (310) Suit his to declare an infant marriage amongst the Parsees to be unil and tood

Note 7 1 (1932) 1932 Pom 42 (43) Cause of action enumed to plaint allegations and

enutined to plaint allegations and not the defence (1934) 1934 Cal 175 (176) Suit by an

(1934) 1934 Cal 175 (176) 316 by assignment as part of the cause of action and upon that leave is invariably

assde in High Court-No leave

See elso Notes 12 to 15 to S 20 Civil Pro edure Code supra and undermentioned cases 2

9 Leave of Court -Leave in suo is not a formal matter of procedure but is the foundation for the exercise of jurisdi tion by the Court! It must therefore, be obtained before the Court tecomes empowered to receive try or determine the suit 2 Such leave will onurs only for the anil or the cause of action | I r whi h or against the defendant in respect of whom it was granted. Leave must be distinctly applied for and granted and connot be implied 6. It is a judicial act of a Court and cannot be delegated to a ministerial officer?

The grapt of leave is a matter within the discretion of the Court 8 In the exercise of their discretion the Courts can take into consideration the convenience of parties 9

Where leave has been at first granted but it is found that the plaint does not obviously disclose a ground justifying leave the plaintiff may be permitted at the trial to allege and

ne essarv (1 - 1) 2 Hurl C C 9.1 33 LJ Fxch ( S) 179 Si hely berch-Followed lu 3

III.

Mad H C R 3-4 and 15 I om 33 Re ferred in 12 Bam H C R t13 9 Cal 105 and 21 I om 106 (1850) 7 Freh 723 21 L J Exch It 256 Not man v Marchaut-Referred in 3

Mad H C R 344 (1852) 21 L J Q B 2 1 Pail C 6 56 Wille Sheridan-Referred in 1

Mid H C R 902 and 3 Mad H C B Note 8

1 (1920) 1920 Cal 718 (719) 47 Cal 583 (1874) 21 Suth W R 503 (306) (1871) 8 Bom H C R 102 (10a)

(1881) 11 Bom 207 (207) Material part of cause of action held to be noces

[See slso (1899) 13 Bom 404 (415)] (1845 77) 1 Bom 23 (45)

[See also (t.304) 27 Mad 491 (495 490)] 2 (1932) 1932 1 om 12 4°) (192 ) 1927 Nrd 650 (649 692) 50 Mad 419 1850 81) 5 Bom 42 (4

(1903) 31 Cal \_71 (2- 283) (1921) 46 Mad I Joar 89n (1898) 3 Cal W N 103n

Note 9 1 (1937) t932 Born 29t (294 300) 56 Born

(1935) 1935 Cul 5t1 (513) (1874) 21 Suth W R 303 (304) (1831) 15 Bom 93 (97 98)

(1913) 20 Ind Cas 530 (531 532) 37 Bom 563 Hence issues tried without necessary leave will not be res juda cata

2. (1932) 1932 Bom 201 (294 300) 56 Bom 324 Court has no jurisdiction even to receive plaint unless leave shall

have been first obtained (1930) 1930 Cal 468 (470)

(1891) 15 Bom 93 (96 97) (1877) 1 Ind Jur (N S) 218

3 (1901) 24 Mad 293 (295) Suit filed with leave - Then withdrawn - Again fresh suit-Fresh grant of leavo necessary

4 (1590) to 1 om 93 (90 98)

2 (1932) 1932 Bom 201 (298) 56 Bom 324 application to add new defendant-Lerse to be taken at the time of

(1696) 20 Bom 767 (7"6) (1921) 1921 Bom 195 (197 198) 45 Bom 24 (On appeal from 1920 Bom 363)

Third party notice at the instance of a defendant-Leave must be applied for and obtained (1924) 1324 Bom 109 (112) Original defen

dant dead before suit-Leave neces sary to implead proper party-

(1929) 1929 Bom 468 (471) (See (1906) 30 Bom 364 (201)

(See also (1898) 17 Bom 466 (468) 1 6 (1880) 4 Lora 492 (188) Plaintiff allowed to sue in forma pauperis-No leave to sue implied

(1696) 20 Bom 767 (7 4) (1921) 1921 Bom 195 (191) 45 Bom 24 Issue of third party notice ordered No kave under Cl 12-Implied leave-

Must spicer oo the notice 7 (1907) 34 Cal 619 (620) Rule of Calcutta yer to

399)1 8 (1933) 1933 Cal 295 (300) 60 Ctl 54 (1924) 1927 Bom 660 (651 652) Where very

substrutial part of cruse of action aroso in London 9 (1923) 1923 Mad 2:2 (274) Nearly whole

cause of action in Malabar-Leave rejected (1907) 30 Vlad 438 (440) Discretion to be exercised with caution- Defendant and witnesses residence and acts

forming cause of action in Hydera bad-Leave refused (1921) 1921 Bom 328 (331 333) 46 Bom 249 Inclusion of Hyderabad properties calculated to delay partition pro

ccedings-Leave refused (1874) 21 Snth W B 204 (208) Parties and

witnesses far away from Calcutta-Decree could be satisfied from pro

prove such a ground and the plant may be also amended 10. In fact, it is quite sufficient if or ands involving difficult questions of fact or law are established to the satisfaction of the Court upon the hearing of the action 11

The question whether leave has been granted under Cl 12 does not affect the pic entr tion of the 1 hint for the purposes of S 3 of the Limitation Act 1"

10 Wayver of want of

te naived has been considered in point One view is that the als

Court in respect of the suit and that consequently neither waiter nor consent can confer the purediction on the Court 1 The opposite view is that in such cases there is no inherent lick of jurisdiction that the want of leave is only a defect in formality and that it can be united \$ It is submitted that the former view is correct Clause 12 of the Letter, Patent obviously lays down that the ordinary original perisdiction in suits can be exercised by the High Court provided only that certain conditions mentioned therein exist. The obtaining of leave is distinetly enjoined as a condition in certain cases and it is provided that such leave shall have heen first obtained. The wording of the Clause clearly shows that the Court his no jouer even to receive a plaint unless such leave is obtained. The leave contemplated by the Clin o constitutes as has been seen in Note 9 above the foundation of the existence of jury liction and 19 not a matter of procedure for which provision is made separately in Clauses 37 and 38 of the Letters I atent Objections to jurisdiction for want of leave can be ruised at any time \$

In any event the question of waiver can arise only in a case inhere the plaintiff alleges facts on the crais of which the necessity for leave arises but not where he alleges grounds in high ontitle him to sue without any leave If in the latter case he fails to prove those ground his suit will be disini sed and no question of warrer can arise by reason of the defendant takir, no objection on the score of want of loave !

11 Rescussion of leave -Leave may be granted ex parte but it is open to the defendant to question it ! He can appear and apply for resocution of leave without waiting for the tiral? He is not houser bound to make such an application. He can wait and insist on hisin, the legality of the have tried as an issue at the trial 3 In fact it is much better that did cult questions involving issues of fact or law boaring on the grant of leave are decided upon the hearing of the suit 4 But where heavy costs are likely to be incurred or serious inconveniences caused it is always better to apply for revocation it the earliest po sible of portunits \$

12 Meaning of the word defendant -Where jurisdiction dejends on the re idence of the business place of the defendant and there are more defendant; than one all of them must reside or carry on business or personally work for gun within the local limits of the jurisdiction of the Court 1

perty outside Calcutta-Lowe re fused 10 (1899) 26 Cal 71, (721) 11 (1932) 1932 C il 116 (147 59 Cal 1-0 12 (1931) 1931 Bom 91 (J3)

Note 10 1 (1J32) 1932 Bom 2J1 (294 200) 56 Bom 321 Lench 1923 Bom 468 (471) over

ruled (1.332) 1933 Bons 42 (46) (1 131) 1331 Cal 651 (6 13) 53 Cvl 763 (1J23) 1J. 3 Cal 358 (364) JG Cal 940

2 (1,104) 35 Cal 334 (393) Water by defen dust filing written statement and all lying for commissioner for exa min then of witheras

Beuch

(16JO) 25 Q Is D 214 Moore & Campto -1 10 el in (1)1") 18 Ind Cas 593 (534) Williamly filing written state inent in I taking part in trial (1923) 1923 1 it 502 (363) The question

tro e in the I itn : High Court in re s leene f Calentta High Court ob tife I without neces are leave (1323) 13 3 Run, 61 (62) 6 Rang C-0

[S o l Hide 281 Bagrant | M ser] 3 (1979) 1329 Cil 358 (364) 56 Cil 340 Oline tion hes in appeal-5 21 C P Cola not application

(1932) 1332 Bons 12 (14)

4 (1917) 1317 Cal Sou (Soi) 11 Cal 10

a ground for reso attom-Remeds 15 imendment er further particulat (See (1889) 1 : Bom 401 (414)) [See also (1874) JI Suth W R .Ji

Note 12 1 (1574) 21 Suile W R 103 (300) (1327) 1327 Cil 768 (773) 51 Cal 6 [bee honever (1)-) 13-3 ( 1 - 7 (3-3 630) Joint Littersors - Su & animat - Mis in against any rest more)

- ' Dwell '-See Notes 3 to 7 to 5 20 C P C and the undermentioned cases !
- 14 Carry on business - See Notes to 5 20 C P C, and the cases cited below 1
- 15 Suit against companies - See Note 31 to S. 20 C. P. C.
- 16 Suit against non resident foreigners - See Note 32 to 5 20 C 1' L
- 17 Personally works for sain -See Note 11 to S 20 C P C
  - 18 Suit against the Secretary of State - See Note 10 to S 20 C P C

Appeal - Ap order to one Judge of the High Court granting or refusing leave cannot be interfered with by an ther Judge of the High Court except on appeal from the order The print remide it is was of an appeal from the order grunting or refusing leave as the rule in a built her also from an order dismisting in application by the defendant t have the plant tiken of the file !

13 And We do further only in that the said Hall Court of Judicities at Fort William in Bongal shall Midris Bombas I rtriorlinari original have nower to remove and to try and determine, as a civil jariedi tion Court of extraordinary original muisdiction, any suit

being or falling within the prishetion of any Court whether within or without the Presidency of Midias Bomby Bengal Division of the Presidency of Fort William subject to its superintendence, when the said High Court shall think proper tailo se either on the incement of the puties to that effect or for purposes I justice the resons for so doing being accorded on the proceedings of the sad He h Court

## Sunonsis

2

3

Note No Withdrawal of suits by High Court to its own file Suit-Meaning of Transfer of petition from Provincial In solvency Court Subject to its superintendence

Note No. Transfer of suit from Presidency Small Cause Court Powers of High Court in suits transferred under this Clause High Court s power to receive plaint Appeal

Other Temes

application- Defore whom to le mile Sec When the High ( art shill think proper to See Note 1 Note 1 Pt (3) do 50 I Withdrawal of suits by High Court to its own file - The High Court has power

under this Clau c to remove to itself cases from any tourt out set to its an irrintendence for trial, whenever it thinks fit t do so for purpo es of jistice. That juryose is to be determined by reference to the circum times of at heave. The describity or necessity to exercise the turisdiction may time in ton a juence of the important of the flictions involved

Note 13 1. (1927) 1927 VI id 659 (690 C92) 0 Wad 413 Dwell cannot apply to corpore (1924) 50 Ind Cus 442 (444) (Bom) Person cruse to appear on summons --Court has jurisdiction though not

permanent resident (1550) 16 Ch D 484 Ex parle Breull - 1 e

ferrel in 29 Vlad 233

1.

trict-Suit he. m Cikutta High Coast Bourle O G 12" Running rice horses is not carring on business or per

sonally working for guin (1920) 1970 Cal 474 (475) (1961 65) 17 ( B \ S 415 Mush v Con jue t -Itelancl m 14 Lon of1 (1857) 11 ( 15 7) Vicdougal v Piterson-

I ejerre l'in Corvton 41 12 Cul 317 I4 1 om 541 16 Lom -16 7 411 79 (F 1)

(1860) 23 L J Q B 10 Kert V Hivnes-Felune in 6 Jur 109, 2 Vid H C R 301 I eferred in 14 Bom 511

Note 19. 1 (1875) S Wid H C R 21 (25)

2 [See (1,)07] 31 Cul 619 (624)]

3 [1866 67] 3 Mid H C R 354 (356) 4 (1873) 21 Suth W R 303 (207) (190a) 23 Bots 249 (258)

or in consequence of the balance of convenience or the cheapness of the trial 1

The power of removal is not limited to any particular possed or eas of the suit and so long as the proceedings in the original Court are in such a condition that one party is entitled to ask that Court to determine any question material to the final result of the suit the suit is in existence in the original Court and is calable of being removed to the High Court under this Clause ? In the undermentioned ease it was held that the High Court can transfer a case pending in a moffussil Court to itself and pass inters norders ther on, but has no power to do so in cases not an pending ">

It has been held by the Righ Courts of Calentin Vairis and Rangoon that the appli on the oss al side of the High

the undermentioned Bombay case as High Court.

2 Suit-Meaning of-Proceedings for the grant of probate which are contested come within the meaning of the word suit as used in this clause I

3 Transfer of petition from Privincial Insolvency Court - An application under this Clause to remove an insolvency petition pending in a moffuseil Court and to transfer it for trini and disposal to the original side of the High Court is not maintainable! The reason is that the powers conferred by S 5 of the Provincial Insotvency Act (V of 1920) which are made subject to the other provisions of the Act cannot be exet ised in such a way as to give the original side of the Migh Court a jurisdiction from which it is expressly excluded by the forms of that section read with this Clause

4 Subject to its superintendence - The civil Court of the Political Resident at idea as constituted by the Aden Courts Act (II of 1861) is subject to the superintendence of the High Court at Bombay within the meaning of this Clause even though no appeal her to the Righ Court from decrees or orders of the Roudent and therefore the High Court has power to remove under this Clause a suit from that Court to itself for trial and determination 1

5 Transfer of suit from Presidency Small Cause Court -The Presidency Small Cause Court is a Court subjet to the superiotendence of the High Court The litter cantherefore romove to itself under this Clause a suit pending before such Smalt Cause Court?

6 Powers of High Court in suits transferred under this Clause -In dealing with suits transferred under this Clau e the High Court has no more powers than those of the Court from which the suit is transferred ! Thus the Itigh Court cannot allow an amendment of a plaint in a suit transferred from the Madras City Civil Court so as to convert it into one which auch City Civil Court would have no jurisdiction to try Under S 11 of the Madras City Civil Court tot (VII of 1892) it is specifically provided that the Court leo payable on a suit so trans ferred from the Madras City Civil Court mast be calculated according to the Rules in force in the High Court in relation to quits filed on the original side of the High Court ?

7 High Court's power to receive plaints -This Ctanso provides only that the High Court may comere to itself a suit rending in a Court subject to its superintendence. It does

Claus I3-Note I 4 (t903) 27 Bom 575 (575) ĭ [See also (1901) 23 Bom 202 (\_93)] Note 2 1 (1927) 1927 Cal 231 (237) 5t Cal 126. (t850) 5 Cat 766 (767 768) Che i pness ot trial 1 .

(1589) 16 Cal 771 (776) (t873) 10 Beng L tl 168 (177 179) The con Note 4 duct of a Judge may be taken into considerat on in directing a transfer 1 (1906) 30 Bota 246 (243) 33 Ind App 33(10) Affirming 27 Loin 575 on appeal to [Sec also Bourke Part II Fx OC 1 No transfer unless prejudi e is

the I ray Conneil. Note 5

1 (1572) 8 Lom tt C tl 50 (65). (1905) 7 Bom L R 143 (143 111)

(1924) 1923 Rang 185 (t86) 1 Rang 226.

not enable the High Court to receive a plaint in a suit cognisable by a moffusil Court and wass orders thereon 1

8 Appeal -The High Court of Midras has held that an order of a Judge of the High Court on the original side transferring to the High Court a suit under this clause is a 'judg ment ' within the meaning of Cl 15 infra and is therefore appealable ! But the Calcutta High Court has taken a contrary view 2 See also notes to Cl 10 of the Letters Pattent infra

Where an application under this class ewis heard and granted by a Beach sitting on the appellate side of the Bombas High Court leave was granted to appeal to the Privy Coucil 3

And We do further ording that where plaintiff has several causes of action a unst defend int such causes of action not beseveral and for land or other ammos able property and the said Jainder causes of action High Court shall have or and jurisdiction in respect

of one of such causes of action, it shall be lawful for the said High Court to call on the defendant to show cause why the several causes of action should not be joined together in one suit, and to make such order for trial of the same as to the said High Court shall seem ht

SUROISIS.

Such causes of action not being for Joinder of several causes of action

1 Joinder of several causes of action - The word several in the expression several causes of action means separate 1. This clause applies only where some causes of action arise within and some without the ordinary original jurisdiction of the High Court It does not apply to cases where all the several causes of action arise within such jurisdiction? It is not necessary that the causes of action outside the ordinary original unreduction, should have arisen within the extraordinary original jurisdiction contemplated by C1 13 ante. They may arise even outside the Presidency 3

an application under this clause for leave to join several causes of action can be made also in a case in which leave has to be or has been obtained under C! 12 aufe 4

To bring a case within this clause it is not necessary that the defendant should adult that any cause of action has arisen within the original jurisdiction of the High Court 5

Such causes of action not being for land - The expression such causes of action not being for land qualifies the words several causes of action and refers to cases where plaintiff has several causes of action other than causos of action for land or athur immovable That is to say in considering this clause any cause of action which is for land or other immovable property must be excluded and if the sole cause of action within jurisdic tion is one i rland or if the sole cause of action outside the jurisdiction is one for land then this clause will have no operation !

And We do further ordain that an appeal shall lie to the said High Court of Judicature at [Madias] [Bombas | Fort William in Bens il from the judgment (not being a jud\_ment passed Appeal from the Courts

of original jurisdiction to in the exercise of appellate jurisdiction in respect of a the Hall Court in itdecree or order made in the everouse of ampellate mais appellate purisdiction diction by a Court subject to the superintendence of the

Note 7 1 (1929) 1929 Wad 29 (90) 52 Wad 52 Note 8

1 (1924) 1924 Mad 90 (91) 47 Mad 136 2 (1920) 1920 Cal 797 (798) 47 Cal 1104 (1927) 1927 Cal 281 (282) 54 Cal 126 3 (1904) 28 Born 2J2 (293)

Clause 14-Note 1

1 (1929) 1929 Bom 100 (102) 53 Bom 251 2 (1929) 1929 Bom 100 (103 106) 3 Bom 2a1 CPC 392 & 393

[See also (1910) 8 Ind Cas 648 (649) 34 Bom 564] 4 (1910) 8 lnd Cas 648 (649) 34 Bom 564 application under this clause may

be made at any time before hearing but it is advisable to make it at the earliest opportunity

3 (1929) 1929 Bom 100 (104) 53 Bom 2a1

5 (1923) 1929 Bom 100 (101) 53 Bom 251

Note 2

1 (1929) 1929 Bom 100 (102) 53 Bom 251

said High Court, and not being an order made in the exercise of revisional juris diction, and not being a sentence of order passed or made in the exercise of the power of superintendence under the provisions of 5 107 of the Government of Iudia ict, or in the exercise of cruminal initialiction) of one Judge of the said High Court or one Judge of any Drusson Court, pursuint to section 108 of the Government of India Act and that notwithstanding anything becombefore provided an appeal shall he to the sud High Gourt from a judgment of one Judge of the sud High Court or one Indge of any Division Court, pursuant to section 108 of the Government of India Act, mado [on or after the first day of February 1929] in the exercise of appellate parisdiction in respect of a decree or order made in the ever cise of appellate jurisdiction by a Comit subject to the superjutendence of the sud High Court where the Judgo who passed the judgment declares that the case is a fit one for appeal but that the right of appeal from other sud-ments of Jud-es of the said High Court or of such Division Court shall be to Us, Our hears or succes

| sors in Out or Their Privy Council                                                                                                                                                                                                                                                                                                                                     | , as l | serein after provided                                                                                                                                                                                                                       |                                                    |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------|
|                                                                                                                                                                                                                                                                                                                                                                        | Syno   | psis                                                                                                                                                                                                                                        |                                                    |
| Amendment Judgment, meaning of Orders which are not 'judgments Orders who have not 'judgments Orders made in the exercise of revisional jurisdiction Orders and an interest of powers Orders made in the exercise of powers Orders made in the exercise of erims nal jurisdiction Appeal to Privy Council Appeal to Privy Council Appeal to ease of disagreement among |        | Judges of a Division Bench Section 175 of Agra Tenancy Act if precludes appeal Declares that the case is a fit one for appeal' Cross objections Sacurity for coals Points on which appeal may be heard Limitation Court fee Raviaw Practice | 10<br>11<br>12<br>13<br>14<br>15<br>16<br>17<br>18 |
| blegt th cases at disasteement willows                                                                                                                                                                                                                                                                                                                                 |        |                                                                                                                                                                                                                                             |                                                    |

#### Other Lomes

Loint not ret ad before single Judge -Himas be urged in L. P. Appeil Sco Note 14 I t. (1)

1 Amendment -- bu ler the old ctur et as it tool before the amendment thereof it 10251a an appeal by from

(1) the decision of a single Judge in all cases other than

(a) orders passed in the matter e of retisionit just diction

(1) sentences or orders las ed in the exercise of the lower of superintendence unfer S 107 of the Government of India tet 1910,

# Clause 15-Note t

1 The old clau e rin as follows -and we do further orders that in apport shall lie to the said High Court of Judicature it bort William in Lengal from the julgment (not being an order made in the exercic of revisional juri-diction and not lains a in tence or order jas el or made in the racres e of the power of uprintendence under the provisions of S 10, of the Government of In his tel 1019 or in the exercise of criminal paradiction) of one Judy 1 of the sail thigh Court or one Jules of any Dier ion Court jur suant to section 13 of the said secret 1 ter mil that an appeal shall all o he to the said thah Court from the judgment (not being a sentence or order as aforesail) fanger in ie Juli - t the 111 High Court or of such Division Court witnesser such Judges are equally divided in of mion and do not imount in nam,

entry on 11-1-1923 in thombay on - -1-112 to Walers in 13-1-1328 in Habitad

1111 To

(c) sentences or orders passed in the exercise of erinning pure-diction . (2) the de mion of the senior Judge where the Judges constituting a bench of two Judges differed

no right of inneal against The off duclates that the case is leat tops of senior Judge where the a nit ore for Judges con titution, a tench differ has been taken twas in siew of the newly amended Cl 36 mere and there is no no power to grant a certificate in such a case?

After the initializant came into lorce there arose a conflict fopinion as to whether it had retto pretive effect According to the High Court of Bomb was it had such effect so that no appeal for against a malament of a single Judge on second appeal filed after the amend ment in the theme of the reput the certificate. The High Courts of Calcuttat and Madrass held on the other hind that the amandment did not operate retrospectively so as to affect the right I appeal which had werm I in respect of suits instituted prior to the amendment According to the linch Court of Allahatade all judgments delivered after the amendment were governed to the amended chanse. Increder to et this conflict it rest, the chaise was beam amonded and the vitt on matter the first to of betruity 1929 here been added

2 'Judgment meaning of The definition of the word in Igment given in S 2 of the Livil Procedure (at is not a led forth construction of the term as used in the Code and is not applicable to the fett of it at ! There is no definition of the word in the Letters Patent the the other hand it em t has been used in different senses in the various clane. This this clinion is the wif judgment while Cl 33 uses the words judgment, destee or order unl Cl 40 the wirl preliminary rinterfocution, judgment decree of order 14 This half area is a third conflict of of mouses to the true interpretation of the word a later to well with him a lin Hurrish Chandra Chou thry . Kalimindery De 1 1 R (Cal 4-2 ) here s single July of the High Court had 1 weed an order refusing to transmit an order of Her 'lajests in Conneil for execution then Lordships of the Prive Council said Mr Justi e l'ontifes had in fact exercise à a judici il discretion and had come to 4 decision of an it importance which if it remained, would entirely could de any rights of halisunden to an execution me this suit ' and they held that the order was a judgment ' This however was not a complete definition of the term In Bhops Lal v The Dahore Temple Committee their Lord hips of the Priva Council observed that the term judgment in the Letters Patent meint in civil ea can decree and not a judgment in the ordinary conce The High Court of Allahated has distinguished this use on the ground that their Lordalines must be decided these made the digrestion referred to with reference to Cl 31 of the Tetter, Patent and not with referent the Clauce

the now proceed a dream shows of the ser and had content on the passion

According to the High Court of Allababid the gravisions of this clause no controlled by the Code of Civil Procedure and the right of appeal under this Clause is restricted to cases which are appealable under the Code 4 But in a later case of the same High Court, 40 the view in 25 Mid 1 F 1 (discussed below) has been adopted. This view has been discented from by the other ligh Courts See Note i to S 104 agte and the cases cited below "

The haling case in what may is called the Cafcutta view is to the meaning of the word indement in The Justices of the Pone for Calcutta v The Oriental tray Co & in which Couch C J defined it as meaning, a decision which affects the merits of the question between the parties by determining some plat or hability. It may be either reliminary or interien tory, the difference letween them leng that a final judgment determines the whole cause or suit and a preliminary or interlocutors judgment determines only a part of it feaving other matters to be determined ' The raht or hability must mean some right or limbility which is the subject matter of controvers in the unt or proceeding. It has however been held by the same lingh Court purporting to lollow the case of Tie I stace, of the Peace for Calcutta

<sup>2 (1928) 1</sup>J28 Cal 81J (820) (F B)

<sup>3 (132</sup>s) 1925 Bom 371 (374) 52 Bom 753 4 (1929) 1928 Cal Gio (Gil)

<sup>5 (132) 1323</sup> M ed 381 (382) 52 Wed 361 (5 B) 6 (1928) 1929 111 704 (704) 50 111 865 Note 2

<sup>1 (1324) 1924</sup> Vird 597 (597 593) 47 Vird 316

<sup>14 (1,333) 1933</sup> Alf 262 (2G3) 2 (1,325) 1 +25 P C 155 (156) (P C)

<sup>3 (1933) 1 33</sup> All 262 (263) (F 1)

<sup>4 (1898) 15 4(1 3</sup>aJ (362 369) (1894) 16 411 443 (449)

<sup>(1832) 14 111 961 (961)</sup> 

<sup>41 (1323) 1923 111 44 (40) 45 414 60</sup> , (1316) 1316 Val 593 (564) 33 Mad 1196

<sup>(1322) 1322</sup> Lah 350 (383) 3 Lah 189

<sup>6 (1977) 17</sup> Suth W R 3: 4 (370 372)

that an order granting leave to suc under C1 12 of the Letters Piteut7 or an order setting aside an abatements or an order rejecting an application for a judgment on admissions under O 12 R 6 of the Civil Procedure Code is a judgment, on the ground that they must be taken to determine some right. These decision, it is submitted exmit he supported even on the basis of the definition which they purport to adopt. In none of these cases are the mention affected and there is no determination of any right or hibility which is the matter in con troversy in the suit or proceeding. In Ebrahim , Fael runisa Bejam 10 Garth, C J expressed the view that the word 'judgment means a judgment or decree which decides the case one was or the other in its entirety and that it does not mean a decision or order of an interloca tory nature which merely decides some isolated point not affecting the merits or the results A similar view was adopted in the cases cated below 11 In Mt Brail amora Ramrick Dass 12 Miclein C J was of opinion that the definition of Couch C J was becoming classical but that it was not exhaustive 13 In Brojogopal Roy Barman v Apar chandra Bhattacharna I L R of Caf 13o F B it was held that the mere fact that an order puts in peril the finality of a decision given to a person a favour does not of itself, make the order a indement within the meaning of this clause. It was doubted whether such orders as an order setting aside an abatement or an order guing leave to appeal could be considered judgment

The definition of Couch C J given above has been accepted generally in the Bombay High Court 14

The earliest attempt to define the word underment as used in this clause was under the thigh Court of Vidaria in DeSoura Colerts and it was held that the unit and election of determination affecting the rights or interests of the suitor or applicant. It was all pointed out that it was not possible to present control to this clause. This definition has however been considered to be set; used in the not been clause. This definition has however been considered to be set; used in the not been claused. The leading case on the point and present in the light Court of Madras is that of Talgaram Ross Algangya I L R 35 Mod 1 (F B). In that case Six through What C J laid down the view that an order is a madgement, within the menting of this clause.

(1) if its effect is to 1 if an end to the suit or preceding so fir as the Court before which the suit of proceeding a pending is concerned or

(a) if the non compliance there will have the effect of jutting in end to such suit
or proceeding or

(m) if it is preced on in independent procedure which is incillirate the suit (incilliration instituted is a step towards judgment but with a town to rendering the judgment effective when of timed) \*g in order on an application for temporary injunit is or for the appointment of a receive.

In Golalchan's Sankal Das, 18 the High Lourt of Libero was of spinion that the term judgment meladed and interlectory pedgment which decided so fir a the Court pronouncing it was concerned, whether faults or temporaris and question insterrills in issue between the pirties and directly affecting the subject matter of the suit. In Raili Single v Sanual, 17 the same High Court adopted the view of White C.J., of the Madra High Court adopted the view of White C.J., of the Madra thigh Court.

In Arusingham Chetty's Kanoppa Chett, 13 the High Court of Ringson hold that where in appeal hes from in order under 0 33 R. 1 of the Civil Procedure Code the older must be then to be a judgment within the meaning of this Chur e In Dayabhai Jiraalai Managappa Chetty<sup>100</sup> kull Beach of the simo figh Court his held discenting from the rights of the partners at 18-20 in the suit are determined. A final judgment is a decreed in smit to which the rights of the partners at 18-20 in the suit are determined. A final judgment is a decreed in 28.

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7 (1574) 21 Suth W R 303 (307)
9 (1922) 1,322 Cal 335 (336 337) 49 C if 62
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14 (1909) 2 Ind Cas Lo7 (Los) This is the Lof

(190J) 2 In I Cas 150 (151) (15 m) (18 0) 14 Bom 555 (558)

(1932) 1332 John 134 (134 135) 6 John 23 15 (1866 67) 3 Mad H C H 334 (257) 26 (1506 137) Lab 236 (254) 1 July 315

16 (1920) 1920 I ah 976 (924) 1 Lah 318

19 . Over

<sup>9 (1920) 1920</sup> Cal 163 (164) 10 (1878) 4 Cal 531 (534)

<sup>11 (1581) 8</sup> Cil 147 (145) (1930) 1930 Cal (23 (62a) 57 Cal 73a

<sup>(1911) 1919</sup> Cal (27 (363) The test lad down in 35 Vad 1 was applied in this case

<sup>12 (1901) 5</sup> C 11 W \ 781 (794) 13 (540 also (1922) 1922 Cal 172 (174)] (1926) 1926 Cal 842 (843) 53 Cal 776 (1929) 1929 Cal 214 (214) 56 Cal 125 (F 1)

Is which till it matters at issue therein are decaded. A preliminary or interlocatory judgment is said a team a switt which this injuly to the relief claumed in this suit is decaded but under which further postedings are incessary before the suit and, entirely, can be determined. See other question and orders and agent in adjacents?

The High Court of Print -1 has alogted the view of the Cilentia High Court as expressed in the case of Brigo togal Rey Burman inferred to above

An examinion of all the rose on the subject for to show that the test applied by white C J in Taljaras Race recedings the least continue of the conflict of decisions on the point. In Taljaras Race recedings the least continue of the conflict of decisions on the point. In the conflict of the subject that the Least law receded in the Civil Procedure Code when a pixelable also show that the Least law conflict the processing a referred to in Civil (p) to (i) of R 1 of C 13. C P C. The right down by White C J. Thus the onlies referred to in Civil (p) to (i) of R 1 of C 13. C P C. The right of the in another proceedings instituted with a ten in the law pudgment that in the fault matter by the defect of putting an end to the sun or pixeling. In it then fore enhanted that the civil public by White, C J. is correct an jumple. The rises in which the orders have been held to be judgments, have all been stopped closes so to show that they can all be supported on the principles had down in Taljaras Paos case though the revenue for the decisions in the various cases differentiable that the supported on the principles had down in Taljaras Paos case differentiable that the processing the various cases differentiable that the processing the various cases differentiable that the processing the various cases differentiable that the processing the various cases differentiable that the processing the various cases differentiable that the processing the various cases differentiable that the processing the various cases differentiable that the processing the various cases differentiable that the processing that the processing the various cases differentiable that the processing that the processing that the processing the various cases differentiable that the processing that the processing that the conflict that the processing three the processing that the processing the processing the processing that the processing the processing the processing the processing that the processing that the processing the processing that the processing

Orders which have been beld to be judgments and which can be supported on the judgment that then have the enect of judgment and to the sunt or providing so far as the Court before which the sunt of presenting so far things or needed.

that had a few to only non a not be being bid for multifulousness 2t

. Other refusing to iddinger only parties in a suit under \$ 92 of the Civil Procedure

(3) Order refusing to allow a plaint to be amended and dismissing out 23

(4) Order refusing to restore suit dismissed for definit See Note 12 to 0 9 R 9, Civil Procedure Code

(5) Finding on a preliminary is no which has the effect of disposing of the suit 24

(6) Order virving or amending a decree 23
(5) Order dismissing a claim polition under O 21 R 55 of the Civil Procedure Code

The High Court of Ringson his, however held that such in order does not present the distribution of the rights of the putter in a reported with therefore in a many information has a finite distribution when the control with the damage of the such is not seen a System to the Court in which the damage of the public his distribution to me under the order in the production.

(s) Older rejecting an application to a trade in autometr of a suit or refusing the uph atom of the issignee of the pluntiff to tall mode to continue the proceed and See Note 14 to 0/12/R/9 and Note 24 to 0/12/R/10

(iii) d. Howing the unbditual of 1 and with liberty to bring a fresh suit of 1 feel up to the trade in order although such withdrawal. See Note 40 to 0.23,

(it) Order ieffi in a hare to sue in permagniary See Note 5 to 0-31, R. 5. The decision in their is raid felow. Fith it in order allowing in a planton for leave to sue in permagniary is a judgment is ignored the principle of Taljaram factor and innote the next Exercise.

(11) Order dismissing application praxim, that the Court may is cave a sum of money as occurrity for the costs of in appeal. See  $\times$  10 14 1 R 10

20 (1333) 1333 Pm 133 (142) 13 Pm 202 21 (1918) 1915 Cd 538 (561) 45 Cd 111 The

test lad down in 35 Ved 1 wie ip plied in this case

22 (1327) 1327 Run, 180 (180) 5 Rang 263 23 (1927) 1927 Rang 154 (155) 5 Rung 115

24 (1930) 1330 Bont 262 (263 265) (1923) 1923 Mad 44 (44)

(1928) 1928 Rang 20 (21) 5 Rang 762 Order deciding question of pure-diction on 1 poelimin (17 1551)e 25 (1923) tJ29 Vt. l 261 (263)

(1907) 2 Ind C is 294 (295) 33 Bom 216 [See also (1875) 12 Bom H C R 129 (137) An order by a single Judge of the High Court reversing a decision of Commissioner for taking ic-

26 See Note 24 to O 21, R 58

27 (1925) 1925 Mrd 167 (168) 48 Mrd 700 Reasons not clearly given

- (12) Order refusion to set aside a dismussal of an appeal for default 28
- (13) Order rejecting an application for leave to file a memorandum of cross objections in forma paureris 29
- (14) Order remanding the whole case to the lower Court for disposal \*\*
- (15) Order refusing leave to appeal in forms pauperis 31
- (16) Order transmitting32 or refu-ing to Iran-mit 33 a decree of the Privy Council for execution
  - (17) Order refusing to extend time to formsh security under O 45 R 7 See Note 10 to that Rule
  - (18) Order dismissing a sust for want of pro-ecution \$4
- (19) Order of transfer under Chase 13 of the Lefters Patent & According to the lingh Court of Calcutta such an order is not a judgment masmuch as it does not affect the ments of the case which is necessary according to the definition of judgment as accepted by that Court 38

(20) Order refusing to sel aside an award 37

Orders which have been held to be 'judyment's and which can be supported on the ground that the non compliance therewith will have the effect of putting an end to the suit or proceeling -

- (I) Order asking plaintiff to elect to proceed against some only of the defendants See Note 14 to 0 1. R 3
  - (2) Order asking plaintiff to furnish security for the costs of the cuit. See Note 14 to O 25, R 1
  - (3) Order imposing conditions for granting leave to defend a suit in which a summons 14 Issued under Ch XIII A of the Rules of the Ifigh Court 38

Orders which have been held to be judgments and which can be supported on the ground that they are passed on ancillary proceeding instituted with a view to rendering the

judgitions in the suit or proceeding effective when obtained -(1) Order appointing a receiver See Note 52 to O 40 R 1

Blombay an order refusing to grant a temporary injunction is not a julgment

- See Note 20 to O 39 R 1 (4) Order directing payment of a certain sum as maintenance to a party pending sult 41
- (5) Order under S 10 of the Code refusing to stay a suit 43
- (6) Order granting or refusing stay of execution of a decree 43 See also Note 20 to 0 41 R 5

35 (1921) 1924 Mad 90 (31) 47 Mad 136 (1923) 1923 Mad 44 (14) (1921) 1921 Mad 687 (687) (1900) 23 Mad 32J (941)

decision on the question of limits

fron (1831) 14 Mad 406 (407)

(1924) 1924 Pat 336 (339) [See also Note 23 to O 41, R 23] 31 See Note 11 to O 14, R 1

(See also (1931) 1931 Mad 194 (198) '3 Mad 215 Right of appeal as sume 1]

2 (1900) 1900 Jah 674 (171) 11 Lab 365 Order transmitting order in conneil for excention

37 (1931) 1931 Hom 125 (127, 123) 55 Bom 6-2 (1918) 1918 Cal 191 (192) 45 Cal '02 39 (1926) 1926 Cal 668 (670)

39a (1935) 1935 Cal 55 (37) 3J (1930) 1990 Cal 507 (801)

40 (1925) 1925 Mad 596 (587) 41 (1925) 1925 Mad 443 (443)

42 (133) 1973 Bom 85 (87)

(1935) 1935 Cal I (9) 43 (1922) 1922 Lah 187 (156) Order refuding ctax

33 See Note 16 to O 45 18 15 24 (1924) 1924 Cal 1025 (10°C) -1 Cal 205

An order which amounts to a diered in effect or which forms part of a pidgment will of course be a "judgment" within the meaning of the clause and appealable is such 44

- 3 Orders which are not "judgments"-The following are among the orders which have feen held not appealable as a judgmont ' under this clause -
  - (1) In order granting feave to sue as a pauper?
  - (1 A) Order staying suit under 5 10 of the Cole 15
  - (2) An order arriting leave to defend a summary sust under O 37.2
  - lut the The Righ Court of Bombay has taken a contrary view -"
  - (\*) An order refusing to revoke here to sue which has been granted 3
  - (4) An older reliasing to direct the Receiver in insolvency to give security for the continuance of suit file I be the del tor &
  - to An order refusing to frame an issue5 or to try in issue as a preliminary issue 6
  - (6) In what refusing have to file written statement after expiry of the time ill ave 17
  - (\*) In order allewing or refusing amondment for plants
  - (s) An ender transposing delembent is plaintiff !
  - (9) In order idding a party 19
    - (10) An order refusing a retain detendant by anjumation from prosecuting a suit in a fercian Court 11
    - (11) An order directing a party to produce and iflow inspection of documents 12
    - 12) An der refusing t ell a mejection 13
  - t unt tik fi citum allegimens in pleidings is so indilons 14 (1d) Yu
    - 14 to rierritu me tarcti w under Rr 130 and 131 of the High Court Rules. Bombay 15
  - (15) in order directing security under O 38 R 5 16 This would be a judgment according to the test applied by White, C , J , in Tuljaran Rao's case in asmuch as it is an order in an ancillary proceeding metitated with a view to lender the judgment effective In view of the buil Pench decision in \ I R 1929 Rang 41 adol long the Madras view the correctness of this decision is open to
    - nucition (16) An order directing 17 or relining 19 the issue of a commission for the examination f witnesse.
  - an order of ad interim stir (1020) 1929 Inh 428 (424) (Irder grenting
    - \$175
  - rits (1916) 1916 Mad 745 (745) (1929) 1329 Mad 197 (139) Appeil ignms1
  - jiehining deeree-butber gre reedings in a 115 on vertoni leims-Judgment debtor dissensied by terms timposed appealing-Appeal to
- set maintainable 44 (1925) 1928 Rang "Of ("O1) Order construed
  - as being in effect a decree (1914) 1914 Mid 418 (419) Order as to costs
  - incidental to a indigment (1919) 1919 Mad 678 (678) 42 Mad 352 (F B) Order passed on a review of treation by the taxing officer
  - (1914) 1914 Mrd 218 (218 219) An order awarding costs
- Note 3 1 (1925) 1925 Mad 167 (168) 48 Mad 700 (19\_6) 1926 Rang 110 (111) 4 Rang 20
- (1930) 19°0 Hang 2.0 (.62) 1a (1935) 1935 Rang 73 (1) (78)

- 2 (1915) 1915 (al 771 (771) d.1 (al 79) (1 1 to) 1945 Rang 245 (246)
- 21 (1 132) 1 (32 1 cm 163 (165) 56 1 om 268 3 (1927) 1927 Mad 916 (815) 0 Nad 770
- 4 (1931) 1931 Ring 286 (256) U Ring 478 , (1910) 8 Ind Cas 340 (812) 95 Mad 1
- (1878) 4 Cal 531 (531) 6 (1909) 2 Ind C et 150 (152) (Bom)
- 7 (1919) 1919 Cal 97 (9J) 45 Cal 818 5 (1919) 1919 Cal 901 (906) 45 Cal 305
- (1917) 1917 Mad 350 (350) Reinsing leave to amend
- f192 a) 1 325 Born 159 (160) Amending title of plaint-Relates only to procedure
- 9 (1926) 1926 Mrd 504 (555) 49 Mad 539 10 (1930) 1970 Mad JS7 (JS7) 54 Mad 191
  - (1920) 1920 Bom "09 (311) 44 i om 272
- 12 (1672) J I om R C R 308 (401)
- (1909) 3 Ind Cas 167 (167) (Bom)
- 13 (1927) 1927 Med 409 (410) 14 (1926) 1926 Med 61 (64)
- 1a (1921) 1921 Bora 320 (321) 45 Pom 428
- 16 (1924) 1925 Rang 267 (268) 3 Rang 307 17 (1' 00) 2 Ind Cas 157 (158) (Bom) | But co (1905) 28 Mad 28 (31) Dis-
- sented from in 35 Mad 1 (F B)] 14 (1920) 1920 Cal 894 (895)
- (1931) 1934 Bora 163 (109)
- (1925) 192, Rung 200 (291) 3 Rang 293

- (12) Order refusing to set uside a dismissil of an appeal for defiult 28
- (13) Order rejecting an application for leave to file a memorandum of cross objections iu foi ma paujerts 29
- (14) Order remanding the whole case to the lower Court for disposal 30
- (15) Order refusing leave to appeal in forma pauperis 31
- (16) Order transmitting33 or refusing to transmit33 a decree of the Privy Council for
  - (17) Order refusing to extend time to furnish security under O 45 R 7 Sec Note 10 to that Rule
  - (18) Order dismissing a suit for want of prosecution 34
- (19) Order of transfer under Clause 13 of the Letters Patent 35 According to the High Court of Calcutta such an order is not a judgment masmuch as it does not affect the ments of the case which is necessary according to the definition of judgment as accepted by that Court 25

(20) Order refusing to set aside an award 37

Orders which have been held to be 'judgment's and which can be supported on ile ground that the non compliance therewith will have the effect of pelling an end to the suit or proceeding -

- (1) Order reking plaintiff to elect to proceed against some only of the defendants See Note 14 to O 1, R 3
- (2) Order asking plaintiff to formsh security for the costs of the suit See Note 14 to O 25, R 1
- (3) Order imposing conditions for granting leave to defend a suit in which a summons 13 Issued under Ch AIII 1 of the Rules of the High Court 83

Orders which have been held to be "judgments" and which can be supported on the with a view to rendering the

Court of Bombay an order refusing to grant a temporary injunction is not a judgment See Note 20 to O 39 R 1

(4) Order directing payment of a certain sum as maintenance to a party pending suit 41 (5) Order under S 10 of the Code refusing to stay a suit 43

(6) Order granting or refusing stav of execution of a decree 43 See also Note 20 to O 41 R 5

24 (1924) 1924 Lab 412 (412) (1925) 1925 Lah 617 (617) Order rejecting an application under O 41 R. 19 2.) (1926) 1926 Wad 656 (656) Right of "ppeal

(1921) 1921 Mad 697 (697) (1900) 23 7/14 323 (311)

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decision on the question of limits tion

(1891) 14 Mad 406 (407) (1924) 1924 Pat 336 (383)

[See also Nete 23 to O 41, R 23] 31 See Note 11 to O 44. Il 1

(See al o (1931) 1931 Ma I 193 (193) 73 Mad 245 Right of appeal as sumedl

22 (1920) 1920 Lah C74 (c75) 11 Lah "65 Order transmitting order in connect for execution

33 See Note 16 to O 45 R 15 74 (1921) 1924 Cal 1025 (1026) 51 Cal 905 39 (1926) 1926 C J 668 (670) 37a (1935) 1935 Cal \*5 (37) 29 (1930) 1930 Cal 503 (501)

40 (1925) 1925 Mad 556 (557) 41 (1925) 1925 Mad 443 (443) 42 (1933) 1933 Bom 85 (87)

(1935) 1935 Cal 1 (9)

35 (1924) 1924 Vlad 90 (91) 47 Vlad 136

(1923) 1923 Mad 44 (14)

43 (1922) 1922 Lali 185 (186) Order refusing 6122

(1918) 1918 Cal 191 (192) 45 Cal 502

An order which an omita to a decre in life tor the blooms put of sjudgment will of coure be a judgment within the meaning of the chine and appealable is such 41

- of cour e be a judgment with in the meaning of the church adopted his sich 41

  3. Orders which are not judgments —The folloring are anning the orders which have been held to the metable as a whement under the church.
  - (1) An order granting leave t sue as a pauter?

    (1 A) Order stave grant under \$ 10 of the C 1 12
  - (2) to order are taglesset def dasumine uta der U : 2
  - Intil The High C at of Lomba 1 take a contrary ve
  - "I As rder fus stor obelene to see 1 1 has ice gastel"
  - 4 Ancider tin na to dreit the Re ver 1 usalsenes to give en ty for the
  - ti ord r fu ht frites uesortate uni massignel miary sues
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    - An orderall g fusing nd tl plat?
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  - (9) in order ld g : pasts b)
  - 10) to order of unit real like the force at gout to a freeza Cure 13
    - tills in order d et 15 12 t t produce a l flo get n fil me tall
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    - 19 \ h h fi to to me pled g to 1 4 14
  - ul 1 ton 1 R 10 1 191 of the High (n rt Rules
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    In order directing securit index 0 % R 18 Tl culd be a julgment accord og to the test applied by While C J in Thera I os a commundation in an archiver proceeding in white the will very to tender the nudement effective his reason of the full french tessen unit 1 R 1809.
  - Raig 41 adopting the Malras ver the correct essofths doc on a open to quest ou
  - (16) An order direct 127 or refuse ges then we of a commission to the examination
  - an order of ad 1 f (1915) 1915 tal 7 7 (1) 42 C 1 3 (192) 1 tal 8 42 f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (1) f (
  - (But ce (1,121) 1921 Jour 34 3) Ind C 503 (809) (Mad)]
  - Ind C 503 (809) (Mad)] 1 2 1 R (22 (726) 3 Rang 2 No.
  - all fl ence of se
  - (1J16) 1J16 Mad 45 ( 4 (1°2)) 1J29 Mad IJ (1 8 Appeal 52 nst
  - (1"21) 1329 that IJ (1 & Appeal gainst left in left Forther le eeding is to stan te n Judgi nt lebtor do 1 fill by
  - trms nio ed pi t g ippe l
- 44 (1925) 1306 Ra £ 201 ( 01) Odros tr 1
  - (F B)
    Order pased on a cost of taxat on
    by the tixing officer
    (1914) 1.014 Mad 248 (218 24) to order
  - (1914) 1314 Mad 218 (218 21 ) to ord a arding costs Note 3
    - 00 g 20

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(1 09) Ind Cvs 177 (1f') (D'm)

13 (1 °7) 1947 Mad 40 (410)

14 (1 26) 1926 Vvd 64 (64)

15 (19 1) 1924 Lom 320 (921) 45 Bom 4 3

16 (1 2 ) 19 5 Rvmg 25 (68) 3 Rang 507

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1 (1672) 9 1

1 0 ) 2 I d C s 157 (158) (Lom) [I t ce (1903) 28 Mad 28 (31) Dis sented from in 35 M vd t (1 1 1)

(1 2 ) 192 Mad 84 (848) 0 M d 0 4 (1931) 1931 R ng 250 (290) 1 Ra g 4 8

u (\$ 110) 8 1 td Ca 340 (319) 95 Vad 1 (th b) 4 Cal ust (534)

(1 1 ) 1919 Cal 3 (99) 45 Cal 818

4 (1J19) 1913 (al 904 (JOG) 45 Cal 30a

10 (19 0) 19 0 Nad ns (19 ) 54 N d 111 11 (19 0) 1320 Bom 09 (311) 44 Lom 2 ?

H C R 3 (401)

1917) 1917 Vad 350 (3.0) Refus ng leave

(19) 1192, Bom 1.0 (160) Ame dag tile

of | la ut - Relat s only to 1 o edure 1926) 1926 V d 5 4 (3 5) 43 Vad 333

C (1 03) 2 1 d C + 1.0 (1.2) (Burn)

- 14 (1J 0) 19 0 Cal 894 (695) (1934) 1931 Pom 163 (16 )
  - (1934) 1934 Pom 168 (16.) (1925) 192 Rang 200 (291) 3 Rang 203

- (17) An order directing the Official Referes to ascertain the shale of the plaintiff and take accounts19 or referring back the report to the Official Referee for a further consideration 20
- (18) An order giving directions to the Commissioner 21
- (19) An order directing a receiver to advance mone; to the guardian ad liters of a minor defendant 22
- (20) In order directing the suit to proceed dismissing an application to take the plant off the file of the Court 23
- (21) A finding on a preliminary issue allowing the tust to proceed after disallowing an objection as to stamp24 or as to the maintainability of the suit 25
- (22) An order admitting evidence 26
- (23)

#### failure to cive security in time 27

- (24) An order refusing to exercise subgreat powers under S 151, C P C 28
- (25) In order setting aside an ex parte decree 29
- (26) An order restoring a suit dismissed for default 30
- (27) In order granting or refusing a certificate for leve to appeal to the Privy Council 34
  - (28) An order retusing stay of execution under O 40 R 13 53
  - (29) An order postpouring sale 33
- (30) Au order refusing to alter the terms of a sale proclamation 34
- (31) An order transferring 342 or refusing to transfer 2 case 35
- (32) In order directing the loane of notice to respondents in Europe 36
- (38) An order of remand in appeal directing the trial of a particular using keeping the caso in file 37 NOTE - in order of remand of the whole case is a judgment -See Note 2 above
- (34) In order made at the settlement of issues fixing a distant date for the hearing of the suit was held to be appealable in the undermentioned case by the High Court of Madras 35 But this decision has been dissented from in the later Full Bench in I L R 34 Mid 1 and is not good law Such an order would not he appealable as it merely related to procedure.
- 4 Orders in proceedings other than suits and appeals .- The following are among the orders in mi cellineous proceedings which base teen held to be appealable as mide ments under this cliuse. Is to whether and how tar these decisions can be regarded as correct on principle, see the discussion as to the meaning of the word 'judgment' in Note 2 above --

(1876) 25 Suth W R 523 (531) (1926) 1J2a Rang Ci (64) 3 Rang 60; (But see (1307) 30 Mal 143 (141) (15:5) 24 Suth W R 1:0 (1:1), Refn ing certi Die ente I from in 35 Mad I (F L)] ficate-Sul mitted not correct (4876) 24 Suth W R 148 (143) 1.) (1.)24) 1924 Ntad 406 (407) -0 (tJ24) 1925 Mal 4"0 (471, 472) 51 Mal (1-91) 7 Cal 333 (342) 32 (1631) 21 C11 473 (475) 21 (192 ) 197, Rang 43 (1s) 2 Rang 467 23 (1924) 1324 VI ad 234 (234) 22 (1901) 21 Mrd 511 (513) (1332) 1332 Bom 184 (135 13f) 56 1 cm 7 23 (1322) 1322 Cit 172 (174) 24 (1329) 192) Ring 41 (53, 34) 6 Ring "C3 (1 1) 25 (19\_c) 11\_6 1 m 136 (1 x) (1331) 1933 Ring 45 (L. 10) 11 Ring 11 (1324) 1324 We 1 232 (233) (1327) 1327 Lab (40 (540) -4 Jab (-4 -6 (4327) 1327 Mal 4021 (t021) 36 (1320) 13.6 Lab 171 (171)

27 (1925) 1324 Mal 151 (15 ) 28 (13.3) 1923 Ltt 133 (142) 12 Pat 202 2) (132) 1326 Cst 327 (324 331)

20 (1022) 1022 (31 107 (107) 10 (31 (16

34 (4-30) 17 Cil 4"5 (457 45-) (1575 70) 1 Cal 102 (103)

24 (1631) 11 Mad 85 (73)

37 (13.7) 1.27 \(\) (317 (315)

11 (2) 2 In 1 ( to 6 to (talk) (Cal) (1918) 1318 1'at ( 50 (C-2) 11 lad Cas 53

(310) 2 lat 1 Jour 663

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Almeralin er i ne Almeralt i jurisdiction 1 (2) An inderactuating leave2 or religing to set uside an order granting leave3 to sue

un ler Cl 12 of the Letters Patent

(9) An order granting or refusing an application to commut for contempt not being an order a seed in the exercise of crummal inradiction of

(4) An order deciding the claim of relatives to the custody of a minor on a writef haleane ry es 6

(a) In order refusing to excue the delay in filing an affect under S 5 of the Limitati n Act 1 1ut a contrary view has been taken by the Calcutta High

fourt 5 (6) An order allowing the Administrator General commission at a curtain rate under

5 27 of 4ct II of 1574 9 (7) In order under 5 90 of the Probate and Administrati n Act 188110 (cor

responding of S 307 of the Succession Act XXXIX of 1925) is also an order granting probite 11 (5) In order relusing to set aside an order for the examination of witnesses

passed to the Registrar in insoliency under S 36 of the Iresidency Towns In there, Active or an order dismissing in application by a judgment creditor priving for payment of a certain sum of money by the Official As ignee 13

(3) An order under 5 215 of the Companies Act derriving cieditor of ill rights to take advantage of winding up proceedings to or an order direction, a fresh meeting the held rejecting the proxy forms used under 5 153 of the same Let 10 8 160 of the (old) Act does not contravene the right of appeal conferred by the provisions of this clause 16

(10) An order refusing to enlarge the time for the submission of an award on an application under S 13 of the Arbitration Act (1800) It or in order refusing to set aside an award, 18 or an order dismissing an application to rosoke a submission to arbitration, 10 or an order remaiting the award to arbitrators to make a fresh award 20 An order under S 19 of the let refusing to stay proceedings is appealable according to the fligh Court of Cilentia21 but not appealable according to the High Court of Rangoon 23

(11) In the undermentioned case23 it has been held by the High Court of Bombay that in proceedings under the Guardian and Wards fet 1500 it has inherent purisdiction to he it in appeal agart from the provision of this clay e

The following orders have been held not appealable -(1) An order directing the issue of a Mandamus " A contrary apinion has been

h wever expressed in the Madras Full Bench case cited below 2-(2) An order idmitting an appeal under S 5 of the Limitation Act -6

12

15 (1932) 1932 Ran, 96 (17) 10 Ring 18) 16 (LJ11) 11 Ind C is 567 (564) (Bom) 1, (1J28) 1J28 Mad 6J (70 71) J1 Mud 101

18 (1314) 1318 Cal 131 (134) 45 Cal 502

(1809) 26 C 1 361 (368) (1879) 4 Cul 231 (235) Onles refusing to tile an award in a penling suit is

appealable 19 (1909) 1 Ind Cas 14 (L) 34 Bom 1 20 (1924) 1924 Rang 47 (4b) 1 Rang 661

21 (1J20) 1920 Cal 906 (JON) 4T C ii C11 22 (1929) 1929 Rang 287 (78.) 289) 7 Rang 481 23 (1931) 1931 Bom 193 (194 195) 55 Bom

145 For a criticism of the soundness of this decision

[See 60 Vad L Jour (N 1 C) 31] 24 (1872) S Beng L R 433 (434)

25 (1910) S Ind C 15 340 (343) 35 Vad 1 (F B) 26 (1929) 1929 Cal 214 (216) 56 C il 135 (F B) [See however (1924) 1924 Rang 148

10 (1936) 23 Cal 5-0 (300) 11 (1695) 17 All 475 (477 478) 12 (1J21) 1J21 Cit 58 (62) 49 Cal 1089 13 (1302) 25 Mad 406 (409) 14 (1927) 1J27 Cil 669 (690, 691)

1 (15°0) 17 C :1 G6 (53)

5 (1837) 25 C 1 236 (239)

Lon 5

9 (1876) 1 Mad 148 (151)

7

(1667) 3 Mid H C H 381 (357 369)

51 (1J33) 1J33 Bont 109 (103) I at laming 7

(Sce also (1J19) 1919 Cal 958 (95J) Que tion left open ]

3 (1874) 13 Beng L R 91 (101) (1883) 7 Boun 5 (12)

- (3) The decision of the High Court in a Land Acquisition appeal is not appeal able under this clause according to the High Court of Majrae 27 But the High Court of Lahore24 has taken a contrary view.
- (4) in order returning an award for complying with the formulaties prescribed by S 11 (2) of the Arbitration Act 29
- (a) An order refusing an application under S 169 of the Indian Companies Ad 30 or an order under S 195 of that Act directing the directors of a company to appear in Court for examination as to their dealings 31
- (6) A decision of the single Indge of the High Court on a point of law referred to it by the Commissioner of Income lax under S 66 of the Income fax Act 32
- (7) in order dismissing an application to adjudge a person as a limitic under the
- Lunacy Act 33 5 Orders made in the exercise of Revisional Jurisdiction —Order, made 1, a ingla
- Judgo in the exercise of revisional purisdiction are not appealable under this clause A right of appeal is expressly excluded in such cases ! Where it is doubtful whether the decision appealed from is in revision or in second appeal, but the party aggriced has a right of se out appeal at must be deemed to be one passed in the exercise of appellate parasiletion ?
- 6 Orders made in the exercise of powers of superintendence —This clause excludes right of appeal in the case of orders passed in the exercise of the powers of superinteniones under S 10: of the Government of India Act, such orders are, therefore not appealable under this clause I
- 7 Orders passed in the exercise of criminal jurisdiction -No appeal lies under this clause against an order passed by a single Judge of the High Court in the exercise of its on min'il jurisdiction 1 in order of sanction to prosecute under S 195 Cr 1' Code is an order made in the exercise of criminal jurisdiction and not appealable under this clause 2 Similarly (1914) 1914 Cal 358 (353) 41 Cal 323

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(152) I Rang 584, 11 111 176 Fell]
27 (1912) 1919 Mad 626 (628) 41 Mad 943
28 (1923) 1923 Lah 275 (277) 3 Lah 290
29 (1)28) 1928 Rung 116 (111) 6 Rang 25
30 (1895) 17 All 434 (446)
31 (1924) 1928 Cal 295 (296) 55 Cal 262
32 (1925) 1925 Lah 336 (336) 6 Lah 30 Pel
lowing 1923 P C 148
(1925) 1925 Cal 598 (599) 52 Cal 546
33 (1933) 1 33 Jon 112 (113)
                                  Note 5
  1 (1924) 1 )24 Bom 824 (325)
      (1898) 22 Born 891 (892 893)
      (1921) 1921 Cal 217 (218)
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2 (1930) 1930 Mad 489 (4nJ)
                  Note 6
1 (See (1913) 20 Ind Cas 683 (684) (Mal) Case
         before the amendment of 1919-Net
         good law under the pre ent cliuse )
  (1935) 1935 (11 750 (1) (750)
                 Note 7
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1 (1910) 1916 Vad 1223 (1221) (1935) 1935 111 55 (58) (1331) 1931 111 600 (609) No appeal from erder on application under S 401 Cr P C (1918) 1919 Mad 731 (792)

(1916) 1916 Mad 970 (970) 39 Mad 537 (1916) 1916 Mad G32 (G32) 39 Mad 472 Order under 5 459 Cr P Cole (1920) 1920 Mad 144 (145) 43 Mrl 5/1 Question left open (1918) 1318 Mad 418 (t18 419) Order under

S 2,0 Cr P Cole (1315) 1315 Mrd 831 (932) 39 Mad 533

Order in revision against or ler of

Migi trate under S 118 Cr 1' Cola (1901) 27 Mad 510 (512) Order under 9 10%. Cr P Cole

(1909) 4 Ind Cas 871 (971) (Mad) (1311) 12 Ind Cas 1, 3 (153) (Mai)

(1 10.) 32 Cal 373 (151) Order granti"

(191 ) 1016 Mal 1220 (1221) 39 Mad 235 (1 to 30 Mid 711 (712)

(167 27 Ma) 63 (50, 64, 64) (1 B) (167 22 Ma) 103 (109) (159 1 Mad 100 (103) (1531) : Mal 406 (407)

(1915) 1915 7[41 450 (191)

such an order can be reroled by the authority to whi h the Judge granting sanction is subord nate.

ho cases

110 110W

an order of a Judge till Will Court staying rarining a trial senot a underneut 'ameriable under this i land 3

8 Appeal to Privy Council - V lectsion of the High Count in an appeal under this

clause is appealable to the Priva Council ! 9 Appeal in cases of disagreement among Judges of a Division Bench-See also S 98-Prior to th an on the decision of the sett r. in opi

nion As noticel in N cited below! who have

to longer law in law nis freque lie intere t

10 S 175 of the Agra Tenancy Act of precludes appeal - Section 175 of the N W P Teran v tot le i teffe t r perlu le the right of appeal conferred by this clause !

Declares that the case is a fit one for appeal -Under the present clause an appeal her ir m the h a mela single Julia of the High Court are ed in second appeal only where the Judge . . , 1 sel tle judge ent declares that the eres is i fit one for appoil 1 No hard and fast rule of he had down as to when a Judge should grant or refuse leave to appeal The mere fact that the day of the lower appellate Court is received by the High Court or the fact that the calmate in I the appeal is levond a particular figure does not by itself entitle the petitioner to a grant of leave to appeal. The pure-diction to hi int leave should not, how ever, be exerused crittrands or represents but in a judicial manner busing regard to all the circum tan e fith can 2 The High Court of Bombry in a recent decisions has held that in the matter f grating leave under this clause the Court should be guided by the same prin tiples a the e gor ming leave to appeal to the Privy Council It has accordingly refused to grant 1 are holling that the case is not one of great jublic or private importance or involving questions which may be important precedents governing numerous other cases. In I arfs

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(1594) 17 Mad 10 : (105)
   (1925) 1925 Mad 1032 (1033)
(1917) 1917 Wast 82 (83) 99 Wad 763 Oues
   (1667) 0 111 6 15 (6 17)
      tion doubted
   (1675 79) 1 All 31 (33) Hell that in order
(1917) 1917 411 474 (474) 39 411 147
(1922) 1922 Bom 455 (456) 47 Lom 270
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[See however (1916) 1918 Cal 650 (852) 44 Cal SO4 Order remanding a case to the Small Cause Judge who actused to grant a sanction under & 135, Cr 1' Code, to make a further investigation and pass orders

thercon is a "judgment" ]
3 (1915) 1918 Pat 128 (133) 3 Pat L Jour 509 Note 8

1 (1872) 21 Suth W R 263 (264) Note 9

Question left open

1 (1924) 1924 Cal 855 (856) 51 Cal 669

(1918) 1918 Cal 415 (417) (1916) 1916 Cal 811 (811) (1913) 18 Ind Cas 253 (254) (Cal) (1890) 17 Cal 2 (11)

(1834) 10 Cal 814 (816) (F B) (1884) 10 Cal 108 (109)

(1672) 18 Suth W R 209 (210) (1870) 13 Suth W R 310 (311)

(1567) 7 Suth W R 512 (312) (F B) (1869) 13 Suth W R 209 (212 215) (1870) 12 Suth W R 498 (499)

(1926) 1926 Lah 65 (67, 68) 7 Lah 179 Right of apical given by C1 10 is not destroyed merely because the Indges, though differing on ments, made a joint order regarding decree to be

passed (1910) 6 Ind Cas 357 (358) 74 Mad 121. (1902) 25 Mad 548 (550)

case is open to appeal -(1876) 1 All 181 (100, 191) (1925) 1925 Bom 118 (120) 45 Lont 6 (1 (1895) 17 A)1 475 (477, 478) (1920) 1920 Cal 316 (317)

(1916) 1916 C 1 843 (848 853) (1926) 1926 Lah 65 (63-69) 7 July 173

(1909) 1 Ind Cas 977 (984) 32 Mad 95 Note 10 1 (1904) 26 411 375 (379)

Note 11

1 (1920) 1926 Rang 1 (2) 3 Rang 546 (F B) (1931) 1931 Rang 147 (149) 9 Rang 31 (F I) (1330) 1970 Bont 367 (360) (1929) 1923 Boin 211 (241)

(1929) 1928 Born "71 (374) "2 1 om 757 application for leave can be made orally

(1930) 1930 M 1d 427 (428) 53 M id 158 2 (1931) 1931 Mad 202 (203 20a) 53 Mad 40.

(See Alan (1923) 1929 All 429 (430) Leave to appeal refused in a suit for malicions pro-ecution].

3 (1932) 1932 Born 218 (221)

- (3) The decision of the High Court in a Land Acquisition appeal is not appeal able under this clause according to the High Court of Madra 27 But the High Court of Labore28 has taken a contrary view
- (4) An order returning an award for complaint with the formalities prescribed by S 11 (2) of the Arbitration Act 29
- (5) An order refusing an application under S 169 of the Indian Companies Act 30 or an order under S 195 of that Act directing the directors of a company to appear in Court for examination as to their dealings 31
- (6) A decision of the single Judge of the High Court on a joint of law referred to it by the Commissioner of Income tax under S 66 of the Income tax Act 32
- (7) An order dismissing an application to adjudge a person as a lunatic under the Lunacy Act 33
- 5 Orders made in the exercise of Revisional Jurisdiction -Orders made by a single Judge in the exercise of revisional principous are not appealable under this clause. A right of appeal is expressly excluded in such cases 1 Where it is doubtful whether the decis on appealed from is in levision or in second appeal but the party aggreesed has a right of second appeal it must be deemed to le one massed in the exercise of appellate juris liction 2
- 6 Orders made in the exercise of powers of superintendence—This clause excludes? right of appeal in the case of orders passed in the exercise of the powers of superintandence under S 107 of the Oovernment of India Act such orders are therefore not appealable under this clause I
- 7 Orders passed in the exercise of criminal jurisdiction No appeal lies under the clause against an order passed by a single Judge of the High Court in the exercise of its cri minal jurisdiction 1 An order of sanction to prosecute under S 135 Cr P Code is an order made in the exercise of criminal jurisdiction and not appealable under this clause 2 Similarly

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(152) 1 Raug 584 11 All 176 Foll]
27 (1919) 1919 Mad 626 (628) 41 Mad 948
28 (1923) 1923 Lah 275 (277) 3 Lah 420
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- 83 (1933) 1933 bom 112 (118)
  - Note 5 1 (1924) 1924 Bom 324 (325) (1898) 22 Bom 891 (892 893) (1921) 1921 Cal 217 (218) (1915) 1915 Cal 695 (2) (695)

- (1914) 1914 Cal 388 (389) 41 Cal 329 2 (1930) 1930 Mad 489 (469) Note 6
- 1 [See (1913) 20 Ind Cas 633 (634) (Mad) Case before the amendment of 1919-Not good law under the present clau e l (1935) 1935 \11 750 (1) (750) Note 7
- 1 (1916) 1916 Mad 1928 (1924) (1935) 1935 All 55 (58) (1334) 1934 All GOG (GOJ) No appell from
  - order on application under S 491 Cr P C (1918) 1918 Mad 791 (792) (1916) 1916 Mad 970 (970) 39 Mad 537
  - (1916) 1916 Mad 632 (632) 39 Mad 472 Order under S 488 Cr P Code
  - (1920) 1920 Mad 144 (145) 43 Mad S61 Question left open
  - (1918) 1918 Mad 418 (418 419) Order under

Cr P Code (1909) 4 Ind Cas 871 (871) (Mad) (1911) 12 Ind C1s (53 (653) (Mad) (1905) 32 Cal 379 (381) Order granting

'(FB) (1907) 30 Mad 311 (312) (1890) 22 Mad 68 (80 84 99) (F B)

(1899) 22 Mad 109 (109) (1894) 17 Mad 100 (102) (1891) 14 Mad 406 (407)

such an order can be reconed the authority to which the Judge granting sanction is subordinate

an order of a Judge fight thick Court staying a criminal trial is not a middinent americally under this clause 3

8 Appeal to Pray Council - \ lect som of the Hack Count in an anneal mader the clause is appealable to the Print Council 1

Appeal in cases of disagreement among Judges of a Division Bench-See also

S 95-Prior to the amendment of this class on 1928, there was a right of appeal from the decision of the senior Julie where the Judges of a Division Loudy were causly divided in oppion As noticed in Note 1 ante such a subt of a te al has now teen taken away. The cases cited below! which were do als I under the old alsu e prior to the imendment in 1928 are now no longer law and are only I ic ime be interest

10 S 175 of the Agra Tenancy Act if precludes appeal - Section 170 of the N W P Ter ver let does not let reschule the meht of apeals effored by the clause 1

Declares that the case is a fit one for appeal - tipler the present clause in appeal hes from the de 1 ion In single July, of the High Court 1 is ed in second appeal only where the Indje the present the judge ent de lares that the cree is a fit one for mould No hard and fast rule in he but down as a whim a Julge should grant or refuse leave to appeal The mere fact that the do an an of the lower appellate Court is received by the High Court or the last that the reluction of the enjoy is beyond a particular fame, does not by itself entitle the petitioner to 1 brint of kive to appeal. The jury diction t given leave bould in t how crer, be exercised printrainly or capricionals but in a judicial manner having regard to all the encumetan es I the ca e \$ The High Court of Bombay in a secent decision his hall that in the matter I granting leave under this clause the Court should be guided by the same jem cirles as the e poverning leave to if peal to the Privy Council. It has accordingly a fused to grant leave holling that the case is not one of great put he or private and ortaine or my lying questions which may be important precedents governing numerous other cases. In isarfs

(1694) 17 7424 10 : (105)

(1917) 1917 Vid 62 (53) 99 Vad 769 Que-

tion doubted (1917) 1917 411 474 (475) 39 411 147

(1922) 1922 Bom 455 (456) 47 Lom 270 Question left own

[See however (1916) 1918 Cal 850 (852) 44 Cal 804 Order remanding a case to the Small Cause Judge who refused to grant a sanction

3 (1315)

Note 8 1, (1872) 21 Suth W R 263 (264) (1925) 1925 Mad 1034 (1033) (1867) 9 111 6 15 (617) (1874 78) 1 All 3) (33) Hell that morter

case is open to appeal -(1876) 1 All 181 (100, 191) (1935) 1925 Bom 118 (120) 45 Lond Cil (1895) 17 All 475 (477 478) (1920) 1920 Cil 316 (317) (1316) 1316 Cit 818 (818 854) (1926) 1926 Lth 65 (63 69) 7 Lah 170 (1909) I Ind Cia JT7 (984) 73 Mid J5 Note 10 1 (1904) 26 \11 375 (879)

(1929) 1923 Loin 211 (211) (1924) 1328 Born 371 (874) 52 long 751 Application for leave can be made

though differing on merits, made a joint order regarding decrea to be passed (1910) 6 Ind Cas 357 (359) 21 Mad 121. (1902) 25 Mad 548 (550)

Leave to appeal refused in a suit for malicions prosecution] 3 (1932) 1932 Rom 218 (221)

Mandar v haru Mandar 32 Courtney Terrell, C J observed is follows - 'I venture to think that leave to appeal as given somewhat too lightly and without reference to the pre e as a fit one for ap

> int of law arises in I venture to

suggest that learned Judges in exercising the responsibility given to them by the Letters Putent to hear appeals, singly, might remember that it is only when a case presents some difficulty and in which the Judge really feels that the matter before him requires further consideration by a larger Court that leave should be granted. If a Judge decides the case with confidence that should be an indication that it is not a fit case for appeal and if he ac cepts the responsibility which is east upon him by the Letters Patent his decision will be fin 1

An order refusing leave to appeal under this clause is not appealable \$

In the case cited below the High Court of Rungoons injected an application for leave to appeal which was filed four months after the magment in second appeal

- 12 Cross objections -It has been held that the provisions of the Code of Civil Pro a dure relating to cross objections do not apply to appeals under this clause 1
- Security for costs -In an appeal under this clause the High Court has power to direct the appellant to furnish security for costs and on his failure to comply their with it can reject the anject under the provisions of O 41, R 10(2) of the Code 1
- Points on which appeal may be heard -It is not ordinarily open to the parties to the on an appeal under this clause a contention which has not been urged before the Court from the judgment of which the appeal is preferred unless the point is one reliting to juitediction or 1 uses a pure question of law 2 But the Court is not however, confined to ficts and circumstances as disclosed on the judgment appealed against it is ontitled to look into the judgment of the lower appellate Court 3

Wrong exercise of discretion-Whether may be a ground of appeal -The High Court of All thabrds has held that an order passed in the exercise of judicial discretion vosted in a single Judge of the High Court is not appealable as a judgment under this clause. The High Court of Madras's has on the other hand held that the fact of a matter boing within the discretion of the original Judge is not a ground for refusing to entertain the appeal but a suffi cont reason for doclining to interfero with that discretion

| 31 (1934) 1934 Pat 466 (466)<br>4 (1J30) 1930 Bern 224 (225) 51 Bern 331<br>(1931) 1J31 Cal 571 (571 572) 58 Cal 342 | (1916) 1916 Pat 317 (319) 1 Pat L John 455<br>(1809) 12 Buth W R JS (499 500)<br>(1908) 20 All 258 (201)<br>(1909) 21 All 21 (315) (F R) |
|----------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------|
| (1980) 1930 Mad 75 (78) 52 Mad 952.                                                                                  | 2 (1890) 21 All 341 (345) (F B)                                                                                                          |

(1935) 1935 All 160 (162) 5 (1924) 1324 Rang 45 (45) Note 12. 1 (1920) 1970 Cal 776 (777)

(1503) 21 All 237 (300) (19)2) 1J22 111 J5 (5J) Followm, 21 All Note 13

1 (1321) 1921 P C 40 (82) 48 C at 481 48 Ind

11 p 76 (P C) (1J24) 1J23 Boin 3J9 (399) [But see (1904) 27 Wad 121 (123) Not ij proved in 1J21 P 6 50] Note 14

1 (1920) 1970 Lah 324 (325) 55 Ind Cas 363

(1930) 1930 Lah 632 (633) 11 Lah 535 (192J) 192J Lili 536 (537) (132a) 132 Lah 291 (281)

(1374) 1924 1 vlt 464 (469) (1324) 1924 Lvlt 251 (252) (1323) 1323 Lah 657 (657)

(1323) 1923 Lah 151 (15° 153) (1372) 1322 1 dt 188 (188 183)

(1921) 1921 Lili 820 (327) (1932) 1929 Had 617 (620)

(1331) 1931 111 893 (831) (1933) 1935 I'at 56 (59) Question of fact not rused in the pleading or it the trial Court cannot be rused in Let

ters Patent appeal (1931) 1931 Lah 144 (144) Decision of 5 single Judge in second at peal inter fering with the findings of fut Set aside in Letters Patent appeil as

being without jurisdiction (Sec also (1922) 1322 1 at 351 (24)

1 Pat 246]

(1 F) 11 11) Ir VI , 111

(1903) 26 Mrd 437 (433)

15 Limitation -Provision has been made in the Rules framed by various High Courts as to the period within which an appeal under this chaise is to be filed. Under the Rules bramed by the High Courts of Allahabid Libert Pitnes and Ringoons the memorandum of appeal under this clause need not be accompanied to a copy of the indigment or decree appealed from Hence it has been held that an appellant is not entitled to claim the benefit of an exten a n or exclusion of time under So 4 and 12 cl the Limitation Act 45

See also the undermentioned ex ex 5

16 Court fee - Prior to the amendment of a fol the Court fees act by act XXXIX of 1722 it was held in the undermentioned or col that a memoriadum of appeal under the clau c was not hable to any Court for masmuch as S 4 did not provide for appeals under this clau c. But under the amended Court less Act at as halle for payment of Court feaunder Sch 1 Art 1

Review See Note 1 to S 114 of the Code of Civil Procedure and the case cited tele v 1

Practice - Section 117 of the Code of Civil Procedure provides that the provisions of the Code shall mills to High Courts save is otherwise provided and O 40 R 3 exempts only certain provisions of the Code as not being applicable to the High Courts. Hence in a Letter Pitent appeal under this clau e the High Court can apply the provisions of O 41 R 11 1 r proceed under O 41 R 102 But as already noticed in Note 10 to S 100 the provi son of the law e are not controlled by S 100 and an order of remand though not appealed ag in t can be chillenged in an appeal under this clau e against the final judgment &

An appeal or der this clau e cannot be proceeded with if necessary parties are not im ilegich in the midermentioned er es the High Court of Wadras allowed an inject under th Clau caga the rie rie ting in the for ition for leave to appeal as a livier under O 44 P 1 1/1 tis usny a tree to the respondent observing that such a procedure was in conformity with the practice of that Court

Although a Letter, latent appeal 1 not preferred under the Civil Procedure Code the Court hearing the appeal is still an appellate Court and can exercise all the lowers of an appellate Court under the Code of Civil Procedure and as such direct the plaint to be returned for pre entation to the proper Court 6

And We do further ordain that the said High Court of Judicatme at Madias Bombay Fort William in Bengal shall be a

apreal from Courts in Court of appeal from the Civil Courts of the Presidency the provinces Bombay Benaul Division of the Presidency of Fort William and from all other Courts subject to its

surerintendence and shall exercise appellate parisdiction in such cases as are subject to appeal to the said High Court by virtue of any laws or regulations now in force

Note 15 1 (1579) 2 Ali 192 (192) (F B)

[Sec. also (1887) 9 All 115 (117) (F B) Held period of limitation is 90 days from date of judgment)

2 (1971) 1921 Lah 26 (27) 2 Lah 12" (1971) 1921 Lab 237 (238)

4a

3 (1921) 1921 Pat 365 (366) 5 Pat L Jour 701 4 (1927) 1927 Rang 20 (27) 4 Rang 26.

(Sco however (1926) 1926 Rung 143 (144) Rule 5 of High Court Rules ie

footing as leave to appeal to P C or leave to appeal as pauper

5 (1870) 13 Suth W R 216 (216) Period of limitation 30 days (1917) 1917 C11 494 (495)

(1669) 11 Suth W R 107 (10s) (1863) 12 Suth W R 458 (401)

Note 16 1 (1J22) 1922 All 164 (165) 44 All 13 (1J22) 1922 Pet 13 (13) 1 Pet 384

(1.123) 1923 Lah 215 (2 6) 3 Lah 470 (1899) 21 All 1"8 (180) [See also (1)22) 1922 Mr.1 421 (472)

45 Wid 849] Note 17

1 (1919) 1918 All 221 (221) Allihabad v ew following 1 All L J 503

Note 18 1 (1970) 1920 Pat 509 (509) 4 Pat L Jour 695

2 (1921) 1921 P C SO (82 S3) 48 C 11 481 48 Ind App 76 (PC)

3 See cases cute I'm Note 10 to S 100 [See also (1929) 1923 Mad 349 (351)]

1 (1925) 1925 Lah 392 (392) 5 (1931) 1931 Wed 198 (198 199) 53 Wed 245

6 (1934) 1334 All a51 (ap3)

| Appeal from | Courts | ın | Provinces |
|-------------|--------|----|-----------|

Synopsis Note No. Note No Subject to its superintendence

1 Appeal from Courts in Provinces -The constitution of the High Court as a Court of appeal is quite different from its man diction to hear appeals from every decree of order passed by a Subordinate Court If there is no law or regulation which allows an appeal to the High Court in a particular case at cannot assume appellate purisdiction in respect of that matter 1

Civil Courts -The term Civil Courts in this clause does not cover a tribunal croated under a paticular status for a paticular purpose. Thus no appeal will he to the High Court against the decision of a commissioner acting as in election Court under the provi ions of the United Provinces Vinnicipalities Act (II of 1916) 1

Subject to its superintendence -This clause provides that every Civil Court of a I revince is subject to the appellate jurisdiction of the High Court and S 10, of the Gove a ment of India act provides that overy Court subject to the appellate juisdiction of the High Court is subject to its powers of superintendence. Reading these two together it follows that every civil Court in a province or Presidency is subject to the High Court's right of superia tendence 1

> une Division Officer exercising Act (III of 1890) is not a Court aning of this clause 2

17. And we do further ordain that the said High Court of Judicature at [Madras ] [Bombay] Fort William in Bengal shall have Juri diction as to in the like power and authority with respect to the persons fant, and lunatica and estates of infants, idiots and lunatics within the Presidency of [Mudrust [Bombay] Bengul Division of the Presidency of Foit William as that which is now vested in the said High Court immediately before the publication of these presents

Sunoms

Note No. Note No Jurisdiction as to infants and lunatics guardian in the case of minor mem bers of Hindu joint families Power of High Court to appoint

1 Jurisdiction as to infants and lunatics -The High Court as the successor and inheritor of the powers of the Old Supreme Court has no jurisdiction under this Clause over natures of India with respect to the persons and estates of infants idiots and lumities who reside outside the ordinary original jurisdiction of the High Court 1 But in respect of 1 property British subjects the High Court could exerc so purisdiction under this clause even though these parties reside outside of and have no property within the limits of its ordinary ong pal jurisdiction 3

2 Power of High Court to appoint guardian in the case of minor members of Hinds joint families - Although a guardiai

1800, for a minor belonging to an inherent purisdiction conferred by

appointment 1 It has been held by the High Court of Allahabad that it can exercise 11

Cl 16-Note 1 1 (1,126) 1,126 411 113 (118) 48 411 104 Note 2

1 (1925) 1325 A11 380 (382) 17 A11 513 (F I ) Note 3

1 (1.)28) 1928 Mad 1032 (1014)

2 (19<sup>2</sup>2) 1)22 Mal 337 (338 341) Cl 17—Note 1

(1939) 1332 Cal J1 (99) 58 Cul J1 1 (1871) 21 (11 706 (211)

(1832) 4 All 159 (163) The Allahabad High Court has the same powers as the of the Cilcutta High Court [But see (1930) 1330 Cal 59s (5,F))

57 Cal 533] 2 (1305) 2 All L J 81 (82) The Ulihabil High Court has the same powers as that of the Calcutt 1hgh Court

Note 2

1 (t.32) 1332 Cal 503 (503) 53 Cal 570

periodiction, under the clause even though another remady by way of an application to the District Judge under the Guardian, and Wards let is open to the party?

District Judge unfor the Grantinas and Wards let is open to the party 4

18 And we do further order that the Court for relief of Insolvent Deltons of [Madras] [Bombay], Calcutte shill be held before one of the Judges of the sud High Court of Indicuture at [Madras] [Bombay] Fort William in

Bengil and the said High Court, and any such Judge thereof, shall have and exercise, within the Presidence of [Mudfas] [Bombay]. Bengal Davision of the Presidence of fart William sinch powers and authorities with respect to original and applicate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in Judy.

## Synopsis

Scope of the Clause

Note No. 1 Laws relating to insolvent debtors

I Scope of the Clause. The modelency purediction and the original tield jurisdiction of the high tourt we spraced with which the Letters Patent. Therefore U. I 2 of the Latter Patent and do, not intend the provisions of this clause, so is to limit the misol core; purisdict not the Court. Thus the High Gourt has puradiction to adjudictive in misol were year-deep or claim relating to minior while properly situated outside the limits of its ordinary original. (a) mis do not

2 Laws relating to insolvent debtors—The law of insolvency applicable to the High Courts is now ind down in the Presidency flowus Insolvency bet (III. of 1909). I not to that Act. The Insolvent Debtors a tet (Set a 11.4.12 bet of 21) was applicable. As no cases under the latter tet are undermentioned cases?

## I an to be administered by the High Court

19 And We do further orders that that, with respect to the law or equity to be applied to each case coming before the said High the exercise of ordinary original card purshitten and purshitten and purshitten and purshitten and the exercise of its ordinary original card purshitten and have or county shall be the law or

equity which would have been applied by the said High Court to such case if these Letters Patent his not issued

#### Sunopsis

Law or equity to be applied to each Applicability of English Law

Note No

(1929) 1923 I om 475 (477) (1925) 1925 All 702 (703) 50 All 702 The pure-diction as regards infants still exist in the Court but the High Court is reluctant to exercise it in the case of rount lindu farm

2 (1J34) 1934 All 7\_2 (7) (723)

Clause 18-Note 1 t (1328) 1328 Vid 732 (734) of Vind 540 (b b) (1317) 1917 Vid 932 (836) 40 Mid 810

Note 2 1 (155) 9 Bom H C R 461 (462) Futoman British subject residing in Bombay Presidency outside the town of Pomitay is entitled to apply to the High Court for adjudicating him self as insolvent

(theb) 1 Peng L R O C 84 (86 87) The jurisdiction of the Insolvency Court has teen narrowed to the Iengal Drisson of the Presidency of Fort William

i i

But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court

26 And We do further ordian that, on such point or points of law being to

High Court to review on certificate of the Advo cate General

reserved as aforesaid, or on its being certified by the said idvocate General that, in his judgment, there is an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction, or that a point or

points of law which has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right

| e., |    |      |  |
|-----|----|------|--|
| Oij | no | psis |  |

Note No Scope of Clauses 25 and 26 Power of Court on review The certificate of the Advocate General 2 Decision under the Criminal Procedure at the hearing Amendment Act

1 Scope of Clauses 25 and 26 -The High Court may review a decision of the High Court in its original criminal parisdiction in the two following cases -

(1) Where the trial Court reserves any point or points of law for the opinion of the

High Court (C1 25)

(2)

she at of

The point or points of law on which the idvocate General certifies an error in the deal sion thereof is not confined to the joint reserved by the trial Court under Cl 90 antel

- 2 The certificate of the Advocate General -The certificate is presumably granted in the interests of justice after a careful consideration of all available materials. It should not be a mero surmise, but should reflect the judgment of the Advocate General. But whether the certificate is granted after careful consideration of the materials or not when on e it is gran ted, the High Court is bound to deal with the ease ?
- 3 Procedure at the hearing it the hearing of the case on review the counsel for the accused should begin and have a right of reply 1 When a Court is called upon to review a case under this Clause, it will accept as unquestionable the statement of the trial Judge as to what actually took place before him 2
  - 4. Power of Court on review -The High Court is empowered after deciding the point

words a point as contrasted with the words Such point Note 2

1 (1915) 1915 Cal 773 (776) (P B) (1924) 1924 Cul 2.7 (261) (F B) The Advo-cate General must hear not only counsel for prisoner but also conusel

for the Crown 2 (1915) 1915 Cal 773 (776) [Sec (1839) 4 Cal W N 433 (439) It is not compulsors on Court to deal sugge has not proper ; on discretion in not grapting an ad journment Note 3

1 (1920) 1920 Cal 500 (501) 58 Ind Case (933) 47 Cal 671 (F B)

2 (1915)1915 Cal 773 (782) (1921) 1921 Cal 257 (806) Note 4

1 (1876) 1 Ca) 207 (218) 11935 1935 Vind 793 (794) (5 B) carrediction under the clouse even though another remedy by way of an application to the District Judge ander the Grandiun- and Wards Act is open to the parts 2

18 and we do further ordin that the Court for relief of Insolvent

Trous, a with it potential before at [Madras] [Bombay], Calcutty shall be had before one of the Judges of the said High Court of Indiceture it [Madras], [Bombay] fort William in Bengil at the said High Court, and any such Judge thereof shall have and Madras [Bombay].

Bengil and the said Righ Court, and any such Judge thereof shall have and exercise, within the Presidence of [Madras] [Bombay]. Bengal Division of the Presidence of Fort William such powers and authorities with respect to original and appellate paradiction and otherwise as are constituted by the laws relating to insolvent dibtors in India.

Synopsis

Scope of the Clause

Note No. Note No. 1 Laws relating to insolvent debtors 2

- I Scope of the Clause. The insolvines jurisdiction and the original civil jurisdiction of the high Cutt or systacts do its with in the factors Patent. Placefore of 12 of the Letters Patent and e. 12 of the promisions of this clause we is to limit the most vency purshists in of the term. This is the High Court has purshists to adjudent in most vency praceding on chains returne to missake property situated outside the limits. I are ordinary original with jurisdiction.
- 2 Laws relating to insolvent debtors —Tho law of insolvence all like ble to the High Courts is nor laid down in the Previdence fromas Insolvence to title of 1000 | 1 ray to that Act The Insolvent Debtors to the State 11 & 12 bet e 21) was applicable. As to case under the latter for an International cases.

## I an to be administered by the High Court

19 And We do further ordain that, with respect to the law or equity to be applied to each case coming before the said High the exercise of ordainer original and pairs it in Bengal in the exercise of its ordainity original end pairs in the exercise of its ordainity original end pairs in the exercise of its ordainity original end pairs in the exercise of its ordainity original end pairs in the exercise of its ordainity original end pairs in the exercise of its ordainity original end pairs in the exercise of its ordainity original end pairs in the exercise of its ordainity original end pairs in the exercise of its ordainity original end pairs in the exercise of its ordainity original end pairs in the exercise of its ordainity original end pairs in the exercise of its ordainity original end pairs in the exercise of its ordainity original end pairs in the exercise of its ordainity original end pairs in the exercise of its ordainity original end pairs in the exercise of its ordainity original end pairs in the exercise of its ordainity original end pairs in the exercise of its ordainity original end pairs in the exercise of its ordainity original end pairs in the exercise of its ordainity original end pairs in the exercise of its ordainity original end pairs in the exercise of its ordainity original end pairs in the exercise of its ordainity original end pairs in the exercise of its ordainity original end pairs in the exercise of its ordainity original end pairs in the exercise of its ordainity original end pairs in the exercise of its ordainity or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise or exercise o

equity which would have been applied by the said High Court to such case if these Latters Patent had not issued

Synopsis

Law or equity to be applied to each Applicability of English Law case

Note No

- (1923) 1323 four 473 (477) (1928) 1928 All "O) ("O)) 50 All 503 The purellation is regards infants still exists in the Court but the fligh Court is includant to exercise it in the case of joint Illindu fam
- Jies 2 (1331) 1931 All 722 (2) (723)
- Clause 18—Note 1 1 (132n) 1328 Mad 732 (731) J. Vint. 540 (F. Is)
  - (1317) 1317 Mal 532 (536) 40 Mal 810
- Note 2 1 (1991) Bom H C R 461 (462) I thorain
- British subject residing in Boinbay Presidency outside the town of Combay is entitled to apply to the High Court for and decisions
- (1868) 1 Eeng L R O C 84 (56 87) Tho jurisdiction of the Insolvency Court has been narrowed to the Bengal Division of the Presidency of Fort William

Suntonsis

Appeal from Courts in Provinces Civil Courts

Note No Note V Subject to its superintendence

Appeal from Courts in Provinces - The constitution of the High Court as a Court of 11 peal 18 quite different from its jurisduction to heat appeals from every decree of order passed by a Subordinate Court If there is no law or regulation which allows in appeal to the High Court in a particular case it cannot issume appellate jurisdiction in respect of that matter 1

Civil Courts -The term Civil Courts in this clause does not cover a tribunal croited under a particular status for a particular purpose. Thus no aspeal will be to the High Court against the decision of a commissioner acting as in election Court under the provisions of the United Provinces Municipalities 4ct (II of 1016) 1

Subject to its superintendence -This clause provides that every tivil bourt of a Province is subject to the appellate juri-diction of the High Court and 8 107 of the Govern ment of India act provides that every Court subject to the appellate jurisdiction of the High Court is subject to its powers of superintendence Reading these two together, it follows that every civil Court in a province or Presidency is subject to the High Court's right of supena tendence 1

The High Court of Madras has held that a Rosenus Division Officer exercising jurisdiction under S 7 of the Madras Hereditary Village Officers' Act (III of 1895) is not a Court subject to the superintendence of the High Court within the meaning of this clause 3

And we do further ordain that the said High Court of Judicature at [Madras.] [Bombay], Fort William in Bengal shall have Juri-diction as to in the like power and unthouty with respect to the persons fints and lunities and estates of infants, idiots and lunatics within the Presidency of Madias [Bombay] Bengil Division of the Plesidency of For: William as that which is now vested in the sud High Court immediately before the publication of these presents

Synopis

Note No Note No guardian in the case of minor mem Jurisdiction as to infants and lunatics hers of Hindu joint families Power of High Court to appoint

Jurisdiction as to infants and lunatics -The High Lours as the successor and inheritor of the powers of the Old Supreme Court, has no jurisdiction under this Chase over natives of India with respect to the persons and estates of infants idiots and lunit es, who reside outside the ordinary original jurisdiction of the High Court 1 that in respect of Lancpeau British subjects the High Court could exercise junisdiction under this clause even though these parties reside outside of and have no property within the limits of its ordinary ong nal jurisdiction,2

Power of High Court to appoint guardian in the case of minor members of Hinds joint families - Although a guardian

1890, for a minor, belonging to an inherent prisdiction conferred by

appointment 1 It has been held by the High Court of Allahabad that it can exercise

Ci 16-Note 1 1 (1926) 1926 All 113 (113) 48 4H 101

Note 2

<sup>1 (1925) 1325</sup> All 380 (352) 47 All 513 (F 1) Note 3

<sup>1 (1</sup>J28) 1929 Mad 1032 (1044) 2 (1922) 19°2 \Lad 337 (388 341)

CI 17-Note I

<sup>1 (1932) 1932</sup> Cal 91 (92) 58 Cat 919 (18 11) 01 Cat 906 (211)

<sup>57</sup> Cal 533) 2 (1905) 2 All L J S1 (82) The Ulrhabit High Court has the same powers as that of the Calcutta High Court

Note 2 t (1332) 1932 ( 11 502 (503) 53 Cal 570

#### Cenain d Jurisdiction

22 And We do further old in that the said High Court of Judicature at Calcutta, [Madias ] [Bombay] shall have ordinary on

Ordinary original mix a ction of the High Court

-mai criminal muscliction within the local limits of its ordinary original civil muscliction, and also in respect of all such persons, beyond such limits over whom the

and Hall Court of Judic store at Calentta [Mada as.] [Bombar] shall have common prisdiction at the date of the publication of these presents

23 and We do further ord un that the said High Court of Judicature at Madris | [Bombas.] Fort William in Bengal in the excicise of its ordinary original criminal unisdiction Jan litius to ter

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shall be empowered to tax all persons brought before at in due course of law

\nd We de further onlain that the said High Court of Judicature at Bombay1, Fort William in Bengal shall

Extraoidinary original have extraordinary original criminal jurisdiction over ill persons residing in places within the jurisdiction of criminal priedi ti n in Court now subject to the superintendence of the said

High Court and shall have authority to try at its discretion any such persons brought before it on charges preferred by the Advocate General or by any Magistrate 1 ther other specially empowered by the Government in that

behalf

Sunonsis

\ote \

Note No High Court Extraordinary eriminal jurisdiction Subject to the superintendence of the Practice in the Calcutta High Court

1 Extraordinary criminal jurisdiction — The High Court can under this Clause remove a criminal case in in the mofinesit and have it before itself 1 Where a commitment is made to the High t wil be 101 . In a case in which the Sessions Court of a division has local puredistion the High Court can a gross by of expediency and convenience direct the trial to proceed in the fligh (ou t 1 If and the min tim mt is not hible to be quash d for want of jurisdiction 2

2 Subject to the superintendence of the High Court - The Court of the Judicial Superintendent of Railways in the Nizam's Dominions is subordinate to the High Court of Lombay in re pect of all criminal matters reliting to European British subjects ! The Griminal Courts in Santal Pargan is subordinate to the Sessions Court have been declared by Regulation V of 1893 to be not subordinate to the High Court and therefore no not subject to its superintendence 2

3 Practice in the Calculta High Court - in application to exercise the musidiction under this Clause must be made according to Ch 37 R 2 of the Crown Side Rules of the Calcutta High Court on the appetiate side 1

25 And We do further ordain that there shall be no appeal to the said High Court of Judicature at [Madras] [Bombay], Fort

No appeal from High Court exercising original purisdiction - Court may reserve points of law

William in Bengal from any sentence of order passed or made in any criminal trial before the Courts of original criminal jurisdiction which may be constituted by one or more Judges of the said High Court

Cl 24-Note 1 Contra Bayley, J 1 (1932) 1932 Cal 229 (230) 2 (1920) 1920 3Iad 824 (825) 2 (1998) 1928 Pat 241 (942) 7 Pat 837 5t Ind C 18 468 (4"0) 4º Mad 79t Note 3

Note 2 1 (189o) J Bom 288 (235) Per Sugent C J 1 (1932) 1932 Cil 394 (395) CPC 394 & 395

# Other Topics

Questions relating to Muhammadan mosque- See Note 1 F N. (3).

Whether Muhammadan Lan could be ap Plied

- 1 Law or equity to be applied to each case, The Letters Patent of 1862 which were revoked by the mesent Letters Pitent of 1862 provided in Ct 18 thereof that the law or equir to be applied to the cases coming before the High Court shall be the liw or equity which would have been applied by the Supreme Courts at Calcutta Bombay and Madras respectively By the Charters constituting the Sapreme Courts they were expressly made Courts of equit and given equitable juri-diction corresponding to that of the Court of Chancery in England And the High Courts of Cilcults Brmbrs and Midres have now succeeded to the jurisdiction conferred upon their predecessors the Supreme Courts and exercise the same equitable juris diction? But such jurisdiction cannot be employed to subsert the native substantive laws It only affords a means of continually amehorating them and so preventing their desirtule by a system of rules horrowed from the English Courte of courty 3
- 2 Applicability of English law tecording to the Charter Acts 'Justice equity and good conscience are the true guides and therefore the High Court on the original side if not bound to decide questions on the bish of English precedents and English Common Law Procedure where the following of such precedents and procedure may be against justice entrits and good conscience 1
- 20 And We do further ordern that, with respect to the law or equity and rule of good conscience to be applied to each case coming before the said High Court of Judicature at [Madras] In the exercise of extraordinary original civil [Bombay], Fort William in Bongal in the exercise of its intradiction extraordinary original civil jurisdiction, such law or

equity and rule of good conscience shall be the law or equity and rule of good conscience which would have been applied to such case by any local Court having mrisdiction therein

21 And We do further ordun that the said High Court of Judicature at Fort William in Bengal shall have ordinary original cummal jurisdiction within the local limits of its ordi By the Righ Court in the exercise of appellate party original civil jurisdiction and also in respect of all furisdiction

such persons both within the limits of the Bengal Divi sion of the Presidency of Fort William, and beyond such limits and not within the limits of the criminal jurisdiction of any other High Court or Court establishe? by competent legislative anticorrity for India as the said High Court of Judicature at Fort William in Bengal shall have criminal jurisdiction over at the date of the unblication of these presents

I Scope-It has been held by the High Court of Madres in the undermentioned cie. that the principle of S 119, Transfer of Property Act 1882, is a rule of equity and real applied to a case not governed by that Act

#### Cl 19-Note 1

1 (1875) 22 Sath W R 370 (374) (See also (1909) 3 Ind Cas 9,0 (990 991) 33 Dom 469]

2 (1927) 1927 Bom 278 (286) J Lona 516 (F B) The Court must first acquire junsdiction under Cis II and 12 lefore applying the Law or equity applicable under C1 19]

[See also [1921] 1921 Bom 333 (31) Mahomedan Law applied in de iding questions relating to Willowing mo-que)

Note 2

1 (1915) 1915 Vad 331 (916) 33 Vad ala (But me (1882) 5 17rd 37 (40) Cl 21-Note 1

1 (1 117) 1917 Vad 390 (393) 35 Ind Cus 32

3 (1850 51) 5 Bom 1.4 (173)

Note No

### Criminal Juris liction

22 And We do further old in that the said High Court of Judicature at Cilcutti, [Madras ] [Bombis] shall have ordinary on

Ordinary or gingl jur a ction of the High Court

and erinned presdiction within the local limits of its ordinary original civil purisdiction, and also in respect of all such persons beyond such hunts over whom the

and High Court of Judic sture at Calcutta [Mada is ] [Bombay | shall have common! prisdiction at the date of the publication of these presents 23 And We do further ord in that the said High Court of Judicature at

in due course of law

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Madres Bombis | Fort William in Bengal in the exercise of its ordinary original communal jurisdiction shall be empowered to try all pursons brought before it

24 Inl We d

further orden that the said High Court of Judicature it Lort William in Bengal shall Bombis in nal have extraordinary organical communal purisdiction over ell persons residing in places within the jurisdiction of ing Court now subject to the superintendence of the sud

High Court and shall have anthurity to the at its discretion any such persons brought left re it in charges preferred by the Idvocate General or by ins Magistrate at other officer specially empowered by the Government in that

behalf

Synopsiv Yote Yo High Court

Extraordinary criminal jurisdiction Subject to the superintendence of the Practice in the Calcutta High Court 1 Extraordinary criminal jurisdiction - The High Court can noder this Clau e

temore a criminal case from the moffu sil and have it before itself! Where a commitment is made to the High Court be slous in a case in which the Sessious Court of a division has local presidention the High Court can on grounds of expediency and convenience direct the trial to proceed in the High Court tell and the commitme it is not hible to be quashed for want of jurn-dulion 4

2 Subject to the superintendence of the High Court -The Court of the Judicial buperintendent of Railways in the Vicam's Dominions is subordinate to the High Court of Lombay in respect of all criminal matters relating to European Lertish subjects 1 The Criminal Courts in Santal Largania subordinate to the Sossions Court have been declared by Regulation V of 1893 to be not subordinate to the II 5h Court and therefore are not subject t its superintendence 2

3 Practice in the Calcutta High Court - tu application to exercise the purisdiction under this Clause must be made according to Ch 37 R 2 of the Crown Sido Rules of the

Calcutta High Court on the appellate a de 1

And We do further ordain that there shall be no appeal to the said High Court of Judicature at [Madias ] [Bombay] Fort William in Bengal from any sentonce or order passed No apreal from High or made in any criminal trial before the Courts of original criminal jurisdiction which may be con

stituted by one or more Judges of the said High Court

Court exercising original jurisdiction - Court mix reserve points of law

Contra Bayley J Cl 24 Note 1 1 (1932) 1932 Cal 229 (230) 2 (1928) 1978 Pat 241 (942) 7 Pat 337

51 Ind C s 469 2 (1920) 19.0 Mad 824 (825) (4"0) 42 Mad 791 Note 3

Note 2 1 (188a) J Bot 1 288 (2Ja) Per Sugent C J (ر 3) 1932 C 1 (1932) 1 CPC 394 & 395

cate (mnera)

But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court

law for the opinion of the said High Court

26 And We do further ordian that, on such point or points of law being so

High Court to review on certificate of the days

reserved as aforesaid, or on its being certified by the said Advocate General that in his judgment, there is an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction, or that a point or

points of law which has or have been decaded by the said Court should be further considered, the said High Court shall have full power and authority to review the case or such part of it as may be necessary and finally determine such point or points of law and thereupon to after the sentence passed by the Court of original jurisdiction and to pass such judgment and sentence as to the said High Court shall seem justs

## Lynopsis

Scope of Clauses 25 and 26 1
The certificate of the Advocate General 3
Procedure at the hearing 4
Amendment Act 5

1 Scope of Clauses 25 and 26—The Righ Court may review a decision of the High Court in its original criminal jurisdiction in the two following cases —

(1) Where the trial Court reserves any point or points of law for the opinion of the

High Court (C1 25)

(2) Where the Adverte General ectifies that in his judgment there is an error in the decision of a point or points of law decided by the trial Court or that a point or points of law so decided should be further considered (Cl. 20)

The point or points of law on which the Advocate General certifies an error in the decision thereof is not confined to the point reserved by the trial Court under Cl 20 aniel

- 2 The certificate of the Advocate General—The certificate is jresumably granted in the interests of pastness after a careful consideration of all analytic materials. It is build not by a more surmuse but should reflect the judgment of the Advocate General. But whether the certificate is granted after circuit consideration of the materials or not when once it is granted the flight Court is bound to dest with the case.
- 3 Procedure at the hearing ht the hearing of the case on review the counsel for the accused should begin and have a right of reply 1. When a Court is called upon to review a case under this Clause: it will accept as unguestionable the statement of the tiral Judge as to what actually took place before him?
- A Power of Court on review —The High Court is empowered after deciding the point it can upon reviewing the violation of certified to pass such judgment or sentence as it may think right. In other words it can upon reviewing the whole case either quash or confirm the courtion 1 But this can however be done only when the High Court decides that there has been an error of law, if there has been no such error there is, no power to deal with the case further? Otherwise an accused person who could obtain an exertificite under this clause could in effect obtain an appeal on its
  - Cls 25 & 26 Note 1 1 (1930) 1930 Mad W N 249 (249) See the words a point as contrasted with the words Such point
  - Note 2 1 (1915) 1915 Cal 773 (776) (F B)

(1924) 1924 Cal 2.7 (261) (F B) The 'idvo cate General must hear not only counsel for prisoner but also coun el for the Crown

2 (1915) 1915 Cal 773 (716) (bee (1899) 4 Cal W N 433 (439) It is not compulsor, on Court to deal with a certificate in which the idvocate General thinks that the in-Judge has not properly exercised his discretion in not granting on aljournment Note 3

Note 3 1 (1920) 1920 Cal 500 (504) 55 Ind Cas 0')

(933) 47 Cal 671 (F B) 2 (1915)1J16 Cal 773 (782)

(1924) 1J24 Cal 257 (306) Note 4

1 (1876) 1 Cal 207 (218) (1935 1335 2116 733 (791) (S D) III. HIGH COULT TO BELIEV ON CLETIFICATE OF ADVOCATL-GLNERAL 3147

several of his sextence, while an accessed who could not obtain such a certificate, would not have the same trailege

The High Court has no power under this clause to remit the case for a fresh trial3 or to reoten any question decided by the trial Judge other than the one reserved or certified \$

5 Decision under the Criminal Law Amendment Act -The judgment of a special Criminal Banch canetitated under 5 6 of the Indian Criminal Law Amendment Act of 1908 is open to reasew under this Clause on a certificate granted by the Advocate General 1

27. And We do further ordain that the said High Court of Judicature at 'Madras , [Bombay], Fort William in Bengal shall be a Court of appeal from the Criminal Courts of the Picsi-Appeal from Criminal deney of [Madras ] [Bombay], Bengal division of the Courts in the Provinces.

Presidency of Fort William and from all other Courts, subject to its superintendence, and shall exercise appellate jurisdiction in such cases as we subject to appeal to the said High Court by virtue of any liw nowlin

Subject to its superintendence See Note 1 Pt (2)

1 Criminal appellate purisdiction -The High Court his been declined under this clau e to be a general Court of criminal appeal the actual exercise of the appellate jurisdiction being defined by the conclud no port on of this clause !

It has been held in the undermentioned case? that the general power of superintendence conferred to \$ 10, of the Congrument f India total different from the superintendence stoken of in this lause

28 and we do further ordain that the said High Court of Judicatine at Madras . Bombay Fort William in Bengal shall be a

Hearing of referred cases and rev ion of criminal terals

force

Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction and shall have power to bear and determine all such cases referred to it by the Sessions Judges or by any other Officers now authorized to refer cases to the said

High Court, and to revise all such cases tiled by any officer or Court possessing criminal jurisdiction as are now subject to reference or to revision by the said High Court

1 Criminal revisional jurisdiction -The II .h Court has a general power of superin tendence under this clause over the Criminal Courts subject to its appellate juri diction. It can revise the decisions of such Lourts It is all o a Court of reference empowered to determine referen ca made to the Sea ions Judges or by any such officer as to referred to in this clause The light t urt of Bombay has thus power to quash proceedings before a village I atil under its lowers of super ntendence ! It cannot under this Clause revise an order of the Secretary to the Bengal Covernment 199uing a warrant under the Goondas Act (I of 1923) ince much as such person was not an officer to essing criminal juri-diction at the time of the issue of the Letters I atent

(1920) 1920 Cal 500 (502, 503, 510) 2 (1921) 1924 Cal 257 (285 315) (1934) 1934 All 273 (275 276) 56 All 428 (1915) 1915 Cul 773 (779 751 783) (1919) 1919 Cal 142 (144) (1017) 1917 Cal 123 (126 129 131) (1890) 17 Cal 642 (667 668) 3 (1920) 1920 Cal 500 (502 509 510)

(1889) t6 Cal 239 (214 245) 4 (1908) 32 Bom 111 (132 145) Per Datar and (1923) 76 Ind Cas 966 (967) (Cat) Beaman JJ (1912) 14 Ind Cas 896 (901 902) (Mad). (1908) 32 Bom 111 (120) High Court has

power to review the whole case and Note 5 1 (1912) 14 Ind Cas 896 (898 908 923, 940) not only quash the wrongty admitted evidence (Mad)

(1877 78) 2 Bom Gt (65) Cl 27-Note 1 1 (1921) 1921 Cal 703 (715) 48 Cal 9.5 2 (tJ18) 1918 Pat 103 (107) 3 Pat L Jour 581, (1930) 1930 Mad W N 249 (280) Misdirection to jury may amount to a point of law and may be reviewed provided CJ 28-Note 1

the accused was really prejudiced

thereby

1 (1919) 1919 Bom 79 (50) 2 (1921) 1924 Cal 698 (700) 51 Cal 460 The High Court heaving a reference under 8 307 of the Criminal Procedure Code hears it as a Court of reference in the execuse of the jurisdiction vested in it under this clause and not in its original criminal jurisdiction.

As to whether the High Court can reside in order of discharge lasted by a Presidency Magistrate see the undermentioned cases 4

29 And We do further ordain that the said High Court shall have power

High Court may direct the transfer of a case from one Court to another to direct the transfer of any criminal case or appeal from my Court to any other Court of equal or superior juris diction, and also to direct the preliminary investigation or trial of any criminal case by any officer or Court

otherwise competent to investigate or try it though such case belongs in ordinary course to the mirediction of some other officer or Court

Synopsis

Transfer of criminal case

Note No. 1 | Practice of the Calcutta High Court 2

Other Topics

Equal or inferior jurisdiction Sec Note 1 Power of High Court to stay 1 to ceding Sec Note 1 Pt (4)

1 Transfer of Criminal Case --Under this clouse the High Court is emponed to direct the transfer of any criminal rese on spother Court of equal or superior jurisdiction. The words from any Court must be read as from any Court subordinate to the High Court authority. Thus the Allahrbad High Court is no jurisdiction to transfer a case from a panchavat constituted under the pion your last the Direct Provinces Act VI of 1920?

The word Crim nal Case in the clause will include proceedings under S 145 of the Criminal Procedure Code 3

The power of suferintendence confeired by this Clause includes by implication the power to send for the exceed of any case pending in the lower Courts this must inceed any have the effect of stating further proceedings in the case in that Court. The High Court has power therefore to stay criminal proceedings instituted on a sanction by a Civil Court under S a of the Criminal Procedure Code till the disposal of the appeal from the Civil Court.

See also the undermentioned case 5

2 Practice of the Calcutta High Court —An 11 heation to exercise the jurisdiction confered by this clusto must be made according to Cb 37 R 2 of the Grown Sido Rules on the appellate side of the Calcutta High Court

The Stuart Js provailing judgment has Konhayalat J contra a nail 3 (1901) 28 Cal 709 (720) Per Taylor J

4 (1908) 31 Mad 510 (511)

5 (1928) 1928 Pat 241 (242) 7 Pat 337 Apr Plication for transfer from one Cri

minal Court to another in Satal Parganas—High Court has no jur r diction as it has no powers of super intendeure over intermediate Cri minal Courts in Santal Parganas

Note 2.

1 (1932) 1932 Cal 394 (395)
[See (1932) 1932 Cal 123 (123) Appl a
tion upon a complaint for taking
proceedings against a person not in
India does not he under this Clau e)

4 (1900) 27 Cal 126 (130) Cl 28 does not apply but only S 15 of the High Courts Act (1893) 26 Cal 746 (748) Clause 28 allhes

Cl 29-Note 1 1 Single Judge of the High Court has lower

to make this transfer (1905) 29 Dom 575 (579) (1871) 15 Suth W. R. Cr 69 (70)

(1912) 14 Mad 121 (125) (1883) 6 Mad 32 (30) (1911) 11 Ind Cas 7 % (7 %) 35 Mad 739

(1911) 11 Ind Cas 7 % (7 6) 35 Mad 739 2 (1924) 1924 M1 265 (266) 46 M1 167 Lor

### Cumpal Lan

30 And We do further ordern that all persons brought for trid before the and Hah Court of Judientino at [Madias] [Bombay] Post William in Bengal either in the evereise of its Oil, aders to be tamshed

under Indian Panal Code

HII

outsinal purisdiction, or in the exercise of its imposition is a Court of appeal, reference of revision, charged with any offence for which provision is made by let No XLV of 1860 called the

"Indian Penal Code, or by any let amending or excluding the sud Act which may have been passed prior to the publication of these presents shall be hable to nunishment under the said let or lets, and not otherwise

1 Offenders to be punished under the Indian Punal Code -- The offenders brought for trial before the High Court should be numbed outs under the provisions of the Indian Penal Code the High Court cannot engraft thereon the rules of the Common Law of England 1

Francis or a resolution elsewhere than at the ordinary place of sitting of the High Court

Judges may be autho rized to it in a plac b way of circlit or special commission

31 and We to further ordum that whenever it shall appear to the Governor to Conneil convenient that the jurisdiction and power by these Our Letters Patent or by the recited Act, vested up the said High Court of Judicature at [Madras]. (Bombay) Fort William in Beneal should be exercised in any place within the muscliction of any Court new sub

sect to the superintendence of the said High Court other than the usual place of sitting of the said High Court, or at several such places by way of circuit, the proceedings in cases before the said High Court at such place or places shall be regulated by any law relating thereto which has been or may be made by compotent legislative authority for India

## Iditionalty and Vice Idmiralty Jurisdiction

32 And We do further ordain that the said High Court of Judicature at [Madras | Bombay] Lort William in Bencal shall bave Civil and exercise all such civil and maintime maisdiction as may now be exercised by the said High Court as a Court of Admiralty or of Vice Admiralty and also such jurisdiction for the trial and adjudication of prize causes and other markime questions around in India as may

now be exercised by the said High Court

Sanoni

Civil and maritime jurisdiction

Note No

` t No | Necessaries supplied to a ship 1 Civil and marstime jurisdiction - The effect of this Clause is to acet the High

Courts with such civil and maritime perisdiction as might have been exercised by the Supreme Courts under their respective charters 1 2 Necessaries supplied to a ship - Refere the passing of the statute 3 t 4 Net

Ch , 65, it was held in Lugland that the Court of Admiralty in Lugland had no jurisdiction in the case of necessaries supplied to a ship though perhaps it occasionally purported to exercise the jurisdiction where not prohibited 1 The same view was also held in India 2

Cl 30-Note 1 1 (1921) 1921 Cal 1 (6) 48 Cal 388 (S.1) C1 32-Note 1

Note 2 1 (1872) 4 P G 161 The two Ellens Johnson v Black-Oit d in 1915 Cal 681(683) (18%) II 1 C 270 mm 112 mm 12

(1315) 1915 Cal 691 (C93) 42 Cal Sa

2 (1843) 1 Fulton

It was also held subsequently in the nundermentioned case. 3 that the powers conferred by the above statute as extended by 24 bet e 10 (the Admiralty Courts Act of 1801) and not become rested in the High Courts by rutue of their several Letters Patents. But at present the jurisdiction of the High Court in relation to necessaries supplied to a ship rests on the Colouril Courts of Admiralty Act 1800 53 & 51 Vect c 27 which tests in it sides and the powers described in \$5 50 24 Vect c 10 And nuder \$5 50 the latter statute the High Court in its Admiralty side has jurisdiction over any claim for occassaries supplied to any ship elsewhere than in the jurt to which the ship Court belongs 4

33 And We do further ordain that the said High Court of Judiciture at [Madass I [Bomhay] Fort William in Bengal shall have and exercises all such ciminal jurisdiction as may now be exercised by the said High Court as a Court of Mamiralty or of Vice Admiralty or otherwise in connection with maintained matters or matters of pure

#### Testamentary and Intestate Jurisdiction

34 And Wo do further ordain that the said High Court of Judicature at [Madias] [Bombas] Fort William in Bengal shall have the hike power and nuthority as that which may now be lawfully exercised by the said High Court in relation to the granting of probates of last wills and testaments and

letters of administration of the goods chattels credits and all other effects whatsoever of persons dying intestate within or without the Presidency of [Madrus] [Bombuy] Bengal Division of the Presidency of Fort William Provided always that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India by which power is given to any other Court to grant such probates and letters of administration.

#### Synopsis

Note No

Note No
Letters Patent Bombay and Madras 1 Testamentary and intestate jurisdiction

## Other Topies

Jurisdiction of High Court to great Probate or Letters of Administration See Note ? Pt (1)

- 1 Letters Patent Bombay and Madras —For Bombay and Madras after the vords exercised by the said High Court read as follows --
- In relation to the grinting of Probates of last valls and testaments and letters of administration of the goods chattels credits and all other effects of persons during inte late whether within or without the Presidency of Bombay (Madras)
- 2 Testamentary and intestate jurisdiction—The High Court of Midras has held that it has no jurisdiction to grant probate of the vill of a testator or letters of shout tration to the estate of an intestate who did not dwell and who did not leave as ets vibil the limits of the Midras Presidency 1
- The High Court acting under S 302 of the Indian Soccession Act \\\\\ of 19 5 acting unsurance of the jurisdiction vested to it under this Clause and not in its ordinary Or 5 st. Civil pursuitation <sup>2</sup>

ı

<sup>-</sup>Referred in 42 Cal b5

tion

### Matrimonial Jurisdiction

35 And We do further ordain that the said High Court of Judicature at [Madias] [Bombay,] Fort William in Bengal shall have jurisdiction, within the Presidency of [Madias] Matrimon al juri-dic

[Bombay,] Bengal Division of the Presidency of Fort William in mitters matrimonial between Our subjects

professing the Christian religion. Provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matumon al by any Court not established by Royal Charter within the said Presidency lawfully possessed thereof

### Synopsis

Note No Note No Between our subjects professing the Respondent not within the Presidency Christian religion Matters matrimonial Both parties other than Christians ž

- 1 Between our subjects professing the Christian religion -This Clause was intended to it like in a wider and modern form the coole justical juri-diction of the Supreme C urt and its so pe was confined to proceedings in which both the parties were Christians I Se als Paragraph 33 of the Despit b from the Secretary of State dited 14th May 1861 mignan, the first Letters Patent of the Calcutta High Court 12 But the limitat on has now teen removed by the enactment of the Indian Divorce Act IV of 1869 which does not require that both parties should profess the Christian religion. The High Court has therefore purisdiction to entertain a suit for restriction of conjugal rights instituted by a Christian woman against her husband who is a Parsee 3
- Both parties other than Christians -it was held by the Privy Council in the undermentioned case! that the Supreme Court of Bombay had no jurisdiction to enter tun a suit on it, ecclesiastical side by a Parsee wile against a Parsee husband for the restitution of conjugal rights. Their Lordships of the Privy Council also observed is follows -

Ent we should much regret il there were no Court and no law whereby a remedy could be administered to the evils which must be incidental to mair ed life igning them Clan e 12 auto was intended to remove this difficulty and by virtue of that Claise the High Court has juri diction to entertain a uit arising out of matrinioni id putca between terson other than Christians for instance between Jews 2

- 3 Respondent not within the Presidency The High Court has 10 jurisdiction to grant elsefit was of relitation of conjugal rights against a re-pondent who is absent from the presidence at the time the suit is justified and remains absent sub equently al<sub>o</sub>o l
- 4 Matters matrimonial -The jurisdiction of the High Court in matters matri monial is only such jurisdiction as is comprised within the provisions of the Indian Divorce Act IV of 1669 therefore a sust for a declaration that a marriage was a valid and lawful marriage does not he 1 Similarly a suit does not he under this Clause to declare a marriage null and told on the ground that the essential ceremonies have not been performed 2

Cl 35-Note 1 1 (1926) 1326 Bom 16J (173) 50 Bom 369 la Appendix III

2 (1950) 1950 Bom 385 (389 390 399) 54 Bom 877 (F B) Overruling 20 Ind C is

Note 2 1 (18.6) 6 Noo Ind App 348 (390) (P C) 2 (1926) 1976 Bom 16J (173 174) 50 Bom 369 (See also (1930) 1930 Cal 558 (508 5.9) 57 Cal 1089 Suit for indical

separation - Parises professing Jewish religion-Wife praying for order against her husband to pay her costs-Clause 35 does not apply but Clause 12 applies and case is governed by S do C P Code] Note 3

1 (1914) 1914 Bom 211 (213) 38 Bom 125 Note 4

1 (1923) 1923 Pat 301 (802)

2 (1934) 1934 All 273 (275 276) of All 429

# Powers of Single Judges and Division Courts

Single Judges and Divi

36 \(\text{nd}\) We do heroby declare that any function which is hereby directed to be performed by the said High Court of

Judicature at [Madras] [Bombay,] Fort William in Bengal in the exercise of its original or appellate

pursidetion may be performed by any Judge, or by any Division Courthered, appointed or constituted for such purpose, in pursuance of section 103 of the Government of Indr. Act, 1915 and if such Division Court is composed of two or more Judges and tho Judges are divided in opinion as to the decision to be given on any point such point shall be decided according to the opinion of the majority of the Judges if there shall be a majority, but if the Judges should be equally divided they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the imajority of the Judges who have heard the case including those who first heard it

## Synopsis

Amendment of the Clause
May be performed by any Judge or by
any Division Bench thereof

When the Judges are equally divided 3 Reference 4

1 Amendment of the Clause -

- (1) The words in pursuance of S 108 of the Government of India tot 1015 were substituted for the words under the provisions of the 13th section of the afore said Act of the Twenty fourth and Twenty fifth vers of our reign by the unused Letters Patent of 11th March 1919
- (2) By the unendment of the Letters Patent in 1928 the words following the words equally drieded till the ond of the clause were substituted for the words the opinion of the Science Judge shall gravil. As to the effect of this amend ment zer Note 12 to 8 98 Crist Procedure Code.

2 May be performed by any Judge or by any Division Bench thereof —Where the Court takes action in contempt proceedings the rule used not be issued by the Court as arentire body 4 single Judge or Division Bench has jurisdiction to resuct the rule 1

entiro body A single Judge or Division Bench has jurisdiction to issue the rule!

The fact that a inatter coming before second appellate Court constituted by a single
Judge in High Court is one of difficulty does not necessitate its being referred to a Bench

of two Judges <sup>2</sup>

3 When the Judges are equally divided —The uneudinent of this clause mide in 1928 mentioned in Note 1 ante applies to all eves lending on the dito of such amond ment.<sup>1</sup>

As to the effect of S. 38. C. P. Code upon this clause and the procedure in such cases 3.6.

Note 12 to that section and also the undermentioned cases 3.

Cf 36 -Note 2

1 (1929) 1929 Pat 72 (73) 8 Pat 323 (F B) 2 (1931) 1931 All 207 (207) and point of difference should is stated by Division Bench

Note 3

this case cannot be accepted as correct in view of the reasoning in 1921 P C b are also the following cases leculed before the amendment of S 33 and of the

(1912) 16 Int Cas 922 (J.G) (Cal) This Clause applies to appeals un for the Cale also also also

before the amendment of 1928 at was held in the following cases that the opinion of the Senior Judge prevailed on a difference of opinion between the Judges of the Division Iscach.3

4 Reference - In order that a reference may be made under this clause it is not neces eary that there must be a difference on a particular point. It may be made even when there is a difference as to the result of the appeal beard by the High Court 1

A single Judge of the High Court is competent to hear a reference under this clause 2 Where a reference is made only the points of difference and not the whole case should be referred to 3

## Carl Procedure

37 And We do further ordum that it shall be lewful for the said High Court of Judicature at [Madias ] [Bombay.] Fort William Peaulition of proceed in Bengal from time to time to make rules and orders for inc. the purpose of regulating all proceedings in civil cases

which may be brought before the said High Court, including proceedings in its Admiralty, Vice Admiralty testamentary, intestate and matrimonial jurisdiction Provided always that the said High Court shall be guided in mak ing such rules and orders as far as possible by the provisions of the Code of Civil Procedure, being an Act pissed by the Governor General in Council and being Act No VIII of 1809 and the provisions of any law which has been made amending or altering the same by competent legislative authority for India Power to dek gate See Note 1 Pt (2)

1 Rules and Orders -This Chase gives the High Court the power to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court 1 But it does not authorise the High Court to frame a rule delegating a judical function to one of its officers. Thus R 515 A of the Rules and Olders of the Calcutta High Court delegating to the registrar the function of granting leave under to 12 ante is ultipa rafes 2

Where a Rule of the Civil Procedure Code is inconsistent with the Rules of the High Court made in phisnance of the power conferred by this Clause the latter must pievail 3 See also the undermentioned case 4

(1925) 1923 Rang 150 (164) 2 Rang 97 (F B) (Do) (1319) 1919 Mad 626 (628) 41 Mad 313

111

Appeals under S 54 of the Land Acquisition Act—Governed by S 98 (1879) 3 Bom 204 (200) Appeals under Code

S 98 applies (1853) 11 All 176 (182) \ case not coming under S 98—Cl 27 of the \ \ \) inha

bid Letters Patent applica (1921) 1921 Lib 1 (3) 2 Lib 133 (F B) Se nior Judge not pressing h sylew but aubmitting case to Chief Justice for reference to Full Bench Cl 26 does

not apply 3 (1J24) 1924 Cal 668 (686) 51 (21 180 Refe rence under Income tax Act

(1925) 1925 Mad 281 (285 286) Revision under S 20 of Provincial Small Cause

Courts let Rule under S 115 C P Cole to set aside sanction granted under 5 19a Cr P Code (1912) 14 In l Cas 755 (757) (Cal)

(1915) 1015 Mal 1193 (1136) (1912) 14 Ind Cas 305 (314) 39 Mad 7 n

(FB) (1320) 1920 Cul 417 (419) 47 Cul 438 Revi sion against an order under S 145 Cr P Code

["sec (1891) to Bom 452 (475) Refe ience to High Court by Sessions Judge under S 307 Cr P Code Held 5 12) Gr P Code overndes Cl 30

Note 4 1 (1539) 1933 Pat 67 (68) 11 Pat 772 > (1933) 1933 Pat 67 (6)) 11 Pat 772

3 (1933) 1933 All 561 (874 875)

Cl 37-Note 1

1 (1 H6) 1916 Mad 473 (474) Rule 100 of ip poliste Side Rules of Madras High Court directing dismissal of appeal for non payment of printing charges 14 not ultra ures

(1 117) 1917 Mad 49 (55) Rule o33 of the Original Side Rules of the Madras High Court giving right of audience on the original side to valids and withhelding it from attorneys is not

ultra ttres- bollowing 1 Mad 24 , (1 )07) 31 Cal 613 (625)

1 (1932) 1932 Cul 1 (2) 50 Cul 370 Order 3 R 4 sub R (5) is inconsistent with

Rules made by the Calcutta High Court 4 (161 2 63) 1 Wad H C R 11a (120) This

clause does not londer S 187 of Act VIII of 1859 a repeal of S 101 of 4 t IX of 1850

q

12

13

Appeal from order granting certificate

### Criminal Procedure

Regulation of proceed nngs

S 111 Note 3 1 t (1)

Order rejecting application for amend

38 And We do further ordain that the proceedings in all criminal cases which shall be brought before the said High Court of Judicature at [Madras] [Bombay] Fort William in Bengal in the exercise of its ordinary original criminal

jurisdiction and also in all other cuminal cases over which the said High Court had jurisdiction immediately before the publication of these presents shall be re gulated by the procedure and practice which was in use in the said High Court immediately before such publication subject to any law which has been or may be made in relation thereto by competent legislative authority for India proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure prescribed by an Act passed by the Governor General in Council and being Act No XXV of 1861 or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as afore said

## Appeals to Prity Council

39 And We do further ordam that any person or persons may appeal to Us Our heirs and successors in Our or Their Privi Power to appeal Council in any matter not being of criminal jurisdiction from any final judgment decree or order of the said High

Court of Judicature at [Madias ] [Bombay] Fort William in Bengil inade on appeal and from any final judgment decree or order made in exercise of original jurisdiction by Judges of the said High Court or of any Division Court from which an appeal shall not he to the said High Court under the provisions contained in the 15th Clause of these presents Provided in orther case that the sum or matter at issue is of the amount or value of not less than Rs 10 000 or that such judgment decree of older shall involve directly or indirectly some claim demand or question to or respecting property amounting to or of the value of not less than or from any other final judgment decree or order made either on appeal or otherwise as aforesaid when the said High Court shall declare that the case is a fit one for al pe I to Us Our heirs or successors in Our or Their Priv) Council subject always to such Rules and Orders as are now in force or may from time to time be made respecting appeals to Ourselves in Council from the Courts of the said Presidency except so far as the sail existing Rules and Orders re per tively are hereby varied and subject also to such further Rules and Orders as We may with the advice of Our Prixy Council beleafter make in that behalf

Sunopsis Note No Scope of the Clause ment of decree See S 100 Note 5 It (8) In any matter not being of criminal 2 Orders in insolvency jurisdiction Decrees on appeal made by High Court Judgment decree or order made on 3 under Special Acts Judgment decree or order made in the Appellate order made in land acquisi tion cases - See S 100 Note 2 exercise of original jurisdiction Decision under the Income tax Act Pts (11) and (11 ) Order made in the exercise of discipli Decree passed by High Court in pursu nary jurisdiction under Cl 10 ance of directions by Privy Council 5 Orders passed on review - See S 100 Order refusing to quash proceedings by 6 Note 5 It (4) writ of certiorari Orders passed in revision - See S 109 Judgment decree or order must be Note 5 Its (16) and (1 ) nd al a

#### Other Topics

Order under Specine Relief Act whether appealable See Note 12 F N (2)

1 Scope of the Clause - The right of appeal to the Privy Council rests upon this clar c and is claborated in Se 100 to 112 of the Civil Procedure Code 1 This Clause deals with tvo nitegories of cares (a) jud mente decrees or ordere undern appeal and (b) judgments, de crees or orders made in the exercise of original nurs diction, whether by individual Judges or by ditt ion Courts 2

There was a conflict of opinion as to whether a party desirous of appealing against a judgment was bound to as peal under Clause 15 ante before appealing to Privy Council where the Judges hearing an appeal were equally divided in opinion 3 In view of the amendment of Classe 30 of the Letters Patent made in 1928 this difficulty cannot now occur

- In any matter not being of Criminal Jurisdiction -The words in any matter thing of Criminal juri-diction govern both the classes of judgments decreas prorders which a e mentioned in this Clau e ! Thus the High Court has no purediction to grant leave to appeal to Prive Council against a judgment of High Court sitting in Criminal appeal from the Addition of a Court of Se 10n 2 Such leave cannot be granted even by virtue of the words then the said High Court shall declare that the case is a fit one for appeal
- 3 Judgment decree or order made on appeal. Where a decree is passed by the High Court ou appeal from sucth r tritunal in order that the decree of the High Court may be at perlable to the I ries C uncil the said tribunal must be a Court subject to the superintendence of the High C ur' within the me ming of Clause 16 a ite 1

Ser Note 4 to 9 intra

- 4 Appealable order made in land acquisition cases See S 100 Note 2 points (11) and (11a)
- 5 Decree passed by High Court in pursuance of directions by Privy Conneil -See S 100 Note a point (3) and also the nudermentioned case 1
  - 6 Orders passed on review See S 109 Note 5 point 4
- 7 Orders passed in revision -Sec S 109 Note 5 points (16) and (17) and also S 111 Note 3 point (1)
- 8 Order rejecting application for amendment of decree See S 100 Note 5 in int (s)
- 9 Order in insolvency in appeal will lie to the Price Council against an order of the H h Court under S 8 of the Pre idence Towns Insolvency Act made on appeal of against an accellate order of the High Court dismissing an Insolvence petit on under the Provincial In hency Act V of 1920 \*
- 10 Decrees on appeal made by High Court under special Acts See S 109 Note 2 t tit (9) and (10) and also the un lermentioned case 1
- II Judgment decree or order made in the exercise of original jurisdiction -The words original jurisdiction are only used in contra distinction to the words made ou appeal urring earlier in th Clau e 1 See also Notes 12 to 14 infea

CI 30 N 40 I 1

Cl 15 (1871) 16 Suth W R 191 (192) Decree on appeal-Appeal to Privy Council her whether appeal under Cl 15 hes or not

Note 2 1 (1931) 1931 Cal 526 (527) 58 Cal 344 2 (1931) 1091 Cal 526 (5271 38 Cal 344 Note 3

1 (1931) 1931 P C 149 (153) 59 Cal as 58 Ind App 259 (P C) Note 5

1 (1905) 32 Cal 963 (°C) Remanded by Privs

Council directing accounts to be taken-Dausson Bench made a fin il decree-Appeal lies to Piny Conteil under C1 39

Note 9

1 (1.12a) 1925 Mad 243 (244) 2 (1913) 19 Ind Cas 435 (436) 40 Cal 685 Note 10

1 (1931) 1931 P C 149 (153) 58 Ind App 259 59 Cal 50 (P C) Award of tribunal under Calcutta Improvement Act (Bengal Act (V of 1911) -Provision for finalty in S 71 excludes further 31 peal from High Court

Note 11 1 (1923) 1923 P C 148 (150) 50 Ind App 212

47 Bem 7

### Criminal Procedure

Regulation of proceed upon the further ordain that the proceedings in all criminal cases which shall be brought before the said High Cout of Judicature at [Madias,] [Bombay], Fort William in Bengal in the exercise of its ordinary original criminal

Bengal in the exercise of its ordinary original crimical jurisdiction, and also in all other criminal cases over which the said High Cout had jurisdiction immediately before the publication of these presents, shall be regulated by the procedure and practice which was in use in the said High Court immediately before such publication subject to any law which has been or may be made in relation thereto by competent legislative authority for India, and that proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure prescribed by an Act passed by the Governor General in Council and being Act No XXV of 1861, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as ifore said

## Appeals to Prity Council

39 And We do further ordern that any person or persons may appeal to
Us Our heirs and successors, in Our or Their Priy
Council, in any matter not being of criminal jurisdiction,
from any final widement decree or order of the said High

from any final judgment decree or order of the said High Court of Judicature at [Madias,] [Bombay], Fort William in Bengal made on appeal, and from any final judgment decree or order made in exercise of original jurisdiction by Judges of the said High Court or of any Division Court from which an appeal shall not be to the said High Court under the provisions contained in the 15th Clause of these presents Provided, in either case, that the sum of matter at issue is of the amount or value of not less than Rs 10 000 or that such judgment, decree or order shall involve directly or indirectly, some claim, demand or question to or respecting property amounting to or of the value of not less than Rs 10,000, or from any other final judgment, decree or order made either on appeal or otherwise as aforesaid when the said High Court shall declare that the ease is a fit one for appeal to Us, Our heirs or successors, in Our or Their Pin) Council, subject always to such Rules and Orders as are now in force, or may from timo to time be made, respecting appeals to Ourselves in Council from the Courts of the said Presidency, except so far as the said existing Rules and Orders respec tively are hereby varied, and subject also to such further Rules and Orders to We may, with the advice of Our Privy Council, hereafter make in that behalf

Sunonsis Note No Note No ment of decree See S 100 Note 5 Scope of the Clause In any matter not being of criminal Pt (8) 2 Orders in insolvency jurisdiction Judgment decree or order made on 10 3 Appellate order made in land acquisi tion cases - See S 109 Note 2. 12 4 Pts (11) and (11 a) of discip Order made in the exercise Decree passed by High Court in pursu nary jurisdiction under Cl 10 5 ance of directions by Privy Council Orders passed on review - See S 109. ante Order refusing to quash proceedings by Note 5 Pt (4) writ of certiorari Orders passed in revision - See S 100, Judgment decree or order must be Note 5 Pts (16) and (17) and also S 111 Note 3 Pt (1) Appeal from order granting certificate Order rejecting application for amend

#### Other Topics

Order under Sterific Relief Act whether appealable Sec Note 12 F N (2)

I Scope of the Clause—The right of apical to the Prix Council tests upon the clause and is chaborated in Sci 100 to 112 of the Civil Procedure Codo! This Civilse deals with "atteories of civils (a) judgments decress or orders under any fail in 100 judgments or or orders under un the exercise of orthinal jurisdiction, whether by individual Judges or division Counts?

There was a conflict of opusion as to whether a party desirous of appealing agains, if Stanett was bound to a pipeal under Chue-15 and teleper a pipeling to Priss Council whi the Judges having an appeal were equally divided in opinion 3. In view of the amendment Chue-26 of the Latters Pient made in 1928 this difficults comnot now occur.

2 In any matter not being of Criminal Jurisdiction - The words in any matt

when the said High Court hill declare that the case is a fit one for appeal

3 Judgment decree or order made on appeal—where a decree is passed by the Hig Cutt on appeal from another tribunal in order that the decree of the High Court has appealable to the I may C moral the scale indunal mustle a Court subjet to the superintendan of the High Court without the mining of Clause 16 a sight.

See Sate 4 to 9 aufra

4 Appealable order made in land sequisition cases - Sec S 109 Note 2 join (11) and (11a)

5 Decree passed by High Court in pursuance of directions by Privy Council See S 100 Note 5 point (9) and also the undermentioned case t

6 Orders passed on review - See S 100 Note 5 point \$

7 Orders passed in revision —Sec S 100 Note 5 points (10) and (17) and also S 1; to 3 point (1)

8 Order rejecting application for amendment of decree - See S 100 Note in (b)

Order in insolvency—an appeal will be to the Prive Council agrupt an order of it flight Council agrupt an order of it flight Council agrupt an appeal or are not appealled and appeal or are appealed and appeal or are appealed and appeal or are as a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a property or a pro

10 Decrees on appeal made by High Court under special Acts —Sec S 100 Note 1 ints (9) and (10) and al o the undermentioned case 1

11 Judgment decree or order made in the exercise of original jurisdiction —T vords original jurisdiction are only is do in control distinction to the words, made on appearing to jury in a control of the mira.

Councy, denoting, "exputity to trans—Division Bench mit a fine—Division Bench mit a fine—Division Bench mit a fine-decree—Appendites to Phily Cont under Cl. 3.

Cl. 15
([SAI] If Suth W R. 191 (192) | D. ree on [1,122] 1923 Vad 213 (244)

(1841) It Sutta Wik 191 1929 Oz. Rei bin appetit - Spirel to Bree Co. and thes whether appeal under Ci. 15 lie or nut. Note 2. (1913) 19 Ind Cra 935 (436) 40 Cat So. 1 (1931) 191 PC 149 (153) 55 Ind Appl 2 69 Ozl 50, PC) Avord of tribu

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1 (1991) 1991 Ca 1 526 (27) 58 Cal 314
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Note 11 1 (1923) 1923 P C 148 (150) 50 Ind App 2 4: Bom 724

Note 5 1 (1905) 82 Cal 963 (°6a) Remarded 15 Invy

12 Decision under the Income tax Act -It via held by the Priva Council in the undermentioned case! that a judgment of the High Court passe I on a reference under S of of the Income tax Act of 1318 was only advisory and therefore, not appealable to the Privy Council But it is now provided by S 66 1 of the let amended by the let ANI of 1926 that an appeal to the Privy Council will lie in such a case

Section 66 A of the Income tax let does not, however provide for an appeal from an order of the High Court under S 66 Sub S (3) refusing to require the Commissioner to state a civil The High Court of Labore has held that such an order is final judgment passed in the exercise of original jurisdiction and is therefore appealable 2 But the High Court of Rangoon has held that it has no jurisdiction to grant leave to appeal in such a cases 3

- Order made in the exercise of disciplinary jurisdiction under Clause 10 a ite -See S 100 Note 2 points (5) and (6) and also the undermentioned cases 1
- Order refusing to quash proceedings by writ of certiorari -No appeal lies to I try Council under this clau e against an order of a Division Bench of the High Court refusing to quash by writ of certionals the proceedings of Deputy Collector who, as an Income tax officer directed the prosecution of a jerson under S 133 Indian Penal Code.1 The reason is that the order is neither one passed on appeal nor one passed in the exercise of original juris liction
- 15 Judgment decree or order must be final -See Note 4 to 5 109 and the under mentioned ex en 1

ï ', of a Judge of a High Court

that Clau ol 40 and We do further ordain that it shall be lawful for the said High

to the Privy Council is not refore not appealable under

Court of Judicature at [Vadias ] [Bombay.] Fort William Appeal from int il u

t ry judgment

in Bengal at its direction, on the motion, or if the said High Court be not sitting then for any Judge of the said High Court, upon the petition of any party who considers humself agariased by any preliminary or interlocutory judgment, decree order or

sentence of the said High Court in any such proceeding as aforesaid, not being of grammal muisdiction to giant permission to such party to appeal against the same to Us, Our hens and successors, in Our or Then Privy Council, subject to the same rules, regulations and limitation as ano become expressed respecting appeals from final indaments, decrees orders and sentences

Order relusing the appointment of a re ever in a suit See Note 1, 14 (6)

1 Appeal from interlocutory judgment -There is no 1110 if to the Privy Council is of right in interlocutory matters and but for the provisions of this Clause an appeal in such appeal hes

Note 12

1 (1323) 1923 P C 148 (133) 0 lnl 4p 212 47 Ion 724 (P C) Overruling 1321 Bom 128

2 (1731) 1331 Lah 1°5 (137) 12 Lah 166 (FB)

[Sed also (1371) 1321 Poin 378 (318 119) Appeal lies from order of High Court refusing to direct the Chiel Revenue Inthority, under S 45 of the Specific Relact let to state a cisc under S 51 of the Income tax 1ct (1,318) 3 (1.30) 1930 Rung 2 4 (277) 4 Rung 435

Note 13

1 (1302) 32 Boin 10o (107) No 11 peal hea-The applicant may, however apply to His May sty the King for leave to appeal (114) 1311 Cd (7 ( )) 41 (41 731 No

[Lut sec (1933) 1333 All 225 (217) It is the practice of the illahabad High Court to grant leave to appeal m such cases-Following 1933 til 16.7

(1.31) 1931 \II 6.33 (301 302) 36 \II 7C Note 14

1 (1313) 21 1nd Cas 836 (697) (Mad)

Note 15 1 (1932) 1932 Ran, 159 (15)) 10 Rang 4 Order of remand, when many lo final

[See also Pis J and 10 Note 4 5 1001 (1J32) 1932 Rang 1J2 (1J2) 10 Rang -04 Order refusing leave to appeal in

form 1 pauperis 1s not final ordet-Note 16

1 (1×40) 17 Cal 17 x (474)

a master would be incompetent? This Clause only contemplates orders which have been under a appeal to the ligh Court under Clause 15 aute and such orders as are by terson of the number of Judges who have taken party in the developm not appealable to the ligh Court?

The granting of the jerms sen to a perl under the Clin executively discretional with the Court or Judge empowered to get it? I be general rule and in the above of making interlocation rulm factors of communities of occasion for its execute the jower of unking interlocation order is one which is not a untable subject for secure I has no leave to a peal to the Princ Council will be granted ander this Cline a gainst an order reliting to a justicion of fractice such as an order for inspection of distincts, or gainst in order relixing an appointment of a received. I list where the order complained of involves truntiter of test importance in the sample of the properties of the proposed of the properties of the properties of the proposed of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the properties of the pr

41 And We do further orders that from any judgment order or sentence of the said High Court of Judgment order of Madeus.

And the armount of Judgment order order of Original criminal jurisdiction or in the excises of original criminal jurisdiction or in the excises where any point or points of the have been received for

the opinion of the sud High Court in numer hereinbelore provided by any Court which has exercised on, and juri-diction it shall be liveful for the person agreed by such judgment order or sentence to appell to to Our heris or succe sors in Council provided the sud High Court shall declare that the case is into one for such appeal and under such conditions as the sud High Court may establish or require subject always to such rules and orders is Wo may with the divise of Our Priny Council herefite and on that behalf

Appeal in criminal cases. The coording of the cluse is very jict o and must be strictly construct to in a criminal case, the Court's power to given leave to appeal to jiel to the Prix Council is only under this Cluse. Thus the High Court has no ponce to give the toe to jiel to the other court from a judgment jassed by it is a criminal appeal to a grant or the rande by it nuder S 118 of the Criminal Procedure Code?

Lursuance of a certificate granted by the Advocate General nuter Cl. of auto are the under monitoned cases.

The right of alignal given by the Clause is vilge to the 1 of that the High Court will delate that the case is a from for a pipel the flight Court he therefore it, duty of starking their lefts declaring a case his for align! that the case falls with a the lumit pure cribed he the Frity Courcil in Dal Songha be propored. I. I. It is 44.41 % to 4

2 Original Criminal Jurisdiction —The jurisdiction every edit the High Court in a reference for confirmation of sentence and also in an appeal by Government when the new hate acquitted to accured a not of an original master in the of in applicable character.

3 Appeal in exercise of Royal Prerogative—Leave not necessary -- "I here there is no right of appeal in decessary the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal into the appeal i

CL 40 Note I 1 (1973) 1923 P C 148 (PC 50 1nd App 212 47 Bom 724 (PC) Citing Gol bring t La Fanque D Hockelaga (1886) 5

lay High Court under C1 13 trus forms to itself a suit from the Court of the Resident at Adeu

appeals to the Privy Council for the exercise of the Royal prerogative no leave or certificate is-

necessary under this clause 1 42

Rule as to transmi-sion of copies of evidence and other documents

And We do further ordain that, in all cases of appeal made from any judgment, order, sentence or decree of the said High Court of Judicature at [Madras], [Bombay], Fort William in Bengal to Us, Our heirs or successors, in Our or Their Privy Council, such High Court shall certify and transmit

to Us, Our hens and successors, in Our or Their Privy Council, a true and correct copy of all evidence, proceedings, judgments, decrees and orders had or made in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court And that the said High Court shall also certify and transmit to Us, Our heirs and successors, in Our or Then Privy Council, a copy of the reasons given by the Judges of such Court, or by any of such Judges, for or against the judgment or determination appealed against And We do further ordain that the said High Court shall, in all cases of appeal to Us, Our heirs or successors, conform to and execute, or cruse to be executed, such judgments and orders as We, Our heirs or successors, in Our or Their Privy Council shall think fit to make in the premises in such manner as any original judgment, decree or decretal orders, or other order or rule of the said High Court, should or might have been executed

I Transmission of records -This Clause expressly requires that the reasons for the decisions of the High Court should be recorded by the Judges and transmitted to the Privy Council for its juformation 1 Where an appeal to the Privy Council against a decree has been admitted such proceedings as applications for review of the judgment and the order of the Court thereon ought not to form part of the records to be transmitted to Fingland 2

Calls for Records, etc , by the Government

43. And it is Our further will and pleasure that the said High Court of Judicature at [Madris], [Bombis] Fort William in Righ Court to comply Bengal shall comply with such requisitions as may be with requisition from made by the Government for records, returns and state Government for records ments, in such form and manner as such Government

may deem proper.

And We do further ordain and declare that all the provisions of these

Our Letters Patent are subject to the legislative nowers of the Governor-General in Legislative Council, and also Powers of the Indian of the Governor-General in Council under section 71 of Legislature preserved

the Government of India Act, 1915, and also of tho Governor-General, in cases of emergency under S 72 of the Act, and may be in all respects amended and altered thereby

Synopsis Note No Note No seislative powers of the Governor Alterations in the Clause General in Council

Scope of the Clause

I Afterations in the Clause - The material afteration made by the amending Letters Governor General in Legislative Council e been substituted for the words 'powers of

2 Scope of the Clause -This Clause males the provisions of the Letters Patent subject to the legislative powers of the Governor General in Legislative Council and also the

Note 3 1 (1935) 1935 Pat 66 (67); 14 Pat 318.

Cl 42-Note I 1 (1e6) 12 Voo Ind App 495 (502) (P C) 2 (1664) 1 Beng L R 1 (5) (F B). overnor General in Council See the undermentioned cases as to instances of exercise of the wer conferred by this Clau c But the Letters Pitent cannot be varied by meie resolutions ther of the local Government or of the Government of India

Inow S 106 of the Government of India 4ct (1915)] Her Letters Patent that they may be subject to the serefore this Clauso is not altra tires of the powers of

ler Maiesty 3 Legislative powers of the Governor General in Council -Section "2 of the Indian ouncils 4ct 1861 (24 & 25 Vict C Ge) gives power to the Governor General in Council to nake laws or regulations for repealing amending or altering any laws or regulations then in erce or thereafter to be in force in the Indian territories. It is also provided by that section hat the Governor General an Council has no power to make any laws or regulations which hall repeal or in any way affect any of the provisions of the Act or of any provisions of ertain other lets named therein or of any let passed in that session of Parliament. Thus the Governor Ceneral in Council has no power to make any alteration in regard to the qualifi cation of Judges fre cribed us 2 or in regard to powers of the superintendence of the High Court given by S 106 of the Government of India Act 19151 Similarly the Governor General in Council has no power to legi late so as to deprive a British subject of h s right of suit against the Se return of Sate for India in Council in such cases as are allowed by S 60 of the Govern

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latent t be ud

ment of India tet 1503 whi h tet is mentioned in the proviso to 5 22 of the Indian Councils And it is Our further will and pleasure that these Letters Patent shall be published by the Governor in Council and shall come into operation from and after the date of such publication and that from and after the date on which effect shall have been given to them so much of the

aforesaid Letters Patent stanted by His Majesty King George the Third as was not revoked or determined by the said Letters Patent of the Twenty sixth of June One thousand eight hundred and sixty two and is in consistent with these Letters Patent shall cease determine and be utterly void to all jutents and purposes whatsoever

In witness whereof We have caused these Our Letters to be made Patent Witness Ourself at Westmuster the Twenty eighth day of December in the Twenty minth year of Our Reign

(5d) C ROMILLY By warrant under the Queen > Sign Manual

Cl 44-Note 2 1 (19 9) 4 Cal 172 (1 7 178) 5 Ind App 1 8 (I C) Removal of territory from the jur sd ction of the High Court In re Ja es Currie (1897) 21 Bom 405

(1836) 1 Cal 431 (450) S 5 of Act \ I of 1874-Providing that in cases of con current decisions there must be a sub tautial question of hav to give a right of appeal to the Privy Coun cil is not ultra vires the Letters Patent Clause 39

(1917) 1917 Mad 670 (670 6:1) 40 Wad 651 S 117 C P Code (1924) 1924 Mad 399 (399) 46 Mad 958

S 111 C P Code overndes Cl 39 Letters Patent

(1914) 1914 Cal 679 (680) 42 Cal 35 The enactment of S 12 L mutation Act 1908 so far as it relates to applications for leave to appeal to Privy Council (1)33) 1933 Bom 1 (3 4) (S B) Power of revision and appeal of High Counts taken away by \$ 51 of Ordinance No II of 1932 (1918) 1918 Pat 103 (105 125 120) 8 Pat

L Jour sal S 8 of the Defence of Ind a Act Il of 1919 takes away night of appeal or revision to the High Court against the decision of the commi stoners

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Note 3

1 (1874) 22 Suth W R (C1) 54 (60) 2 (191°) le Ind Cas 22 (24) 40 Cal 391 40 Ind App 48 7 L B R 10 (P C) appeals to the Privy Council for the exercise of the Royal prerogative no leave or certificate is necessary under this clause 1

42 And We do further nrdam that, in all cases of appeal made from any

Rule as to transmission of copies of exidence and other documents

judgment, order, sentence or decree of the said High Court of Judicature at [Madras], [Bombay], Fort William in Bengal to Us, Our heirs or successors, in Our or Their Privy Council, such High Court shall certify and transmit

to Us, Our hens and successors, in Our nr Their Privy Council, a true and correct copy of all evidence, proceedings, judgments, decrees and orders had or made in such cases appealed, so far as the same have relation to the matters of appeal, such comes to be certified under the seal of the said High Court And that the said High Court shall also certify and transmit to Us, Our heus and successors, in Our or Their Piny Council, a copy of the reasons given by the Judges of such Court, or by any of such Judges, for or against the judgment or determination appealed against And We do further ordain that the said High Court shall, in all cases of uppeal to Us. Our hous or successors, conform to and execute or cause to be executed, such judgments and orders as We, Our heirs or successors, in Our or Their Privy Council shall think fit to make in the premises in such manner ner order or rule of the

.- .. that the reasons for the decisions of the High Court should be recorded by the Judges and transmitted to the Pray ainst a decree has been and the order of the England 3

### Calls for Records, etc , by the Government

43. And it is Our further will and pleasure that the said High Court of Judicature at [Madras], [Bombay], Fort William in Bengal shall comply with such requisitions as may be

High Court to comply with requisition from Government for records, etc.

made by the Government for records, returns and state ments, in such form and manuer as such Government

may deem proper.

And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative nowers of the Governor-General in Legislative Conneil, and also Powers of the Indian of the Governor-General in Council under section 71 of

Legislature preserved

the Government of India Act, 1915, and also of the Governor-General, in cases of emergency under S 72 of the Act, and may be in all

respects amended and altered thereby. Sunopsis.

Alterations in the Clause. Scope of the Clause

Note No Note No Lgeslative powers of the Governor General in Council

> made by the amending Letters General in Legislatine Council, tituted for the words powers of

2. Scope of the Clause -This Clause makes the provisions of the Letters Patest subject to the legislative powers of the Governor-General in Legislative Council and also the Cl 42-Note 1

Note 3 1 (1935) 1935 Pat 66 (67): 14 Pat 318 1 (1863) 12 Moo Ind'App 495 (502) (P C) 2 (156\*) 1 Leng L B 1 (5) (F B)

Governor-General in Council See the undermentioned cases! is to instances of exercise of the power conferred by this Clau e Init the Letters Pitent cumot be vired by mere resolutions either of the local Government or of the Government of Indus ?

Section 9 of the High Contis tet Inow S 106 of the Government of India 4ct (1910.)

Section 9 power to Her Majesta to direct by Her Letters Patent that they may be subject to the powers of the Indian Legaliture and, therefore, this Clause is not ultra circs of the powers of

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the Indian of Council to

force, or thereafter

that the Governor uses a state that the Governor uses a state at the Governor way affect any of the provisions of the let or of any provisions of scattain other acts named therein or of any let passed in that session of Parliament. Thus the Governor General in Council has no power to make by afteration in regard to the qualification of Judges prescribed us S 20 ris regard to powers of the superintendence of the High Count given he is 100 of the Government of Judges prescribed us S 20 ris regard to powers of the superintendence of the High in Council has no power to legislate so as to deprive a British subject of his right of suit against the Secretor of Sate for India in Council has the Secretor of Sate for India in Councils and the Sate of the Sate of the Sate of the Sate of the Sate of the Sate of the Sate of Sate of India in Councils at the Sate of the Sate of Sate of India in Councils at the Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of Sate of S

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And it is Our further will and pleasure that these Letters Patent of times to timeous e Letters patent operation from and after the date of such the local color on the operation from and after the date on which the local color of the operation of the operation from the local color of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation of the operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation operation

aforesaid Letters Patent granted by His Majesty King George the Third as was not revoked or determined by the said Letters Patent of the Twenty sixth of June One thousand eight hundred and sixty two, and is inconsistent with these Letters Patent, shall cease determine, and be utterly void.

to all intents and purposes whatsoever
In witness whereof, We have caused these Our Letters to be made Patent
Witness Ourself at Westminster, the Twenty eighth day of December in the

Twenty minth year of Our Reign
By warrant under the Queen's Sign Manual

(Sd) C ROMILLY

Cl 44-Note 2 1 (19°9) 4 Cal 172 [177 178] 5 Ind App 178 (P C) Remoral of territory from the jur solution of the High Court In re James Currie (1817) 21 Born 405 (408) (Du)

(1910) 5 Ind Cas 729 (7°0) (Mad) Conferring jurisdiction on the High Court in a class of suits arising outside its juris

diction

- (1896) I Cal 431 (4.0) S 5 of 1ct 11 of 1874—Providing that m cases of our current decisions there must be a substantial question of law to give a right of appeal to the Pray Council is not ultra tires the Letters Patent Clause 39.
  - (1917) 1917 Mad 670 (670 671) 40 Mad 651 S 117 C P Code
  - (1924) 1.124 Mad 209 (399) 46 Mad 958 S 111 C P Code overndes C1 33, Letters Patent
- (1914) 1914 Cal 679 (680) 42 Cal 25 The enactment of S 12, Limitation Act, 1908, so far as it relates to applications

- for leave to appeal to Prity Council (1933) 1933 Bom 1 (6 4) (8 B) Power of revision and appeal of High Counts taken away by 8 51 of Ordinance by II of 1992
- (1918) 1318 Pat 103 (105 125 120) 3 Pat L Jour 31 S 8 of the Defence of India Act IV of 1915 takes away light of appeal or revision to the

the Presidency Town of Madras under the Letters Petent-Madras

2 3 (1318) 1918 Pat 103 3 Pat L Jour 531 Note 3

1 (1874) 22 Suth W R (Cr) 54 (60) 2 (1912) 16 Ind Cas 22 (24) 40 Cal 391 40 Ind App 48 7 L B R 10 (P C)

## Testamentary and Intestate Jurisdiction

25 And Wo do further ordain that the said High Court of Judicature for the North Western Provinces shall have the his power and authority as that which is now lawfully concessed within the said Provinces by the said High Court of

Judicature at Fort William in Pengal in relation to its goods chattels credits and all other effects whatsoever of persons dying intestate and that the jurisdiction of the said last mentioned High Court in relation thereof shall cease from the date of the publication of these presents. Provided always that any proceedings already commenced in relation to any of the matters aforesaid in the said last mentioned. High Court shall continue as if these presents had not been issued. Provided also that nothing in these Letters. Petent contained shall interfere with the provisions of my law which has been made by competent legislative authority for Indir. by which power is given to any other Court to grant such probates in letters of administration.

### Matrinionial jurisdiction

26 See Calcutta Cl 35

Powers of Single Julges and Dirision Civits

27 See Calcutta Cl 36

### Civil Procedure

28 And We do further order that it shall be lawful for the said High Court of Judicature for the North Western Provinces ings of proceed ings as far as possible the provisions of

the Code of Civil Procedure heme an Act passed by the Governor General in Council and being let No VIII of 1853 and the provisions of any law which has been or may be made amending or altering the same by compotent legislative authority for India to all proceedings in its testamentary intestitie and matrimonal jurisdictions respectively.

#### Criminal Procedure

29 And We do further ordain that the proceedings in all criminal criminal Regulation of proceed into said High Court in the exercise of its ordinary original criminal jurisdiction shall be regulated by the procedure and practice which was in use in the High Court of Judicative for

Fort Wilham in Bengal, immediately before the publication of these presents subject to any law which has been or may be made in relation thereto by component legislative authority for India and that the proceedings in all offer eriminal cases shall be regulated by the Code of Criminal Procedure prescriled by an Act passed by the Governor General in Council, and being let No West 1861 or by such further or other livs in relation to criminal procedure as may have been or may be made by such authority as aforesaid

## Ippeals to Prity Council

30 See Culcutta Cl 33

31 See Calentta CL 40

32 See Calentta Cl. 41

111

Ind We do further ordain that in all cases of appeal made 33 from any jud-ment order sentence or decree of the hule as to tran mi si n sud High Court of Judicature for the North Western of cores it evidence and Provinces to Us Our heirs or successors in Our or other documents

Their Prive Council such High Court shall certify and transmit to Us Our hour and succes ors in Our or Then Privy Council a true and correct copy of all evidence, proceedings judgments decrees and orders had or made in such cases appealed so far as the same have relation to the matters of appeal, such comes to be certified under the seal of the said High Court, and that the said High Court shall also certify and trasmit to Us Our heirs and successors in Our or Their Privy Council a copy of the reasons given by the Judges of such Court, or by any such Judges for or a unst the und-ment or determination ap pealed against

And Wo do further ordain that the said High Court shall in all cases of appeal to Us. Our heirs or succes ors conform to and execute or cause to be execu ted, such sudements and orders as We. Our heus or successors in Our or Their Prive Council shall think ht to make in the premises in such manner as any origin nal judgment, decree or decretal orders or other order or rule of the said High Court, should or might have been executed

Calls for Records etc . bu the Government

34 See Calcutta Cl 43

Powers of Indian Lenslature ire erred

35 See Calcutta Cl 44

In witness whereof We have caused these Our Letters to be made Patent Witness Ourself at Westminster the seventeenth day of Murch in the twenty ninth year of Our reign

By warrant under the Oneen's Sun Manual

(Sd) C ROMILLY

appeals to the Privy Council for the exercise of the Royal prerogative no leave or certificate is necessary under this clause 1

42 And We do further ordain that, in all cases of appeal made from any

Rule as to transmission of copies of evidence and other documents

judgment, order, sentence or decree of the said High Court of Judicature at [Madras], [Bombay], Fort William in Bengal to Us, Our heirs or successors, in Our or Their Privy Council, such High Court shall certify and transmit

to Us, Our hears and successors, in Our or Their Privy Council, a true and correct copy of all evidence, proceedings, judgments, decrees and orders had or made in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court And that the said High Court shall also certify and transmit to Us, Our heirs and successors, in Our or Then Privy Council, a copy of the leasons given by the Judges of such Court, or by any of such Judges, for or against the judgment or determination appealed against And We do further ordain that the said High Court shall, in all cases of appeal to Us, Our heirs or successors, conform to and execute, or cause to be executed, such judgments and orders as We, Our heirs or successors, in Our or Their Privy Council shall think fit to make in the premises in such manner as any original judgment, decree or decretal orders, or other order or rule of the and High Court, should or might have been executed

1 Transmission of records -This Clause expressly requires that the reasons for the stied to the Privy st a decree has been the order of the agland 4

Calls for Records, etc , by the Governme it

43 And it is Our further will and pleasure that the said High Court of Judicature at [Madras], [Bombay] Fort William in High Court to comply Bengal shall comply with such requisitions as may be with requisition from made by the Government for records, returns and state Government for records, ments, in such form and manner as such Government

etc. may deem proper,

And We do further ordain and declare that all the provisions of these 44 Powers of the Indian Legislature preserved.

Our Letters Patent are subject to the legislative powers of the Governor-General in Legislative Council, and also of the Governor-General in Council under section 71 of the Government of India Act, 1915, and also of the

Governor-General, in cases of emergency under S 72 of the Act, and may be in all respects amended and altered thereby

Alterations in the Clause Scape of the Clause

Synopsis Note No Note No Lgesslature powers of the Governor General in Council

made by the amending Letters

General in Legislative Council tituted for the words ' powers of

2 Scope of the Clause -This Clause makes the provisions of the Letters Patcot ambject to the legislative powers of the Governor General in Legislative Council and the

Note 3 1 (1935) 1935 Pat GG (67). 14 Pat 318

Cl 42-Note 1 1 (1063) 12 Moo Ind App 495 (502) (P C) 2 (1864) 1 Peng L B 1 (5) (I' B).

Garager General in Council See the undermentioned cases! is to instances of exercise of the rower conferred to this Clause but the Letters Pitant councile varied by mere resolutions cither of the local Government or of the Government of India 2

Se tion 2 of the High Courts let from S 10a of the Government of India let. (1915)1 cives tower to Her Majesty to direct by Her Letters Pstent that they may be subject to the Twees of the Indian Lebislature and, therefore, this Clau e is not ultra circs of the powers of

Her Maic tv 3 3 Legislative powers of the Governor General in Council -Section 22 of the Judian Sternor General in Council to . . . livs or regulations then in

elso provided by that section that the Governor General in Council has no power to make any laws or regulations which shall rereal or in any way affect any of the protessors of the fet or of any provisions of centain other tels named therein or of any tot passed in that session of Parliament. Thus the Governor-General in Council has no power to make any alteration in regard to the qualification of Judges prescribed in S 2 or in regard to powers of the superintendence of the High Court given by S 100 of the Government of India Act 13t5 1 Similarly, the Governor General in Council has no power to leadale so as to deprive a bestish subject of his right of suit against the bearctary of Sale for India in Loan if in such cases as are allowed by S 60 of the Govern ment of India Act 1534 whi h tet is mentioned in the groups to 5 22 of the Indian Councils 1 1 2

45 and it is Our further will and pleasure that these Letters Patent shall be published by the Governot in Council and shall Provisions of Lemon come into operation from and after the date of such Letters Latent monsis lest with they letters publication and that from and after the date on which La ent to be id effect shall have been given to them so much of the

aforesaid Letters Pitent arented by His Majesty King George the Third as was not revoked or determined by the sud Letters Patent of the Twenty sixth of June One thousand eight hundred and sixty two, and is in

consistent with these Letters Palent shall cease, determine, and be utterly void, to all intents and purposes whitsouver

In witness whereof We have caused these Our Letters to be made Patent Witness Ourself, at Westminster, the Twenty eighth day of December in the Twenty minth year of Our Roben

By warrant under the Queen's Statt Manual Cl 44-Note 2

(5d) C ROMILLY

1 (1573) 4 Cal 172 (177 176) 5 Inl 11p 174 (P () themoral of territors from the jurnsdiction of the High Court In 16 James Currie (1537) 21 1 mm 103 (40-) (D)

(1910) o Ind Cas 729 (7"0) (31 11) C microng jurisdiction on the High Court in a class of suits or ing outside its juris diction

(1536) 1 Cal 431 (450) 5 5 of 1ct 11 of 1874-1 royiding that matter of consubstantial question of law to give a light of uppeat to the Privy Conn cil is not ultra tares the Letters Patent Clause 3J

(1917) 1917 Mad 670 (670 671) 40 Mad 651 S 117 ( P Lode

(1924) 1924 Mad 339 (339) 46 Mad 958 S 111 C P Code overndes Cl 33 Letters Patent

(1914) 1914 Cal 6"9 (650) 42 Cat 85 The enactment of S 12 Limitation Act 1308 so far as it relates to ai plications for kits to ipjeil to Prity Council (1 139) 1333 from 1 (3 4) (8 B) Power of revision and appeal of High Courts taken tway by 5 51 of Ordinance No Il of \$192

(1 HS) 1918 1 IL 103 (105 115 120) 3 Pat L Jour sel S 8 of the Defence of India tot IV of 1315 takes away night of appeal of revision to the High Court against the decision of the commissioners

(1321) 1921 Mad 258 (200 201) 44 Mad 446 Madris Legislative Conneil has no power to alter and law applicable to the liestlency fown of Madras under the Letters Petent- Madras

3 (1916) 1918 Pat 103 3 Pat L Jour 591 Note 3

1 (1874) 22 Suth W R (Cr) 54 (60) 2 (1912) 16 Ind Cas 22 (24) 40 Cal 391 40 Ind App 48 7 L B R 10 (P C)

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Cerminal jurisdiction

- 15 Ordinary original jurisdiction of the High Court
  - 16 Jurisdiction as to la reons
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- diction
  18 No anneal from High Court exercises
- 18 No appeal from High Court exercising original jurisdiction Court may reserve points of law

Lstablishing a High Court in the North-Western Provinces of the Binjah Presidency, dated 17th March, 1866

[The first two paragraphs of the Preamble are similar to those in Calcutta Letters Patent of 1865]

And where is it is further declared by the said recited Act that it shall be lawful for Us by Letters Patent, to erect and establish a High Court of Judicature in and for any portion of the territories, within Hor Majesty's dominions in India not included within the limits of the local juri-diction of

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19 High Court to review cases on joints of law reserved by one or more Judges of the said High Court

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22 High Court may direct the transfer of a case from one Court to another

Act under uhich Punishments to be inflicted

23 Indian Penal Code

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from Government for records, etc.
35 Powers of Indian Legislature fre

another High Court, to consist of a Chief Justice and such number of other Judges with such qualifications as were by the same let required in persons to be appointed to the High Courts established at the said Presidencies, as We from time to time might think fit and appoint and that subject to the directions of the Letters Pitent all the provisions of the said recited let relative to High Courts and to the Chief Justice and other Judges of such Court, and to the Governor General or Governor of the Presidency in which such High Courts were established shall as has as encumstances may permit be applicable to any new High Court which may be established in the said territories and to the Chief Justice and other Judges thereof and to the persons administering the Government of the sud territories

And whereas We did upon full consideration of the premises think ht to erect and establish and by Our Letters Patent under the Great Seal of the United hingdom of Great Britain and Ireland beining dato at Westminster. the fourteenth day of May in the twenty fifth year of Our Reisn in the year of Our Lord one thousand eight hundred and sixty two did accordingly, for Us Our heirs and successors creet and establish at Fort William in Benzal for the Bengal Division of the Presidency of Lort William aforesaid a High Court of Judicature which should be called the High Court of Judicature at Fort William in Bengil and did thereby constitute the said Court to be a Court of Record

Now know he that We upon full consideration of the premises and of Our special race certain knowledge and mere motion have thought fit to erect and establish and by these Establishment of High Court for the North presents We do accordingly for Us Our heirs and successors erect and establish for the North Western

Provinces of the Presidency of Fort William aforesaid a High Court of Judi cature which shall be called the High Court of Judicature for the North Western Provinces and Weld hereby constitute the said Court to be a Court of Record

Constitution and first Judges of the High Court

And We do hereby appoint and ordain that the said High Court of Judicature for the North Western Provinces shall until further or other provision shall be made by Us of Our heirs and successors in that behalf in accordance with the said recited 1ct consist of a Chief Justice and

Chief Justice he ng Walter Morgan Esquire and five Judges the first Mexander Ross Esquire William Edwards Esquire the five Judges being William R berts Esquire Francis Boyle Pearson Esquire and Charles Arthur Turner Esquire being respectively qualified as in the said Act is

declared 1 Appointment of sixth Judge -The appointment of a xth Puisne Judge

by the Sovereign to the High Court of Allahabad is not invalid 1 And We do hereby ordain that the Chief Justice and every Judge

of the said High Court of Judicature for the North I eclarate to be made Western Provinces previously to extering upon the h Judges execution of the daties of his office shall make and sub scribe the following declaration before such authority. or person as the Governor General in Council may commission to receive it -

Cl 2-Note I -1 (1914) 1914 All 85 (85) 36 All 168

"I, 4B, appointed Chief Justice (nr Judge) in the High Court of Judicature, for the North-Western Provinces, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and juddment."

4 See Calcutta Cl 6

5 See Calcutta Cl 7

Admission of Idiocates, Valils and Attorneys

6 See Calcutta Cl 8

7 See Calcutta Cl 9

8 See Calcutta Cl 10

Civil Jurisdiction of High Court

9 See Calcutta Cl 13

10 See Calcutta Cl 15

11 See Calcutta Cl 16

And We do further nrdain that the said High Court of Judicature for the North-Western Provinces shall have the like

Junidiction as to in power and authority with respect to the persons and tants and lunatics estates of infants, idiots and lunatics within the North-Western Provinces, as that which is exercised in the Bengal Division of the Presidency of Fort William, by the High Court of Judi

cature at Fort William in Bengal, but subject to the provisions of any laws or regulations now in force

See Notes to Cl. 17 of the Culcuita Letters Putent.

See Notes to Cl. 11 of the Cuculta Letters Piten

13 See Calcutta Cl 20 14 See Calcutta Cl 21

#### Criminal Jurisdiction

15 And We do further ardam that the said High Court of Judiceture, for the North-Western Prayinces, shall have ordinary original jurisdiction of the High Court of Judica within the said Provinces as the High Court of Judica ture at Fort William in Bengal shall have eminal jurisdiction.

ture at Fort William in Bengal shall have eminial jurisdiction over, at the date of the publication of these presents and the eminial jurisdiction of the said last mentioned High Court over such persons shall cease at such date Provided, no ertheless, that criminal proceedings which shall at such date have been commenced in the suid last mentioned High Court shall continue as if these presents had not been issued

16 See Calcutta Cl 23.

17 And Wo do further ordain that the said High Court of Judiciture, it the North-Western Provinces, shall have extraordinary original criminal parisdiction or again a criminal parisdiction of any Court now subject to the superintendence of the Sudder Nizamut Idawlat, and shall have authority to try at its discretion any such persons brought before

it on charges preferred by my Ministrate or other officer specially empowered by the Government in that helplif

- 18 See Cilcutti Cl 23
- 19 And We do further ordinn that on such point or points of law being, so reserved as iforeshid the said High Court shall have full power and authority to review the case on points of law for ladder of the said High Court.

  10 And We do further ordinn that on such points of the said of the said of the said of the said High Court of original purisdetion and to pass such in Liments and sentence as to the said High Court.

shall seem right

21

20 And We do further ordun that the said High Court of Judicature, for the North Western Provinces shall be a Court of Appeals from Criminal Courts in the Provinces and from all other Courts from which there is now an amount to the Court of Rodder Nizamust Advants for the

appeal to the Court of Sudder Nizamut Adamlut for the said Provinces and shall exercise uppellate jurisdiction in such cases as are subject to appeal to the said Court of Sulder Adamlut by virtue of any law now in force,

Ind We do further ordain that the said High Court shall be a Court

Hearing of reference and revision from the Criminal Courts subject to its appellate jurisdiction and shall have power to hear and determine all such cases referred to it by the Sessions Judges or by any other officers now authorized to refer cases to the Court of Swd for Nazamut Adawlut of the North Western Provinces and to revise all such cases tried 1, any officer or Court possessing criminal jurisdiction as are now subject to reference or to revision by the said

Court of Sudder Nizamut Adamlut

22 See Calcutta Cl 29

ict un ler which punishments to be inflicte?

23 See Calcutta Cl 30

24 And We do further ordain that whenever it shall appour to the Licutenant Covernor of the North Western Provinces Judges may be autho subject to the control of the Governor General rized to sit in any places Council convenient that the jurisdiction and power by by way of circuit or special these Our Letters Patent or by the recited Act vested commission in the said High Court should be exercised in thy place within the jurisdiction of any Court now subject to the superintendence of any Sudder Dewanny 'dawlut or the Sudder Nızamut Adawlut of the North Western Provinces other than the usual places of sitting of the said High Court or at several such places by way of circuit the proceedings in cases before the said High Court at such place for places shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

### Lestamentary and Intestate Jurisdiction

25 And We do further ordain that the said High C.

Testamentary and in testate jurisdiction

And Wo do further ordain that the sud High Court of Judicature, for the North Western Provinces, shall have the his power and in uthority as that which is now lawfully excressed within the said Provinces, by the said High Court of Judicature at Port William in Pengal in relation to the

granting of probates of last wills and testaments, and letters of administration of the goods, chattels credits and all other effects whitsoever of persons dying intestate and that the jurisdiction of the said last mentioned. High Court in relation theeded shall cease from the date of the publication of these presents. Provided always that any proceedings already commenced in relation to any of the matters aforesaid in the said last mentioned. High Court shall continue as if these presents had not been issued. Provided also that nothing in these Letters Patient contained shall interfere with the provisions of any law which has been imide by competent legislative authority for India by which power is given to any other Court to grant such probates and letters of administration.

### Matrimonial jurisdiction

26 See Calcutta Cl 35

Powers of Single Judges and Drisson Colits

27 See Calcutta Cl 36

#### Civil Procedure

28 And We do further ordain that it shall be lawful for the said Hab Court of Judicature for the North Western Provinces Regulation of proceed from time to time to make Rules and Orders for the

ings

purpose of adopting as far as possible, the provisions of the Code of Civil Procedure being an Act passed by the

Governor General in Council and being Act No VIII of 1859, and the provisions of any law which has been or may be made amending or altering the same, by competent legislative authority for India, to all proceedings in its testimentary intestric and matrimonal jurisdictions, respectively

#### Criminal Pro edure

29 And We do further ordain that the proceedings in all criminal criminal criminal forms of proceed ings which shall be brought before the said High Coort in the oxererse of its ordinary original criminal jurisdictions shall be regulated by the procedure and practice which was in use in the High Court of Judicative for

Lort William in Bengal, minediately before the publication of these presents subject to any law which has I een or may be made in relation thereto by competent legislative authority for India and that the proceedings in all other command cases shall be regulifed by the Code of Criminal Procedure, presented by an Act passed by the Governor General in Council, and being let No NN of 1861, or by such further or other laws in relation to criminal procedure as may have been or may be mide by such sutherity as afore-aid

## Ippeals to Privy Council

31 See Cilcutt Cl 40

32 See Calcutta Cl 41

33 And We do further order that in all cases of appeal made from any judgment order sentence or decree of the

Rule as to tran m on of copies f evidence and other documents

from any judgment order sentence or decree of the and High Court of Judicture for the North Western Provinces to Us Our heirs or successors in Our or Their Pray Council such High Court shall certify and

transmit to U. Our heirs and successors in Our or Their Pray Council a true and correct copy of all evidence, proceedings judgments decrees and orders had or made in such cases a prelied so far as the sime bay celebrate to the matters of appeal such copies to be certified under the seid of the said High Court shall also certify and trasmit to Us Our heirs and successors in Our or Their Pray Council a copy of the reasons given by the Judges of such Court or by any such Judges for or a name the judgment or determination appealed against

And We do further ordate that the said High Court shall so all cases of appeal to Us Our heirs or successors conform to and execute or cause to be executed, such judgments and olders as Wo Our heirs or successors so Our of Their Privs Council shall think fit to make in the premises in such manoer as any original judgment decree or decretal olders or other order or rule of the said High Court should or might have been executed.

Calls for Records etc by the Government

34 See Calcutta Cl 43

Powers of Indian Legislature Insuited

35 See Calcutta Cl 44

In witness whereof Wo have caused these Om I atters to be made Patent Witness Ourself at Westminster the seventeenth by of Murch in the twenty unth year of Our reige.

By warrant under the Queen's Sign Manual

(SI) C ROMILLY

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41 lowers of Indian Legislatures 100 served

### LETTERS PATENT (PATNA)

Letters Patent constituting the High Court of Judicature at Patna, for the Provinces of Bihar and Orissa, Dated the 9th February 1916

G1016E THE THTH, by the Grace of God, of the United Kingdom of Great
Britum and Ireland, and of the British Dompions beyond
Recital of Act 24 4 25 the Seris, King, Defender of the Faith, Emperor of India
To all to whom, these Presents shall come, greeting

Whereas by an Act of Parlament passed in the Twentyfourth and Twenty, fifth Years of the Rugn of Her Into Majesty Queen Victoria, and called the Indian High Courts Act, 1861, it was, amongst other things, enacted, by section one that it should be lawful for Her Majesty, by Letters Patent under the Great Seal of the United Kingdom, to creet and establish a High Court of Judicature at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William

and by section two that such High Court should consist of a Chief Justice and as minn Judges, not exceeding fifteen, as Her Majesty might, from time to time think fit to appoint, who should be selected from among persons qualified as in the sud let was declared

and, by section eight, that upon the establishment of such High Court as aforesaid the Supreme Court and the Court of Sadar Diwani Adalat and Sadar Nizamat Adalat at Calcutta, in the said Presidency, should be abolished,

and, by section mue, that the High Court of Judicature so to be established should have and vereise all such civil, criminal, admiralty and vice admiralty, testamentary, intestate and matrimonal jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the said Presidency, as Her Magest; might by such Letters Patent as aforesaid grant and direct, subject, however, to such directions and limitations, as to the exercise of original, civil and ciminal jurisdiction beyond the limits of the Presidency-town, as might be prescribed thereby, and that, said as by such Letters Patent might be otherwise directed, and subject and without projudice to the legislative powers in clation to the matters aforesaid of the Governor General of India in Council, the High Court so to be estibilished should have and exercise all jurisdiction, and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under the suid Act at the time of the abolition of such last mentioned Courts.

And whereas it was further declared by section sixteen of the said recited Act that it should be lawful for Us by Lettors Patent to erect and establish a High Court of Judicature in and for any portion of territories within Our Dominions in India, not included within the limits of the local jurisdiction of another High Court, to consist of a Chief Justice and such number of other Judges, with such qualifications as were by the same Act required in persons to be appointed to the High Courts established at the Piesidenness of Fort William in Bengal, of Madras, and of Bombay, as We from time to time

might think fit and appoint and that it should be lawful for Us, by such Letters Pateot, to confer on any new High Count which might be so established any such jurisdiction powers and authority as under the same Act was authorized to be conferred on or would become vested in the High Court established in any of the said Presidencies and that subject to the directions of the Letters Patent, all the provisions of the said recrited Act relative to High Courts and to the Chief Justice and other Judges of such Courts, and to the Governor General or Governor of the Presidency in which such High Courts were established to any of the suid Presidencies and that subject to the directions of the High Court which might be established in the said territories, and to the Chief Justice and other Judges thereof and to the presons administering the Government of the said territories.

And whereas upon full consideration of the premises, Her late Majesty

Recital of estallish ment of High Courts at Fort William and Altaha bad Queen Veton, by Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westmoster, the kourteenth day of May, in the Twenty fifth Year of Her Reign, in the Year of Our Lord One thousand eight hundred and sixty-two, did

eroot and establish a High Court of Judicature at Fort William in Bengal for the Bengal Division of the Presidency of Fort William iforesaid and did constitute that Court to be a Court of Record

And whoreas Her late Majesty Queen Vactoria, by Letters Patent under the Great Seal of the United Kingdom of Great Britane and Ireland, bearing date at Westminster the Twenty eighth day of December in the Twenty ninth Year of Her Reign in the Year of Our Lord One thousand eight hundred and sixty five did rovoke the said Lotters Patent bearing date the Fourteeoth day of May in the Year of Our Lord One thousand eight hundred and sixty two but netwithstanding that revocation did continue the said High Court of Judeature at Fort William in Bongal and declared that the Court chould continue to be a Court of Record

And whereas, upon full consideration of the premises, Her late Majesty, Queen Victoria, by Letters Patent under the Great Seal of the Uoited Mingdom of Great Britain and Ireland, bearing date at Westoninster the Seventeenth day of March, in the Twenty minth Year of Her Rengu in the Year of Our Lord One thousand eight hundred and sixty six did erect and establish a High Court of Judicature for the North Western Provinces, which said Court is situated at Allahabad in the Province of Yua and is so we called the High Court of Judicature at Allahabad, and did constitute that Court to be a Court of record

And where is by an Net of Parliament passed in the lirst and Second Yearlike it of Net 1 & 2

Rect of of Net 1 & 2

1911 it wis enacted, amongst other things, by Section
one that the mannoun number of Judges of a High

Court of Judic sture in India including the Chief Justico should be twenty ,

and, by Section two, that Our power under Section sixteen of the Indian High Courts Act 1861, might be exercised from time to time and that a High Court might be ostablished under the said Section sixteen in any portion of the territories within Our Dominious in India whether or not included within the limits of the local jurishtetion of another High Court and that, where such a High Court was established in any pirt of such territories included within the limits of the local jurisdiction of another High Court, it should be lawful for us, by Letters

Putent to alter the local muscleton of that other High Court and to make such incidental consequential and supplemental trovisions as might anter to be neces sary by reason of the alterations of those limits

And whereas the said Indian High Courts Ac s 1861 and 1911 have been retealed and re enacted by an Act of Parliament passed in heestal of let 5 & 6 the Lifth and Sixth Years of our Rein and called the Geo \ c Cl from erroment of India Act 191a

Recital of creation of Liovince of Lihar and Ort sa

And whereas certain territories formerly subject to and included within the limits of the Presidency of Fort William in Bengul were by proclumation made by the Governor General of lpdia on the Twenty second day of March in the Year of Our Lord One thousand nine hundred and twelve

constituted a separate Province called the Province of Bihar and Orissa and are now governed by Lieutenant Governor in Council

Now know we that We upon full consideration of the premises and

Establishment [ H cl Court at 1 t a

of Our special in see certain knowledge and mere motion have thought ht to elect and establish and by these presents Wo do accordingly for Us Our herrs and success sors erect and establish for the Province of Bihar and

Orissa aforesaid with effect from the date of the publication of these presents in the Bibar and Oussa Gazette a High Court of Judicature which shall be called the High Court of Judicature at Patna and We do hereby constitute the said Court to be a Court of Record

Constitution and first Judges of the H gl Court

And We do hereby appoint and ordern that the High Court of Judi cuture at Patna shall until further or other provision be made by Is or Our heirs and successors in that hehalf in accordance with section One bundred and one of the said recited Government of India Act 1915 consist of a

Chief Justice and six other Judges the first Chief Justice being Sir Ldward Maynard Des Chames Chamier Knight and the eix other Judges being Sarvid Shurf ud din Esquire Edmund Pelly Chapman Esquire Basanta Lumar Mullick. Esquire Francis Reginald Roe Esquire the Hon ble Cecil Athinson and Jowala Prasad Esquire being respectively qualified as in the said Act is declared

- 3 See Calentta Cl. 5
- See Calcutta Cl 6
- 5 See Calcutta Cl 7
- 6 See Calcutta CL 8

Adn 1851on of Advocates Values and 1tto news

- 7 See Calcutta Cl 9
- 8 See Calcutta Cl 10

Civil Jurisdiction of the High Court

- See Calcutta Cl. 13
- 10 See Calcutta Cl 15

11 Appeal from other Civil Courts in the Province of Bihar and Orissa

And We do further ordain that the High Court of Judicature at Patna shall be a Court of Appeal from the Civil Courts of the Province of Bihar and Orissa and from all other Courts subject to its superiotendeoce, and shall exer

cise appellate jurisdiction in such cases as were imme diately before the date of the publication of these presents subject to appeal to the High Court of Judicature at Fort William to Bengal by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Patna by any law made by competent legislative authority for India

12 See Calcutta Cl 17

Law to be administered by the High Court

- 13 See Calcutta Cl 20
- 14 See Calcutta Cl 21

Criminal Jurisdiction

15 And We do further ordain that the High Court of Judicature at Patna shall have ordinary original eriminal jurisdic Ordinary original crimi tion in respect of all such persons within the Province nal jurisdiction of the High Court of Bihai and Orissa as the High Court of Judicature at Fort William in Bengal had such criminal jurisdiction over immodiately before the publication of these presents

- 16 See Calcutta Cl. 93
- 17 See Calcutta Cl 24
- 18 See Calcutta Cl 25

19 And We do further ordam that, on such point or points of law being so reserved as aforesaid the High Court of Judi High Court to review caturo at Patna shall have full power and authority to cases on points of law re review the case or such part of it as may be necessary

served by one or more Indees of the High Court and finally determine such Point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and soutence as to the said High Court may seem right

20 See Calcutta Ct 27

And We do further ordain that the High Court of Judicature at Patna shall be a Court of reference and revision from Hearing of referred the Criminal Courts subject to its appellate jurisdiction cases and revision of cri and shall have power to hear and determine all such minal trials

cases referred to it by the Sessions Judges or by any other officers in the Province of Bihar and Orissa, who were immediately before the publication of those presents authorized to refer cases to the High Court of Judicature at bort William in Bengal, and to rouse all such cases tried by any officer or Court possessing criminal jurisdiction in the Province of Bihar and Orissa as were, immediately before the publication of these presents, subject to reference to or revision by the High Court of Jodicature at Lort William in Ben, al

## Criminal Lau

23 See Calcutta Cl 27

## Admiralty Jurisdiction

24 And We do further order that the High Court of Judicature at Patna shall base and exercise in the Province of Bihar Civil and Orissi all such civil and miritime jurisdiction as was

exercisable therein ammediately before the publication of these are ents by the High Court of Judicature at Fort William in Beneal as a Court of Admiralty and also such pressdiction for the trial and administration of prize cases and other maritime question as was so exercisable by the High Court

of Judicature at Fort William in Bengal 25 And Wo do further ordain that the High Court of Judicature at Patna shall have and exercise in the Province of Bihar and

Orisa all such criminal jurisdiction as was exercisable therein immediately before the publication of these pre sents by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty or otherwise in a nucction with maritime matters or matters of prize

### Testamentary and Intestate Jurisdiction

26 See Calcutta Cl 34

Criminal

### Watermonial Jurisdiction

27 See Calcutta Cl 35

Powers of Single Judges and Division Courts

28 See Calcutta Cl 36

# Civil Procedure

29 And We do further ordain that it shall be lawful for the High Court of Judicature at Patna from time to time to make rules and orders for regulating the practice of the Court and for Regulation of proceed the purpose of adopting as far as possible the provisions angs of the Code of Civil Procedure being an let No V of

1908 passed by the Governor General in Council and the provisions of any law which has been or may be made amending or altering the same by competent legislative authority for India in all proceedings in its testamentary intestate and matrimonial jurisdiction respectively

Civil Procedure Code S 122 -As to whether S 122 Civil Procedure Code applies to the High Court of Patna see Note 4 to S 122 and Note 1 to S 124 a te

Criminal Procedure

30 See Calcutta Cl 38 Appeals to Prity Council

31 See Calcutta Cl 39

32 And We do further ordain that it shall be lawful for the High Court of Judicature at Patna at its discretion on the motion Appeal from interlocu tory judgments or, if the said High Court be not sitting then for any Judge of the said High Court upon the petition of any party who considers himself aggrieved by any preliminary or interlocu

tory judgment decree or order of the said High Court, in any such proceed ing as aforesaid not being of criminal jurisdiction, to grant permission to such party to appeal against the same to Us. Our hears and successors, in Our or Their Privy Council subject to the same rules regulations and limitations as are herein expressed respecting appeals from final judgments, decrees and orders

- 33 See Calcutta Cl 41
  - 34 See Calcutta Cl 42

Fxercise of jurisdiction elsewhere than at the usual place of sitting of the High

35 and We do further ordain that unless the Governor General in Council otherwise directs one or more Judges of the High Court of Judicature at Patna shall visit the Division of Orissa Judges to visit Orisas by way of circuit by way of circuit, whenever the Chief Justice from time to time appoints in order to exercise in respect of cases irising in that Division the jurisdiction and power by these Our Letters Patents

or by er under the Government of India Act 1915, vested in the said High Court Provided always that such visits shall be made not less that four times in every year, unless the Chief Justice, with the approval of the Lieutenant Governor in Council otherwise directs Provided also that the said High Court shall have power from time to time to make Rules with the previous sanction of the Lieuten ant Governor in Council for declaring what cases or classes of cases arising in the Division of Orissa shall be heard at Patna and not in that Division, and that the Chief Justico may in his discretion order that any particular case arising it the Division of Orissa shall be heard at Patna or in that Division

I Vacation Judge in Patna-Powers of -A vacation Judge of the High Court of ead with R 5 of Chap 22 of n against the order of a Sub 18 13rt y Council for raview of

CHI UITS

36 And Wo do further orders that whenever it appears to the Lieutenant Governor in Council, subject to the control of Governor Special commission and General in Council, convenient that the jurisdiction and lower by theso Our Letters Patent or by or under the

Government of Indra Act, 1915, vested in the High Court of Judicature at Pitna should be exercised in any place within the jurisdiction

of any Court subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court, or at several such places by way of circuit one or more Judges of the Court shall visit such place or places accord mals

and We do further ordain that whenever any Judgo or Judges of the 37 High Court of Judicature at Patna visit any place under the 35th or the 36th Clause of these presents the proceed Proceedings of Julges on special torne ssion or ings in cases belove him or them at such place shall be circuit regulated by any law relating thereto which has been of

may I o made by competent leadative authority for India

### Delegation of Duties to Officers

38 The High Court of Judicature at Patna may from time to time make
Power to delegate duties
United for delegating to any Registral Prothonotary or
Master or other official of the Court any indicial quasi
understand non-indical duties

Cessation of Jurisdiction of the High Court of Judiculture at Fort

39 And We do further ord in that the jurisdiction of the High Court of Judicature at Fort William in Ben, all in any matter in

Cessation of jurisdiction of the High Court of Judicature at Fort William over the Province of Biliar and Orissa which jurisdiction is by these piesents given to the High Court of Judiciture at Patus shall cease from the date of the publication of these presents and that all proceedings needing in the former Court on that date in reference to

any such matter shall be transferred to the latter Court

Provided first that the High Court of Judicature at Fort William in Bengal shall continue to exercise jurisdiction—

- (a) in all proceedings pending in that Court on the date of the publication of these presents in which any decree or order other than an order of an interlocutory nature his been passed or made by that Court or in which the validity of any such decree or order is directly in question and
- (b) in all proceedings [not being pioceedings referred to in paragraph (a) of this Clause; pending in that Court on the date of the publication of these presents, under the 13th 15th, 22nd 23rd 21th 25th 26th 27th 25th, 29th, 32nd, 33rd, 34th, or 35th Clause of the Letters Patent bearing date at Westminster, the twenty eighth day of December in the Year of Our Lord One thousand eight hundred and sixty five, relating to that Court and
- (c) in all proceedings instituted in that Court on or after the date of the publication of these presents with reference to my decree or order passed or made by that Court

Provided secondly that if any question arises as to whether any case is covered by the first provise to this Clause the matter shall be referred to the Chief Justice of the High Court of Judicature at Fort William in Bengal and his decreases shall be final

1 Cessation of jurisdiction of Calculis High Court

The High Court of Patna has 10 purishetion to exe ute au order of His Magasiy in Council in an appeal from a decree of the High Count of Cheatin passed on uppeal from the decree of a Subordinate Court in the Province of Bill at the upplication for execution must be made to the High Court of Calcutta 1

Calls for Records ite by the Government

40 See Calcutta Cl 43

I cuers of Indian Legislatures

41 See Calcutta Cl 44

In witness whereof We have caused these our letters to be made patent Witness Ourself at Westmuster the Ninth day of February in the year of Our Lord One thousand muc hundred and sixteen and in the sixth year of Our leagn

By warrant under the King's Sign Manual

(Sd) SCHUSTER

## LETTERS PATENT (LAHORE)

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- 37 Powers of Indian Legislatures Pre served

## LETTERS PATENT (LAHORE)

Letters Patent constituting the High Court of Judicature at Lahore, for the Provinces of Punyab and Delhi, dated 21st Warch, 1919

FIFTH, by the Grace of God, of the United hing lom of Great Britain and Ireland, and of the British Dominions boyond the Seat,

King, Defender of the Faith Emperor of India To ill to whom these Presente shall come greeting. Whereas by an 'tot of Parliament passed in the Fifth and Sixth years of Our Reign and cilled the Government of India Act 1915 it was amongst other things envited that it should be lawful for Us by Letters Patent to establish a High Court of Judicitius in any territor; in British India whether or not included within the limits of the local jurisdiction of another High Court and to confer on any High Court so established any such jurisdiction, powers and authority as were vested in or might be conferred on any High Court existing at the commencement of that tet and

WHILLAS the Provinces of the Punjah and Delhi are now subject to the jurisdiction of the Chief Court of the Punjah which was established by an Act of the Governor General of India in Council being let No NIII of 1865 and was continued by later envetments and no jurt of the said Provinces is included within the limits of the local jurisdiction of any High Court

1 Now know ye that We upon full consideration of the premises and of Our special grace certain knowledge and mere motion,

Litablishment of 11 gh
have thought fit to creet and establish and by these presents We do necordingly for US Our herrs and success
sors erect and establish for the Provinces of the Punjab
and Delin aloresaid with effect from the date of the publication of these presents
in the Gazette of Inia 1 High Court of Judicature which shall be called the
High Court of Judicature at Lahore and We do berely constitute the said Court

2 and We do hereby appoint and ordain that the High Court of Judica tune at Lahore shall until further or other provision be made by Us or Our heirs and successors in that behalf locart and considered for the said rected Government of India Act 1915 consist of a Chief Justice and six other Judges the first Chief Justice being Sir Henry Adol

Chief Justice and six other Judges the hist Chief Justice being Sir Henry Adol plug Rattia, an Knight and the six other Judges being William Chavis Esquire Henry Scott Smith Esquire Shadi Lai Esquire Rai Bahadur Waiter Aubin Lo Rossignol Esquire Leycester Hudson Lesho Jones Esquire and Alan Brice Broadway Lesquire being respectively qualified as in the said Act is declared

3 See Calcutta Cl 5

to be a Court of Record

- 4 See Calcutta Cl 6
- 5 See Calcutta Cl 7
- 6 See Calcuita Cl 8

Admissio 1 of Advocates Valils and Attorneys

- 7 See Calcutta Cl 9
- 8 See Calcutta Cl 10

Civil Jurisdict on of the High Court

- 9 See Calcutta CI 13
- 10 See Calcutta Cl 15

ı,

11 And We do further ordain that the High Court of Judicature at Libore shall be a Court of Appeal from the Civil Courts in the Provinces of the Provinces of the Provinces of the Punjab and Delhi and from all other Courts subject to its superintendence, and shall

oxetesso appollate jurisdiction in such cases as were immediately before the date of the publication of these presents, subject to appeal to the Chief Court of the Punjab by artue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judiciture at Lahron by any law inside by competent legislative authority for India

And We do further ord un that the High Court of Judicature at Lahore shall have the like power and authority with trans and lunates are limited to the persons and estates of infants, identically interpreted to the persons and estates of infants, identically into Propulse of the Punnal and Delbu 18

that which was vested in the Chief Court of the Pumpb immediately before the publication of these presents

Law to be administered by the High Court

- 13 See Calcutta Cl 20
- 14 See Calcutta Cl 21

#### Criminal Jurisdiction

15 And We do further orders that the High Court of Judicature at Labore shall have ordinary original criminal jurisdiction in respect of all such persons within the Provinces of the High Court that the Chief Court of the Pulpab had belth as the Chief Court of the Pulpab had such criminal jurisdiction over unmediately before the

publication of these presents

- t Original criminal jurisdiction—The original criminal jurisdiction of the It.5 Court of Lahoro is contentive with that of the late Chief Court of the Punjab The 11th Court of Lahoro has no jurisdiction to ity on its original criminal side a British Indian subject for an offence, since the Chief Court had no such original criminal jurisdiction except in ite c. of I'uropean British subject 1.
  - 16 See Calcutta Cl 23
  - 17 See Cilcutta Cl 24
  - 18 See Calcutta Cl 25
- 19 And We do further ordern that, on such point or points of law life, so reserved as iforestid, the High Court of Juhestun at Labore shall have full power and authority to reases on points of law reserved by one or more Judges of the High Court of the life of the High Court of the law and there is no alter the sentence present by the Court of training the sentence present by the Court of training

Dolba

20

25

27

Appeals from other Cra

minal Courts in the Pro

vinces of the Punish and

urradiction, and to pass such ind\_ment and sentence as to the said High Court may seem right

And We do further ordain that the High Court of Judicature at

21 See Calentta Cl. 28

Labore shall be a Court of appeal from the Criminal Courts of the Provinces of the Puniab and Delhi and from all other Courts subject to its superintendence and shall exercise appellate muisdiction in such cases as were im mediately before the date of the publication of these pre ents, subject to appeal to the Chief Court of the Punjab by virtue of any law

then in force or as may after that date be declared subject to appeal to the High Court of Judicature at Lahore by any law made by competent legislative authority for India

22 See Calcutta C1 29

Crownal Lan

23 See Calcutta Cl 30

To tamentary and Intestate Jurisdiction

24 See Calcutta Cl 34

Matermanial Jurisdiction

Sec Calcutta Cl 35

Powers of sinile Judges and Division Courts

26 See Calcutta Cl 36

Caul Procedure

And We do further ordain that it shall be lawful for the High Court of Judicature at Labore from time to time to make rules Pegulation of proceed and orders for regulating the practice of the Court and ngs for the purpose of adopting as far as 10881ble the provi sions of the Code of Civil Procedure being an Act No V of 1908 passed by the Governor General in Conneil and the provisions of any law which has been or may be made amending or altering the same by competent legislative authority for

India to all proceedings in its testamentary intestate and matrimonial jurisdic tion, respectively

Communal Procedure

And We do further ordain that the proceedings in all criminal cases brought before the High Court of Judicature at Lahore Regulation of proceed shall be regulated by the Code of Chiminal Procedure, ngs being an Act No V of 1898 passed by the Governor. General in Council or by such further or other laws in relation to criminal procedure as may have been or may be made by competent legislative authority for India

### Appeals to Priny Council

29 See Calcutta C1 39 C P C 398 A 399

30 And We do further mrdam that it shall be lawful for the High Court of Judicature at Lahore at its discretion on the motion

Appeal from interlocu tory judgments

or if the said High Court be not sitting then for any Judge of the said High Court upon the petition of any party whn considers himself aggreeved by any preliminary or interlocutory judgment decree or order of the said High Court in any such

proceeding as aforesaid not being of oriminal jurisdiction to grant permission to such party to appeal against the same to Us Our heirs and successors in Our or Their Privy Council subject to the same rules regulations and limits tions as are heigin expressed respecting appeals from final judgments decrees and orders

31 See Calcutta Cl 41

32 See Calcutta Cl 42

Exercise of Jurisdiction elsewhere than at the usual glace of sitting of

the High Court 33 And We do further ordain that whonever it appears to the Lieute

circuits

nant Governor of the Punjah subject to the control of Special commissions and the Governor General in Council convenient that the jurisdiction and power by these Our Letters Patent or hy or under the Government of India act 1910 vested

in the High Court of Judicatore at Labore should be exercised in any place within the jurisdiction of any Court subject to the superintendence of the said High Court other than the usual place of sitting of the said High Court or at several such places by way of circuit one or more Judges of the Court shall visit such place or I laces accordin\_ly

Proceedings of Judges

circuit

34 And We do further ordain that whenever any Judge or Judges of the High Court of Judicature at Lahore visit any place under the 33rd clause of these presents the proceedings on special commissions or in cases before him or them at such I lace shall be regu lated by any law relating thereto which has been or may

he made by competent legislative authority for India

### Delegation of Duties to Officers

35 The High Court of Judicature at Lahore may from time to time make Rules for delegating to any Registrar Prothonotary or Master or other official of the Court any judicial just Po ver to delegate duties judicial and non indicial duties

Calls for records etc by the Government

36 See Calcutta Cl 43

Powers of Indian Legislatures

37 See Calcutta Cl 44

IN WITNESS whereof We have caused these Our Letters to be mad

Patent Witness Ourself at Westminster the 21st day of March in the year of Our Lord One thousand nine hundred and nineteen and in the ninth year Our Reign

BY WARRANT under the King's Sign Manual

(5d) SCHLSTLR

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# LETTERS PATENT (RANGOON)

11th November, 1922

GEOIGE THE FIFTH by the Grace of God of the United Laugdon of Great Britain and Ireland and of the British Dominions bosond the Se is Laug Defender of the Futh Emperor of India

To all to whom these presents shall come pleeting

WILLRLIS in the Government of Indra Act it was amongst other things consider that it should be lawful for Us by Letters Pitent to establish a light Court of Judicatine in any territory in British India whether or not included within the limits of the local jurisdiction of mother High Court and to confer on any High Court so established any such jurisdiction powers and authority as were vested in or might be conferred on any High Court existing at the commencement of thir Act.

and whereis that portion of the Province of Burma I nown as Lower Burma is new within the Inmits of the purselection of the Chief Court of Lower Burma which was established by an Act of the Governor General of India in Legislative Council being, let No Al of 1900 and whereas that portion of the sud Province I nown as Upper Burma is with certain overptions now within the limits of the jurisdiction of the Judicial Commissioner of Upper Burma ippointed in pursuance of a Regulation of the Governor General of India in Council being, Regulation No A of 1892 and of the Court of the Judicial Commissioner of Upper Burma which was established by a Regulation of the Governor General of India in Council being, Regulation No VIII of 1886 and was continued by a Regulation of the Governor General of India in Council feing, Regulation No I of 1896.

And whereas no must of the said Province is included within the limits of the local nurisdiction of any High Court

1 Now I now yo that We, upon full consideration of the premises and of Our steem! Trace certain knowledge and mero motion fount it Bingson have thought fit to erect and establish and by these free sents We do accordingly for Us Our heirs and successors.

erect and establish for those portions of the province of Burna at present within the limits of the murisdiction of the said Cluef Court of Lower Burna and of the said Judical Commissioner and of the said Court of the Judical Commissioner of Upper Burna as indexed with effect from the date of the publication of these presents in the Gazette of India a High Court of Judicature which shalf be called the High Court of Judicature at Russian, and Wood hereby constitute the said Court to be a Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court of the Court o

2 And Wo do hereby appoint and order that the High Court of Julican interest and the cature at Ringson shall until further or other rows a Judges of the High Court half in accordance with section one hundred and one of the Government of India tet ordinarily consist of a Chief Justice and not be string seven other Judges the first Chief Justice being, Sir Sjulney Mullick Robin son, hit and the other Judges feing Leshie Hurry Sunders Ley, C.54 Musshim Ext Charles Phillip Rulford Young, I sq. Henry Sheldon I ratt Ley, Benjiming Herbert Heald L. q., John Guy Rutfedge, Ley, one of Our Counsel

learned in the Law and Hugh Eurnest MacColl, Esq., being respectively qualified as in the still let is declared

- 3 See Calcutta Cl 5
  - See Calcutta Cl. 6

6

5 See Calcutta Cl. 7 See Calcutta CL 8

Idmission of Iducates and Pleaders

- 7 See Calcutta Cl. 9
  - 8 See Calcutta Cl 10.

Civil Jurisdiction of the High Court

- See Calcutta Cl. 11
- 10 and We do further ordain that the High Court of Judicature at Rangoon in the exercise of its ordinary original civil Original turi diction as jurisdiction shall be empowered to receive thy and to suits determine suits of every description if in the case of suits for land or other immoveable property such land or property shall be

situated, or in all other cases if the cause of action shall have arisen either wholly, or, in case the leave of the Court shall have been first obtained in part. within the local limits of the ordinary original civil jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell, or carry on business, or personally work for gum within such limits except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Rangoon Small Cause Court

1 Suit for land -The expres ion uit for land or other immoveable property means suits in which having reard to the same a data the plending the de recorrude will affect directly the projectory or possessor take to land or other immovable property. A suit to enforce a mortgage is a suit in which the plaintill a ke the Court t ell the property in the event of the mortgage debt not being paid with n the time illowed i r redemit on 1

- 11 See Calcutta Cl. 13
- 12 See Calcutta Cl. 14
- 13 See Calcutta Cl 15
- 14 and We do further ordain that the High Court of Judicature at Rangoon shall be a Court of Appeal from the Civil

Appeal from other Cavil Courts of the Province of Burms for which imme Conrts distely before the publication of these presents the Chief

Court of Lower Burma or the Court of the Judicial Commissioner of Upper Burma was a Court of Appeal and from all other Civil Courts whether with in or without the Province of Burms for which the said High Court is declared to be a Court of Appeal by any law made by the local legislature or by competent legislative authority for India and shall exercise appellate juris diction in such cases as were immediately before the date of the publication of these presents subject to appeal to the Chief Court of Lower Burma or to the Court of the Judicial Commissioner of Upper Burma by virtue of any law then in force, or as may after that date be declared subject to appeal to the said High Court by any law mide by the local legislature or by competent legislative authority for India.

- 15 See Calcutta Cl 17.
- 16 And We do further ordain that the Court for relief of insolvent debtors at Rangoon shall be held before one of the Provision with respect Judges of the High Court of Judicature at Rangoon to the Insolvent Court and the said High Court, and any such Judgo therecf,

shall have and exercise within the Province of Burma, such powers and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in the Province of Buima

Law to be administered by the High Court in the exercise of ordinary or ginal civil jurisdiction

17. And We do further ordain that, with respect to the law to be applied to each case coming before the High Court of Judicature at Rangoon in the exercise of its ordinary original civil jurisdiction, such law shall be the law which would have been applied by the Chief Court of Lower Burma to such case if these Letters Patent had

#### not issued

I Law, meaning of -The word 'law' as used in this Clause increly meins the logal enactments of the Indian and Burmese legislatures and the English common law and equity which was applied by the late Chief Court of Burma It does not include the published decisions of that Court and, therefore the High Court in the exercise of its ordi nary original jurisdiction is not bound by the authorized reports of decisions of the Chief Court of Lower Burma 1

See also the undermentioned case 2

And We do further ordern that, with respect to the equity to be applied to each easo coming before the High Court of

Equity to to administered by the High Court in the exercise of ordinary original civil jurisdiction

Judicature at Rangoon in the exercise of its ordinary original civil turisdiction, such equity shall be the equity as nearly as may be which the High Court of Judicaturo at Fort William in Bengil in the overcise of its

ordinary original civil jurisdiction is authorized to apply to such case

- 19 See Cilcutta Cl 20
- 20 See Calcutta CI 21

## Criminal Jurisdiction

- See Cylcutta Cl 22 21
- 22 See Cilcutta Cl 23
- 23 See Calcutta Cl 21
- 24 See Cilcutta Cl 25
- and We do further ordan that on such point or points of live 25 being so reserved as afores ud, or on its being certified by the Government Advocate that in his jud, ment, there is High Court to review on an error in the decision of a point or joints of law certificate of the Govern ment Advocate decided by the Court of original criminal juri-diction, or

that a point or points of law which has no have been decided by the said Court, should be further considered, the High Court of Judicature at Rangoon shall have full power and authority to review the ease, or such part of it, as may he necessary, and heally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original purisdiction, and to pass such undement and sentence as to the said High Court shall seem right

And No do furtle, ordan that the High Court of Judicature at Rangoon shall be a Court of Appeal from the Cuminal Courts Appeals from Criminal for which immediately before the publication of these presents the Chief Court of Lower Burma or the Judicial Courts Commissioner of Upper Burma was a Court of Appeal

and from all other Criminal Courts whether within or without the Province of Burma, for which the said High Court is declared to be a Court of Appeal by any law made by the local legislature or by competent legislative authority for India and shall exercise appellate jurisdiction in such cases as were immediately before the date of the publication of these presents subject to appeal to the Chief Court of Lower Burma or to the Judicial Commissioner of Upper Burma by virtue of any law then in force or as may after that date be declared subject to appeal to the said High Court by any law made by the local legislature or by competent legislative authorrity for India

See Calcutta Cl 28 27

And We do further ordain that the High Court of Judicature at Ran-28 goon shall have power to direct the transfer of any crimi

Righ Coart may direct the transfer of a case from one Court to another

30

111

nal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it though such onse

belongs in ordinary course to the jurisdiction of some other officer or Court Power of transfer -This Clause does not confer any power of transfer over and

shove that conferred by S 526 of the Code of Criminal Procedure 1 The reason is that this Clau e 10 qualified by Cl 36 sufra

Criminal Lan

See Calcutta Cl 30 29

## Admirally Jurisdiction

goon shall have and exercise all such civil and maritime CIVIL jurisdiction as might be exercised by the High Court of Judicature at Fort William in Bengal as a Court of Ad mirally immediately before the date of the publication of these presents and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions arising in India as might be exercised by the said High Court at the said date

And We do further ordain that the High Court of Judicature at Ran

31 And We do further ordain that the High Court of Judicature at Rangoon shall have and exercise all such criminal jurisdiction Criminal as might immediately before the publication of these prosents be exercised by the High Court of Judicature at the said High Court by any law mide by the local legislature or by competent legislative authority for India

- 15 See Calcutta Cl 17
- 16 And We do further ordain that the Court for relief of insolvent debtors at Rangoon shall be held before one of the Provis on with respect Judges of the High Court of Judicature at Rangoon to the Insolvent Court

and the said High Court, and any such Judge thereof shall have and exercise within the Province of Buima such powers and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in the Province of Burma

And We do further ordain that with respect to the law to be applied to each case coming bofore the High Court of Law to be administered Judicature at Rangoon in the exercise of its ordinary by the High Court in the original easil jurisdiction, such law shall be the law exercise of ordinary ora which would have been applied by the Chief Court of ginal civil purisdiction Lower Burma to such case if these Letters Patent had

# not issued

1 Law meaning of -The word law as eved in this Clause meroly means the legal enactments of the Indian and Burmese legislatures and the English common laward equity which was applied by the lete Chief Court of Burm. It does not include the published decisions of that Court and therefore the High Court in the exercise of its off many original jurisdiction is not bound by the authorized reports of decisions of the Chief. Court of Lower Burma 1

See also the undermentioned case 3

and We do further ordain that with respect to the equity to be applied to each case coming before the High Court of Lquity to be administered by the High Court Indicature at Rangoon in the exercise of its ordinary original civil purisdiction, such equity shall be the equity in the exercise of ordinars

as nearly as may be which the High Court of Judica original civil jurisdiction turo at Port William in Beneal in the exercise of its ordinary original civil jurisdiction is authorized to apply to such case

- 19 See Calcutta Cl 20
  - See C deutta Cl 21 20

## Criminal Juris liction

- 21 See Calcutta Cl 23
- 22 See Calcutta Cl 23
- 23 See Calcutta Cl 21
- 24 See Calcutta C1 25
- and We do further ordain that on such point or joints of live 25 being so reserved as aforesaid, or on its being certifical by the Government Idvocate that in his judgment there is Rich Court to review on an error in the decision of a joint or joints of law certificate of the Govern

ment Advocate decided by the Court of original criminal innaliction or C1 17-Note 1

that a point or points of law which has or have been decided by the said Court, should be further considered, the High Court of Judicature at Rangson shall have full power and authority to review the case, or such part of it, as may be necessary, and finally determine such point or points of law, and thereupon to after the sentence pissed by the Court of oughand jurisdiction, and to pass such judicinent and sentence as to the sud High Court shall seem right

26 And We do further ordinu that the High Court of Judicature at Rancoon shall be a Court of Appeal from the Criminal Courts

Appeals from Criminal
Courts the Chief Court of Lower Burma or the Judicial
Commissioner of Upper Burma was a Court of Appeal

and from all other Criminal Courts, whether within or without the Province of Burma, for which the said High Court is declared to be a Court of Appeal by any law made by the local legislature on by competent legislature authority for India and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the Chief Court of Lower Burma or to the Judicial Commissioner of Upper Burma by virtue of any law then in force of as may after that date be declared subject to appeal to the said High Court by any law made by the local legislature of by competent legislature authority for India

- 27 See Calcutta Cl 29
- 28 And We do further ordain that the High Court of Judicature at Rangoon shall have power to direct the transfer of any otiminal case or appeal from any Court to another equal or superior jurisdiction, and also direct the padimination.

nary investigation of trial of any criminal case by any

officer or Court otherwise competent to investigate or try it though such case belongs in ordinary course to the missilication of some other officer or Court

belongs in Onlinery collise to the Dissistance of School control collection of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissistance of the Dissis

#### Criminal Lau

29 See Calcutta Cl 30

### Admiralty Jurisdiction

30 And We do further ordain that the High Court of Judicitine at Ran goon shall have and exercise all such evil and maritime trustation as might be exercised by the High Court of Judiciation as might be exercised by the High Court of Tudiciation the fort William in Bengal as a Court of Admirally immediately before the date of the publication of these presents and also such jurisdiction for the trial and adjudication of prize causes and other manitime questions arising in India as might be exercised by the sud High Court at the said date

31 And We do further ordam that the High Court of Judicature at Rangoon shall have and excross all such criminal jurisdiction as might immediately before the publication of these presents be exercised by the High Court of Judicature at

Fort William in Bengal as a Court of Admiralty or otherwise in connection with maritime matters of matters of prize

Testamentary and intestate surrediction

32 See Calcutta Cl 34

Vatrimonial surisdiction

33 See Calcutta Cl 30

Powers of single Judges and Division Courts

34 Sec Calentta Cl 36

Civil Procedure

35 And Wo do further ordain that it shall be lawful for the High Court of Judicature at Rangoon from time to time to make Rules and Orders for the purpose of regulating ill proceedings in envil cases which may be brought before the sail High

Court including proceedings in its identiality testament try, intestate and mathemorial purisdiction respectively. Provided always that the said High Court shall be guided in making such Rules and Orders as fair as possible by the provisions of the Code of Civil Procedure being an act passed by the Governor General of India in Legislative Council and being. Act No Not 1908 and the provisions of any law which has been or may be made amending or after my, the same by the local legislature or by competent heislative authority for India.

1 Power to make Rules This Clause entitle the High Court to make Rules and ngs in evil exect. It is not claible it if if if of the Letters I steat. Thus R 25 of the Appl.

Judge of ler thin the Jidge who procks judgment my declar that a case is a fit of for first full the Cl 13 and the

#### Criminal Procedure

36 And We do (unther ordinar that the proceedings in all eriminal cases brought before the lingh Court of Julicature at Riug,oo in Shill be regulated by the Colo of Criminal Procedure being in Yet No Vof 1898 passed by the Governor or other laws in Tultion to eriminal procedure is have been or may be middly

or other lives in relation to criminal procedure is have been or may be unide! the local legislature or by competent legislative authority for linha

See notes to Cl 23 ante

If reals to Pen J Connecil

37 See Cilcutti Cl 33

38 And We do further or lun that it shall be lawful for the High Court of Ju heature it Rang on at its discretion on the motion

Appeal from interlocation of 10 increase at Hagh Court 10 unt sitting, then from 10 interlocation page of the said Hagh Court 10 unt sitting, then from 11 interlocation page of the said Hagh Court up on the petition famour interlocation page of the said Hagh Court up on the petition famour interlocation page of the said Hagh Court up on the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petition in the petitio

Cl 35-Note 1 1 (IJ ) IJA Rang I (-) 3 Rang aso (L 1)

proceeding as aforesaid, not being of criminal jurisdiction, to grant permission to such parts to appeal against the same to Us. Our bers and successors in Our or Their Privy Council, subject to the same Roles regulations and limitations as are herein expressed respecting appeals from final underments decrees and orders

39 See Calcutta Cl 41

40 See Calentta Cl. 42

I xercise of Julis liction elsewhere than at the usual place of sitting of the High

## Court

- 41 And We do further ordain that unless the Governor of Burma in Council otherwise directs one or more Judges of the High Court of Judicatine at Rangoon as the Chief Justice may from time to time direct shall set at Vlandalayt in order to exercise in respect of cases using in such areas in Upper Burma as the Governor of Burma in Council may direct the junisdiction and power by these Our Letters Patent or by or under the Government of India Act vostel in the said High Court Provided that the Chief Justice may in his discretion order that any particular case arising in the said areas in Upper Burma shall be heard at Rangon.
- 42 And Wo do further ordan that whenever it appears convenient to
  the Governor of Burma in Council that the inrisdiction

special commissions and only power by these Our Letters Patent or by or under circuits

The Government of Indiv Act vested in the High Court of Judicature at Rangoon should be evereised in any

place within the jurisdiction of any Court subject to the superintendence of the said High Court other than the usual place of stiting of the said High Court other than the usual place of stiting of the said High Court or at several such places by way of circuit one or more Judes of the said High Court shall visit such place or ulaces accordingly

43 And We do tuther orders that whenever any Judge or Judges of the Preceedings of Judges on petal comm sion or circuit such place under the 41st or the 42ml Clause of these circuit such place shall be regulated by any law relating, thereto

which has been or may be made by the local leg slature or by a competent legislative authority for India

# Provisions regarding Pending Priceedings

44 And We do further ordain that all suits apreals revisions applications reviews executions and other proceedings whatsoever

Provisions regarding rending proceedings on the Court of Lower Burms or hefore the control Lower Burms or hefore the Judicial Commissiones of Lipes Burms or in the Court

of the Judicial Commissioner of Upper Burms or in the eveness of any junishe tion rested in them by any law shall be continued and concluded in the High Court of Judicature at Rangoon as if the same had been instituted in the said High Court and the said High Court shall in relation to all such proceedings exercise the jurisdiction given to it by these pre-ents.

APP III.

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Delegation of Duties to Officers

45 The High Court of Judicature at Raugeon may from time to time male Rules for delegating to any Registrar, Prothonotary or Power to delegate duties Master or other official of the Court any judicial, quasi-

judicial and non-judicial duties

Calls for Records, etc., by the Government.

46 See Calcutta Cl 43

Pouers of Indian Legislatures

47 See Calcutta Cl 44.

In witness whereof We have caused these our letters to be made patent

Witness Ourself at Westminister, the eleventh day of November in the year

of Our Lord One thousand nine hundred and twenty-two, and in the Thirteenth Year of Our Reign

By Warrant under the King's Sign Manual

#### APPENDIX IV.

# RULES OF THE JUDICIAL COMMITTEE OF THE

#### PRIVY COUNCIL, 1925.

#### INTERPRETATION

I -{1) In these Rules unless the context otherwise requires -Interpretation

Appeal means an appeal to His Wajesty in Council

Judgment includes decree order sentence or decision of any Court Judge or Judgeal Officer

Record means the aggregate of papers relating to an apject (including the pleadings proceedings cidence and judgments) proper to be laid before His Majesty in Conneil on the berview of the appeal

Registrar means the Registrar or other proper officer having the custody of the records in the Court appealed from

Abroad means the country or place where the Court appealed from is situate

Agent means a person qualified by virtue of Her Late Majesty's Order in Council of the 6th March 1890 to conduct proceedings before His Majesty in Council on behalf of another

Prity and all words descriptive of parties to proceedings before Its Wijest, in Council (such as petitioner appellant respondent) mean in respect of all sets proper to be done by an Agent the Agent of the party in question where such par y is represented by an Agent

Respondent includes Intervener Month means extendar month

Words in the singular shall include the plural and words in the plural hall enclude the singular

(2) Where he these Rales are step is required to be taken in England in connection we the proceeding before first highest in Commonle whether in the way of belging a petition or other document entering in appearance lodging security or otherwise such step shall be eithern in the first set of the Privy Council Downing Street London

#### LEAVE TO APPEAL

2 All appeals shall be brought either an pursuance of love obtained from the Court appealed from or in the absence of such leve on parsu rails)

Court appealed from or in the absence of such leve on parsu once of steelal leave to appeal granted by His Mayest, in Council upon a petition in this behalf presented by the

entending appellant SPECIAL LEAVE TO APPEAL

3 A petition for special leave to appeal to His Majesty in Council shall state succinctly and clerchy all such facts as it may be necessity to state in Form of petition for order to enable the Judicial Committee to advise His Majesty whether such leave ought to be greated and shall be sized by whether such leave ought to be greated and shall be sized by the most himself

if he appars in person. The petition shall deal with the merits of the case only so far as is ne essays for the parpose of explaining and supporting the particular grounds upon which appears less to appeal is sought

of O hee lees

- The petitioner shall lodge at least five comes of his petition for special leave to appeal together with the affidavit in support thereof prescribed by Fire copies of petition R 50 heremafter contained, and, unless as Caveat as prescribed by to be lodged together with R 48 has been lodged by the other parties who appeared in the affidavits in support Court below, an affidavit of service of notice of the intendel application upon such parties or their Solicitors or accuseither abroid or in England
- A petition for special leave to appeal may be lodged at any time after the date of the judgment sought to be appealed from, but the Patitioner Tune for lodging peti shall, in every case, lodge his Petition with the least 100 itle tion
  - delay Where the Judicial Committee agree to advise His Wajesty to grant special leave to appeal, they shall, in their Report, specify the amount of the
- Security for costs and security for costs (if any) to be fodged by the Petitioner, and shall, ransmission of record upless the engumetances of a particular case render such a council unnecessary provide for the transmission of the Record is the Registrar to the Registrar of the Pray Council and for such further matters as the justice of the case may require. Unless otherwise ordered the security shall be lodged at any time laforthe Appellant enters an Appearance
  - 7. Sixons by the four list preceding Rules otherwise provided, the provisions of Rr 17 to 50 and 52 to 53 (all melusive) hereinafter continued shill iff) General provisions mutatia mintandis to Petitions for special leise to at Ical
- Rules 3 to 7 (both melusive) shall apply mutatis mutandis to Petitions for lease to appeal in forma jaupers, but in addition to the Afridavite to l'etitions lur special ferred to in R 4 every such Petition shall be accommand by 15 Affidavit from the Petitioner string that he is not worth \$20 13 lerie to appeal in forma Jan eris the world excepting his ucrimg apparel and his interest in the subject matter of the intended typest and that he is unable to
- provide anicties and also by a Certificate of Council that the Pet tioner has reasonable group! of appeal 9 Where a Petitiouer obtains leave to appeal in ferna I remption of pinjer restress he shall not be required to ledge security for the con-Appellant from lodging
- scentrity and paying Office of the Respondent or to pay any Council Office fees ice-10 A jetitioner whose petition for leave to appeal in forma jaugeria as dismissed may, not with standing such dismissif le excused from piving the Count I xemption of unine cil Office has usually chargettle to a fetitioner in respect of ecseful l'etitioner for
- jetition for leave to appeal, if His Mijesty in Council on the have to affect in forma rauleres from thymens idence of the Judicial Committee shall think ht so to order

#### RI CORD AND APPEARANCE BY APPILLANT

is soon as the Appell has been admitted, whether by an Order of the Luis appealed from er by an order of His Wijesty in Connell granting 15 ctallette to specif, the tillicant shall without delay time all Accord to to trus-init mecanity steps to have the Record to mountted to the Registrarel tel without deliv the Privy C uncil, and the Pegistrar shall, with all convenced

specif, certify to the Registrir of the Privy Council that the Respondent his recental nonct is otherwise aware of the order of the Court appealed from admitting the Appeal of the Order of the Magesty in Council giving the Appellant special love to appeal and has also received notice, or as otherwise is use of the despatch of the Receid to I usland Where an Appellant who has obtained special leave to appell to an Order of His Magas? in Council fuls to have the Record transmitted to the hegistrar of the frity toon to with due diligence, the Registrar of the Privy Council shall call up a the Appellant 1 explain his definit and if no explanati n is offered, or if the explanation a fered is in the ormion of the sail Registrir mouricient, the said Registrar may usue a Summ rate the Michael cilling upon him to show rause te ore the Jubical Committee at a time to be nary i in the sold Summons why the special leave to appeal granted should not be are indi-The keep adout shall be natified to be heard before the Judicial Committee in the hance

the sail Summons and to ask for his costs and such other relief us be may be advised. The Judicial Committee may there considering the mitter of the said Summons recommend to this Maje is to recent the grant of special levie to appeal or give such other directions therein as the 12 to, of the ever my require

12 The Record shall be printed in accordance with the Rules contained in Schedule A hereto. It was be printed either abroad or in England. When Printing of record printed abroad the prittee in England shall upon perusal consider whether the order of the documents is in accordance with these

Rule and fit is not they shall agree upon the project order. The Appellant shall then rearrange copies of the Record for the use of the Judavil Committee and the other parties for the event of the purities being mable to agree the matter shall be referred to the Registrar of the Pray Council who if he thinks fit may require the parties to attend before the Judicial Committee for directions.

13 Where the Record is printed abroad the Registrat shall at the expense of the Tigliant transmit of the Registrat of the Print Council of copies. Number of copies to be disable Record one of which copies he shall certify to be correct printed troad on the shall certify the correct printed troad on the shall certify the contrappealed from the shall certify the contrappealed from the shall certify the contrappealed from the shall certify the contrappealed from the shall certify the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from the contrappealed from

14 Where the Record is to be printed in England the Registry shall at the exposus
One central copy of the Appellini transmit to the Registry of the Paris, Commit
One central copy of the control open of such Record Sogether with in males of all the
tran mitted where road a later, and exhibite in the case. No other certified copies of the
to be point in Final and
Record shall be transmitted to the Agents in England by or on
behild of the priviles to the Appell

15 Where part of the Record is printed abroad and part is to be printed in England Record printed parts as Record printed parts are printed abroad and such as are to be printed in England abroad and such as are to be printed in England.

16 The rea ons given by the Judge or any of the Judges for or against any judgment genomenced in the course of the proceedings out of Rea ons for judgments which the Apeal arises shall by such Judge or Judges be communicated in writing to the Registrar and shall be included in the Record

17 The Begistrir as well as the jatter and their Agents shill enleavour to exclude from the Record III, documents (more pirth ulinh with as a row Exclusion f unner essared ou ment from IR. Appell and generally to reduce the bulk of the Record is first stord.

17 The Begistrir as well as the jatter and their Agents shill enleavour to exclude from the Record in Grant Exclusion (and the Record is first to cord.)

formal parts of documents but the documents omitted to be printed or copied shill be enumerated in a type written but to be trusmitted with the Record

18 Where it the course of the preparation of a Record one parts objects to the ministen of a document on the ground that its numers earn or Doc mments objected to trete and and the other parts is excludes instants i point to trete and the other parts is excludes instants in the ministed the record as finally printed (whether should or in Ingland) shall with a use to the sub-equent idjustment of the coasts of and principally the safe of the minister of the makes of pages or otherwise the

fact that and the justy by whom the meiusion of the document was objected to

19 As soon as the Record is received in the Registry of the Privy Council it shall be

Registration and num
being of Records

Registration and num
being of Records

A Record of in part of theory due printed on written
the Rules continued in Schedule 1 hereto shall be treated as

written Appeals shall be numbered consecutively in each year in the order in which the Records are re-cived in the said Registry

Inspection of Records by parties

The parties shall be entitled to inspect the Record and to extract all necessary particulars therefrom for the purpose of entering an Appearance

Appearance by Appel lant

The Appellant shall enter an Appearance belore taking any step in the prosecution of the Appeal and after entering such Appearance shall forthwith give notice thereof to the Respondent if the latter has entered an Appearance

22 Times within which a copy of a written Record

shall be bespoken

Where the Record arrives in England either wholly written, or partly written and partly printed the appellant shall, within a period of four months from the date of such arrival in the case of Appeals from Courts situate in any of the countries or places named in Schedulo b hereto and within a period of two months from the same date in

the case of Appeals from any other Court enter an Appearance and bespeak a typewritten copy of the Record or of such parts thereol as it may be necessar) to have copied and shall engage to pay the cost of preparing such copy at the following rates per lolio typed (exclusive of tibular matter) 2d per folio of English matter 2ld per folio d Indian matter and 3ld per lolio of foreign matter and shall also engage to pay at su h price as shall be fixed by the Registrar of the Price Council the cost of printing at least 50 copies thereol

is soon as the inpellant has obtained the type written copy of the Record be poken by him he shall proceed with due diligence to arrange the do " Preparation of copy of monts in suitable order to check the index to insert marginal Record for Printer notes and check the same with the index and generally, to do

whitever may be required for the purpose of prepiring the copy for the printer in accordance with the Rules contained in Schedule 1 heroto and shall if the Rospondent has ontered an Appearance submit the copy as prepared for the trinter to the Respondent for his approval. In the event of the pirties being unable to agree the matter shall be referred to the Registrar of the Privy Council who if he thinks ut may require the narries to attend before the Judicial Committee for directions

is soon as the typewritten coly of the Record is ready for the printer, the Appellant shall lodge it in the Registry of the I rivy Council! I frinting by a printer selected by the Registrar of the Privy Council Lodgin, copy of Record for | rinting and at the same time shall lodge the amount of the estimated cal

of 1 rinting the Record

Whenever it shall be found that the decision of a matter on as peal is lakely to tura exclusively on a question of law, the jurites with the sauction of the Resistrar of the Persy Council may submit such question of law to the Indicial Committee in the form of a Special Case a

Spc tal caso

print such parts only of the Record as may be necessary for the discussion of the saile live vided that nothing herein contained shall in any way prevent the Julicial Committee fr at ordering the full discussion of the whole case, if they shall so think fit and that in order to

26 The Registrar of the I rivy Council shall, as soon as the proof prints of the R are ready, give notle to all parties who have entered an 100 Examination of proof pearance requesting them to attend at the Registry of the level of Record and a rial a Council at a time to to named in such notice in order to exam ! the said [roof prints and compare the same with the certical Ic of copies

cold and shall for that furpose furnish each of the said part with one proof print ther the examination has been completed the Appellant shall, with delay, ludge his groot print, duly corrected and (so far as necessary) approved by the ler pondent, and the Registrar of the Irray Council shall thereupon cause the cor solita Record to be struck of from such groof print

27 Lach jurty who has entered an Allearance that le entitled to receive for his own use, six c per of to Number of class of Record for justice Recest.

28 Subject to any special direction from the Judicial Committee to the contrary the coils of and meldentil to the printing of the Record shall form.

How costs of printing part of the costs of the Appeal but the costs of and incidentil to Record are to be forme the printing of any december objected to by one pruty, in accord-

ance with R 18, shall, if such document is found on the taxation of costs to be unnece sary or irrelevant, be disallowed to, or borne by, the party insisting on including the same in the record

#### PETITION OF APPEAL.

Times within which
ptition shall ke lodged

(a) where the Record arrives in England printed, within a period of four months

- from the date of such arrival in the case of Appeals from Courts situate in any of the countries or places named in Schedule B hereto, and within a period of two months from the same date in the case of Appeals from any other Courts,
  - (b) where the Record arrives in England written, within a period of one month from, but not before, the date of the completion of the printing thereof

Provided that nothing in this Rule contained shall preclude the hypellant from lodging his Petition of Appeal prior to the arrival of the Record, or the completion of the printing thereof, if there are special reasons why, in the opinion of the Registrar of the Privy Council, it should be de riable for him to do so

30 The Fettion of typeal hall be lodged in the ferm prescribed by R 47 hereinstice
Form of position chromological order the principal steps in the proceedings leading up to the typeal from the commencement thereof down to the admission of the typeal but shill not contain argumentative matter or travel into the monts

of the case

31 The Appellant shall, after lodging his Petition of Appeal serve a copy thereof without delay on the respondent, as soon as the latter has entered an Appearance, and shall endorso each copy with the date of the fodgment

# WITHDRAWAL OF APPEAL 32 Where an Appellant, who has not ledged his Petition of Appeal, desires to withdraw

his Appeal he shall give notice in writing to that effect to the Withdraws of Appeal Registrar of the Privy Council, and the sud Registrar shall, with before Petition of Appeal all convenient speed after the receipt of such notice by letter notify the Registrar of the Court appealed from that the Appeal has been lodged withdrawn, and the said 'pepsal shall thereupon stand dismissed as

from the date of the said letter without further Order

33 Where an Appellant, who has ledged his Telition of Appeal, desires to withdraw his typeal, he shall present a Petition to that effect to His Majosty Withdrawal of typeal in Council on the hearing of any tuch Petition a Respondent after Petition of Appeal who has entered an Appearance in the Appeal shall, subject to any has been ledged agreement between him and the Appellant to the contrary, he en-

titled to apply to the Judical Committee for his costs, but where the Respondent has not entered an Appearance, or having entered an Appearance, conseits in writing to the prayer of the Petition, the Petition may, it the Judical Committee thinh, it to disposed of in the same way mutatis mutandis as a consent Petition under the provisions of R 56 herenafter contained.

#### NON PROSECUTION OF APPEAL

34 Where an appellant takes no step in prosecution of his appeal within a period of Dismissal of Appeal in the case of an Appeal from a Court situate in any of the coun where Appellant takes no risks or places hamed in Schedule B hereto, or within a period of step in prosecution two months from the same date in the case of an Appeal from any other Court the Registrar of the Pray Council shall, with all contents speed, by letter notify the Registrar of the Co appealed

from that the Appeal has not been prosecuted, and the Appeal shall thereupon stand dis missed for non prosecution as from the date of the said letter without further order, and a copy of the said letter shall be sent by the Registrar of the Privy Council to any respondent who has entered an Appearance in the Appeal

Dismissil of Appeal for non prosecution after An pellant's Appearance and before lodgment of Peti tion of Appeal

- 35 Where an Appellant who has entered an Appearance
- (a) fulls to bespeak acopy of a written Record, or of part of a written Record in ac cordance with and within the periods prescribed by R 22, or
- (b) having be maken such copy within the periods prescribed by R 22, fails thereafter to proceed with due diligence to take all such further steps as may be necessary for the purpose of completing the printing of the said record, or
- (c) fails to lodge his Petition of Appeal within the periods respectively prescribed by R 23 the Registrar of the Privy Council shall call upon the Appellant to explain his default and if no explanation is offered or if the explanation offered is in the opinion of the said Registrar manificient the said Registrar shall with all con venient speed by letter notify the Registrar of the Court appealed from that the Appeal has not been effectually proscented, and the Appeal shall thereupon stand dismissed for non prosecution as from the date of the said letter without further order and a cony of the said letter shall be sent by the Registrar of the Print Council to all the parties who have entered an Ampearance in the Appeal
- 36 Where in Appa

Dismissal of Appeal Appeal

for non prosecution after planation as offered or if the explanation offered is in the opinion lodgment of Patition of of the said Registrar insufficient the said Registrar shall issue a Summons to the Appellant calling upon him to show cause before the Judicial Committee at a time to be named in the said Summons

why the appeal should not be dismissed for non prosecution. Provided that no such Summons shall be assed by the and Registrar before the expiration of one year from the date of the arrival of the Record in England If the Respondent has entered an appearance in the appeal the Registrar of the Privy Council shall send him a copy of the said Summons and the Repondent shall be entitled to be heard before the Judicial Committee in the matter of the said Summons at the time named and to ask for his costs and such other relief as he may be advised The Judicial Committee may after considering the matter of the said Summon. recommend to His Milesty the dismissal of the Appeal for non prosecution, or give such other directions therein as the justice of the case may require

Restoring an Appeal dismi sed for non prose cution

37 An Appellant whose appeal has been dismissed for non protecution may present a Petition to His Vajesty in Council praying that his Appeal may be restored

#### APPEARANCE BY RESPONDENT

- 38 The Respondent may enter an appearance at any time between the arrival of the Record and the hearing of the Appeal but if he undely delays entering an Appearance he shall bear, or be disallowed the which Time within Respondent may appear costs occasioned by such delay, unless the Judicial Committee otherwise direct
- 39 The Respondent shall forthwith after entering an Appearance give notice thereof to Notice of Appearance by the Appellant of the litter has entered an Appearance Respondent
- Form of Appearance where all the Respon dents do not appear
- 40 Where there are two or more respondents and only one, or some of them, enter an Appearance, the Appearance form shall set out the names of the appearing Respondents
  - 41 Two or more Respondents may, at their own rik as to Separate Appearances costs enter separate Appearances in the same Appeal

Non appearing Respon dent not entitled to re ceive noti es ir lodge case.

A Respondent who has not entered an Appearance shall not be entitled to receive any notices relating to the Appeal from the Registrar of the Privy Council nor be allowed to lodge a case in the Arrest

Procedure поп appearing of Respon dent

- Where a Respondent fails to enter an Appearance in an Ap mal the following Rules shall subject to any special Order of the Judgetal Committee to the contrary, apply -
- (1) If the non appearing Respondent was a Respondent at the time when the Appeal was admitted whether by the Order of the Court appealed from or by an Order of Ilis Milests in Council giving the Appellant special leave to Appeal, and it appears from the terms of the said Order, or Order in Council, or otherwise from the Record or from a certificate of the Registrar of the Court appealed from that the said non appearing Respondent has received notice. or was otherwise aware of the Order of the Court appealed from admitting the appeal or of the order of His Wajests in Council giving the appellant special leave to appeal and has also received notice, or was otherwise aware, of the despatch of the Record to England the Appeal may, if all other conditions of its being set down are satisfied be set down ex parte as against the said non appearing Re-pondent at any time after the expiration of three months from the date of the ledging of the Petition of Appeal
  - (b) If the non appearing Respondent was made a Respondent by an order of His Majesty in Council subsequently to the admission of the Appeal, and it ap pears from the Record, or from a Supplementary Record, or from a Certi ficate of the Registrar of the Court appealed from, that the said non ap pearing respondent has received notice, or was otherwise aware of any in tended application to bring him on the Record as a Respondent the Appeal may, if all other conditions of its being set down are setisfied, he set down er parfe as against the said non appearing Respondent at eny time after the expiration of three months from the date on which he shall have been served with a copy of His Majesty's Order in Council bringing him on the Record. es a Respondent

Provided that where it is shown to the satisfaction of the Registrar of the Privy Council by thidavit or otherwise, either that an Appellant has made every reasonable endeavour to serie a non appearing Respondent with the notices mentioned in Cls (a) and (b) respectively and has failed to effect such service or that it is not the intention of the non appearing Res pondent to enter an Appearance to the Appeal, the Appeal may, without further Order in that hehalf and at the risk of the Appellant be proceeded with experte as against the said non appearing Re pondent

appeal in forma pauperis

A Respondent who desires to defend an Appeal in forma pauperis may present a Petition to that effect to His Majesty in Council, which Potition Respondent defending shall be accompanied by in Affidavit from the petitioner stating that he is not worth £25 in the world excepting his wearing apparel and his interest in the subject matter of the appeal

#### PETITIONS GENERALLY

All petitions for orders or directions as to matters of practice or procedure arising after the lodging of the Petition of Appeal and not involving any Mode of addressing change in the parties to an Appeal shall be addressed to the Judi petitions cial Committee All other Petitions shall be addressed to His

Majerty in Conneil, but a Petition which is properly addressed to His Majesty in Council may include, as incidental to the relief thereby sought, a prayer for orders or directions as to matters of practice or procedure

Where an Order made by the Judicial Committee does not embody any special terms or meluda any special directions, it shall not be necessary Orders on petitions to draw up such order, unless the Committee otherwise direct, which need not be drawn but a Note thereof shall be made by the Registrar of the Privy up, Conneil

C.P C. 400 & 401

lodged

All Petitions shall consist of paragraphs numbered consecutively and shall t written, typawritten or lithographed on brief paper with quarte Form of Petition and margin and endorsed with the name of the Court appealed from number of copies to be the full title and Privy Conneil number of the Appeal to whi hith Petition relates or the full title of the Petition (as the cale may

be) and the mane and address of the London Agent (if any) of the petitioner but need not be signed, except as provided by R 3 Unless the retition is a Coa

sent Petition within the meaning of R of at least five copies thereof shall be lodged Where a Petition is expected to be lodged or has been lodged, which does not tel to

Caveat

to my pending Appeal of which the Record has been regi tered in the Registry of the Prive Council in person claiming a right to

appear before the Judicial Committee on the hearing of such Peti tion may lodge a Gaveat in the matter thereof, and shall thereupon be entitled to receive from the Registrar of the Privy Council notice of the lodging of the Petition, if it the time of the lodging of the Careat such Petition has not yet been lodged and if and when the Petition has been lodged to require the Petitioner to serio him with a copy of the Petition and to furnish him at his own expense with copies of any papers lodged by the Petitioner in support of his Potition The Careator shall forthwith after lodging his Careat give notice thereof to the Petitioner if the Petition has been lodged

Where a Petition is ledged in the matter of any pending Appeal of which the Rocord has been registered in the Registry of the Prive Council Service of Petition the petitioner shall serve any party who has entered an Appearance in the inpeal with a copy of each Petition, and the party so served

shall thereupon be cutified to require the Petitioner to furnish him at his own exten e with copies of any papers lodged by the Petitioner in support of his Petition

50 A Petition not relating to any appeal of which the Record has been registered in

Affidavit

the Registry of the Pring Council and any other Petition contain Verifying Petition by ingallegations of fact which cannot be verified by reference to the registered Record or any certificate or duly authenticated state ment of the Court appealed from shall be supported by Affidant

Where the Petitioner prosecutes his Petition in person the said Affidavit shall be snorn by the Petitioner himself and shall state that to the best of the deponent a knowledge information and belief the allegations contained in the Petition are true. Where the Petitioner is represented by an Agent the end Affidavit shall be eworn by such Agent and shall be ide stating that to the best of the deponent a knowledge information and helief the allegations contained in the Petition are true, shew how the depouent obtained his instructions and the miormation enabling him to present the Petition

51 A Petition for an Order of Revivor or substitution shall be accompanied by a cortin cate or duly authenticated statement from the Court appealed from

Petition for Order of Revivor or substitution

showing who in the opinion of the said Court is the proper person to be substituted or entered on the Record in place of or in addition to a party who has died or undergone a change of status

Petition disclosure no reasonable cause of appeal or containing scandalous matter to be refused

52 The Registrar of the Priva Council may refuse to receive a Petition on the grounds that it discloses no reasonable cruse of appeal, or is frivolous or contains scindalous matter, but the Peti tioner may appeal by way of motion, from such refusal to the Judicial Committee

Setting down petition

53 As soon as a Petition and all necessary documents 150 ledged, the Petition shall thereupon be deemed to be set down

Times within which

54 On each day appointed by the Indical Committee for the hearing of Petitions the Registrar of the Pring Council shall, unless the Committee other wise direct, put in the paper for hearing all such Petitions as but been set down, provided that in the absence of special circum stances of urgency to be shown to the satisfaction of the sad Registrar, no Petition, if opposed, shall be put in the paper for

set down petitions shall be heard

hearing before the expiration of ten clear days from the lodging thereof unless the opponent consents to the Petition being put in the paper on an earlier day 55 Subject to the provisions of the next following Rule the Registrir of the Privi

Notice to parties of day fixed for hearing Petition Council shall, as soon as the Judicial Committee have appointed day for the hearing of a Petition notify all parties concerned by Summons of the day so appointed

Procedure where petr tion is con ented to er is 'crmal

IV.

56 Where the priver of a Pelition is consented to in writing by the opposite party or where a 1 tition is of a formal and non-contentious character, the Judi 131 Committee 113, if they think fit make their Report to His Milesty on such Petition or make their Orler thereon as the en e may be without requiring the attendance of the parties in the conneil chamter and the Registrar of the Privy Council shall

not in any su hich easie the summous provided for by the last preceding rule but shall with all convenint speed after the committee have made their report or order notify the part en that the report or order has been made, and of the date and nature of such report or order

57 A relationer who le ares to withdraw his petition shall give notice in writing to that effect to the Registrir of the Privy Council Where the Peti

Wathdrawal Cletation tion as oppo ed the opponent shall subject to any agreement bet ween the parties to the contrary be entitled to apily to the Judy all Committee for his costs but where the Petition is unopposed or where in the case of an oppo cd Pelition the parties have come to an agreement as to the costs of the Petition the I ctition may if the Judicial Committee think fit be disposed of in the same way mutatis

t utandis as a Consent Petition under the Provisions of the last preceding Rule

Where a retitioner unduly deleys bringing a Letition to a hearing the Registric of the Privy Council shall call upon him to explain the delay and if no explanation is offered or if the explanation offered is in the I recedure where hear ing of Petition unluly opinion of the said Registrar insufficient the said Registrar may

delayed after notifying all parties suferested by Summons of his intention to do so put the Petition in the laper for hearing on the next following dr appointed by the Indicial Comm thee for the hearing of Petitions for such direc-

tions as the Committee may think fit to give thereon

Only one conneel heard on a side in potitions

59 At the hearing of a Petition not more than one counsel shall be admitted to be heard on a side

#### CASE

60 No party to an appeal shall be entitled to be heard by the Judicial Committee unless he has previously ledged his case in the appeal provided that Lodging of case where a respondent who has entered an appearance does not desire to lodge a case in the appeal ho may give the Registrar of the Privy Council notice in writing of his intention not to lodge any case while reserving his right to address the Judicial Committee on the question of costo

The case may be printed either abroad or in England and shall in either event be printed in accordance with the Rules I to III contained in Schedule A hereto overy tenth line thereof being numbered in the Printing of case marg n and shall be signed by at least one of the counsel who attends at the hearing of the appeal or by the party himself if he conducted his appeal in

person Number of prints to be ladged

Euch party shall lodge 30 prints of his case

63 The case shall cooper of paragraphs numbered consecutively and shall state as conci ely as possible the circumstances out of which the uppeal Form of case arises the contentions to be urged by the party lodging the same and the reasons of appeal References by page and line to the relevant portions of the record as printed shall as far as practicable be printed in the margins and care shall be taken to avoid as far as pessible the reprinting in the case of long extract from the record The Taxing Officer in taxing the costs of the appeal shall either of his own

motion or at the instance of the opposite part; inquire into any unnecessary probaity in the

Separate cases by two or more Respondents

case and shall disallow the costs occasioned thereby

64 Two or more respondents may at their own risk as to costs lodge separato cases in the same appeal

Notice of lodgment of Each party shall after lodging his case, forthwith give notice thereof to the other party case



Procedure where pcti tien is con ented to or in formal

W

56 Where the rriver of a Petition is concepted to in writing by the annosite party or where a patition is of a formal and non contentions character, the Judicial Committee may, if they think fit make their Report to His Mac to on such Petition or make their Order thereon as the en e may be without requiring the attendance of the parties in the council chamter and the Registrar of the Privy Council shall

not in any such case; ste the summons provided for by the last pieceding rule, but shall with all convenient suced after the committee have made their report or order notify the parties that the report or order has been made and of the date and nature of such report or onler

57 A retitioner who decires to withdraw his petition shall give notice in writing to Where the Petr

ny agreement bet Wathdrawal of Petation to apply to the

Judicial Committee for his costs but where the Petition is unopposed or where in the case of an opposed Petition the parties have come to an agreement as to the costs of the Petition the Petition may if the Judicial Committee think fit be disposed of in the same way mutatis mutandes as a Consent Petition under the provisions of the last preceding Rule Where a petitioner unduly delays bringing a Petition to a hearing the Registrar

Procedure where hear ing of Petition unduly delased

of the Pray Conneil shall call upon him to explain the delay and if no explanation is offered or if the explanation offered is in the epinion of the said Registrar insufficient the said Registrar may after notifying all parties interested by Summons of his intention to do so put the Petition in the paper for hearing on the next

following day appointed by the Indical Committee for the hearing of Patitions for such directions as the Committee may think fit to give thereon

Only one counsel heard 59 At the hearing of a Petition not more than one counsal shall be admitted to be heard on a side on a side in petitions

#### CASE

60 No party to an appeal shall be entitled to be heard by the Judicial Committee unless he has previously lodged his case in the appeal provided that Lodging of case where a respondent who has entered an appearance does not desire to lodge a case in the appeal he may give the Registrar of the Privy Council notice in writing of his intention not to lodge any case while reserving his right to address the Judicial Committee on the question of costs

61 The case may be printed either abroad or in England and shall in either event be printed in accordance with the Rule, I to III contained in Schedule A hereto every tenth line thereof being numbered in the Printing of case margin and shall be signed by at least one of the counsel who attends at the hearing of the appeal or by the party himself if he conducted his appeal in

person Number of prints to be lodged

Each party shall lodge 30 prints of his case

The case shall consist of paragraphs numbered consecutively and shall state as concisely as possible the circumstances out of which the appeal Form of case arises the contentions to be urged by the party lodging the same

motion, or at the instance of the opposite party inquire into any unnecessary prolinity in the case, and shall disallow the costs occasioned thereby

Separate cases by two or more Respondents

64 Two or more respondents may at their own risk as to costs lodge separate cases in the same appeal

Notice of lodgment of case

Each party shall, after lodging his case, forthwith give notice thereof to the other party

47

Form of Petition and

All Potitions shall consist of piragraphs numbered consecutively and still written, typewritten, or lithographed on brief paper with q margin and endorsed with the name of the Court appealed! the full title and Privy Council number of the Appeal to while

number of copies to be lodged Petition relates or the full title of the Petition (as the a be), and the name and address of the London Ageut (if aur); petitioner but need not be signed, except is provided by R 3 Unless the petition is all

sent Petition within the meaning of R 56 at least five copies thereof shall be lodged

Where a Petition is expected to be ledged, or has been ledged, which does not? to any pending Appeal of which the Record has been regi at a Caveat the Registry of the Prive Council, any person claiming at h

appear before the Judienal Committee on the hearing of such! tion may lodge a Caveat in the matter thereof, and shalf thereupon be entitled to receive the Registrar of the Privy Council notice of the lodging of the Petition, if at the time of lodging of the Cavert such Petition has not yet been lodged and if and when the Petition's been lodged to require the Petitioner to serve him with a copy of the Petition and to full him at his own expense, with copies of any papers lodged by the Petitioner in support of Petition The Caveator shall forthwith after lodging his Gaveat give notice thereof to: Petitioner if the Petition has been lodged

Where a Petition is lodged in the matter of any pending appeal of whi hit Record has been registered in the Registry of the Prire Count the petitioner shall serve any party who has entered an appear a Service of Petition

in the Appeal with a copy of such Petition, and the party so serie shall thereupon be entitled to require the Petitioner to furnish him, at his own expense " copies of any papers lodged by the Petitioner in support of his Petition

50 A Petition not relating to any appeal of which the Record has been register d the Registry of the Privy Council, and any other Petition continu ing allegations of fact which cannot be verified by reference to the Verifying Petition by registered Record or any certificate or duly authenticated talk Affidavit

ment of the Court appealed from shall be supported by this Where the Petitioner proscentes his Petition in person the said affidavit shall be swore in the Petitioner himself and shall state that to the best of the deponent a knowledge, and shall state that tion and belief the allegations contained in the Petition are true Where the Petiti ner is represented by an Agent the said Midant shall be sworn by such agent and shall be to stating that to the best of the deponent's knowledge information and belief, the allered in contained in the Petition are true shew how the deponent obtained his instructions and the information enabling him to present the Petition

51 A Petition for an Order of Revivor or substitution shall be accompanied by a c, a cate or duly anthenticated statement from the Court appealed La showing who in the opinion of the said Court is the proper P Petition for Order of

Revivor or substitution to be substituted or entered, c tion to a party who has died

52 The Registrir of th Petition disclosing no a Petition on the grounds that it di close no reasonable ras reasonable cause of appeal

or containing scandalous matter to be refused

53 As soon as a Petition and all necessary document 10dged, the Petition shall thereupon be deemed to be set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down to the set down Setting down petition

Registrar of the Pray Conneil shall, unless the Committee wise direct, put in the paper for hearing all such Petitions a been set down, provided that in the absence of special cu Times within which stances of urgency to be shown to the satisfaction of the set down petitions shall Registrar, no Petition, if opposed, shall be put in the I ver be heard

hearing before the expiration of ten clear days from the lodging thereof, unless the opportunity by consents to the Petition being put in the paper on an earlier day 55 Subject to the provisions of the next following Rule the Registrar of the Fritten 1.1

Council shall, as soon as the Judicial Committee have appoint; if day for the hearing of a Petition notify all parties concerned if Notice to parties of day fixed for hearing Petition Summons of the day so appointed

Procedure where puts tion is consented to or is formal

IV.

56 Where the prover of a Petition is consented to in writing by the or posite Party or where a letition to of a formal and non contentions character the Judical Committee may, if they think fit make their Report to His Maie to on such Petition or make their Order thereon as the eremant, without requiring the attending of the parties in the council chamler and the Registrar of the Privy Council shall

not in any such cases be the summons provided for by the list preceding rule but shall with all convent it speel after the committee have made their report or order notify the part es that the report of order has been made and of the date and nature of such report or order

57 A petitioner who de pres to withdraw his petition shall give notice in writing to that effect to the Registrar of the Pring Council Where the Peta tion is oppo ed the opponent shall subject to any agreement bet Withdrawal of Petition we n the parties to the contrary be entitled to apply to the Judicial Committee I r his costs but where the Potation is unopposed or where in the case

the Petition way mutatis

Where a relationer unduly delays bringing a Letition to a hearing the Registrar of the Privy Conneil shall call upon him to explain the delay and if no explanation is offered or if the explanation offered is in the Procedure where hear ommon of the and Registrar insufficient the said Registrar may ing of Petition uotuly delayed after notifying all parties interested by Summons of his intention

following day appointed by the Judicial Committee for the hearing of Petitions for such direct tions as the Committee may think fit to give thereou

Only one counsel heard on a side in petitions

At the hearing of a Petit on not more than one counsel shall be admitted to be heard on a side

to do so put the Petition in the paper for hearing ou the next

#### CASE

No parts to an appeal shall be entitled to be heard by the Judicial Committee unicss he has previously lodged his case in the appeal provided that Lodging of case where a respondent who has entered an appearance does not desire to lodge a case in the appeal he may give the Registrar of the Privy Conneil notice in writing of his intention not to lodge any case while reserving his right to address the Judicial Committee on the question of costs

The case may be printed either abroad or in England and small in either event be printed in accordance with the Rules I to III contained in Printing of case Schedule A hereto every tenth line thereof being numbered in the marum and shall be signed by at least one of the counsel who

attends at the hearing of the appeal or by the jurty himself if he conducted his appeal in person

Number of prints to be lodged

Each party shall lodge 30 prints of his case

63 The case shall consist of paragraphs numbered consecutively and shall state as concisely as possible the circumstances out of which the appeal Form of case arises the contentions to be urged by the party lodging the same and the reasons of appeal References by page and line to the relevant portions of the record as printed shall as far as practicable to printed in the inargins

and care shall be taken to avoid as far as possible the reprinting in the case of long extract from the record The Taxing Officer in taxing the costs of the appeal shall either of his own motion or at the instance of the opposite party inquire into any unnecessary prolixity in the case, and shall disallow the costs occasioned thereby

Separate cases by two 64 Two or more respondents may at their own risk as to or more Respondents costs, lodge separate cases in the same appeal

Notice of lodgment of 65 Each party shall after lodging his case, forthwith give notice thereof to the other party case

Subject as hereinafter provided, the party who lodges his case first may, at any time after the expiration of three clear days from the day on which he has given the other party the notice prescribed by the last pre

Case notice

meantime lodged h month from the of his so doing the other party fails

at any time after the expiration of the time limited by the said case notice for the lodging of the case lodge an afridavit of service (which) shall set out the terms of the said case (notice) and the appeal shall thereupon if all other conditions of its being set down are satisfied be set down ex parte as against the party in default, provided that no case notice shall be served until after the completion of the printing or re arrangement under R 12 of the Record and also that nothing in this Rule contained shall preclude the party in default from lodging his case at his own risk as regards costs and otherwise at any time up to the date of hearing

67 Subject to the provisions of R 43 and of the last preceding Rule an appeal shall Setting down Appeal and exchanging cases

be set down apso facto as soon as the cases on both sides are lodged and the parties shall thereupon exchange cases by handing one another either at the offices of one of the Agent, or in the Registry of the Privy Council ten copies of their respective cases BINDING RECORDS, LTC

ceding Rule, serve such other party, if the latter has not in the

68 As soon as an appeal is set down, the appellant shall attend at the Registry of the

Mode of binding re Judicial Committee

Privy Conneil and obtain ten copies of the record and cases to be bound for the use of the Judicial Committee at the hearing The cords etc for use of copies shall be hound in cloth or in half leather with paper sides and siz leaves of black paper shall be inserted before the 47 pellant a case The front cover shall bear a printed label statics the title and Privy Council number of the appeal the contents of the volume and the names

and addresses of the London Agents The several documents indicated by mouts shall be arranged in the following order (1) Appellant's case, (2) Respondent's case, (3) Record if in more than one part showing the separate parts by incuts all parts being paged at the top of the page) (4) Supplemental record (if any), and the short title and Privy Council numb? of the appeal shall also be shown on the back

within which lodged

69 The Appellant shall lodge the bound comes not less than bound comes shall be lour clear days before the commencement of the sittings during which the appeal is to be beard

HEARING

Notice of day on or be fore which appeals must be set down for ensuing

70 The Registrar of the Pring Council shall name a day on or before which appeals must be set down if they are to be entered in the list of business for the ensning sittings. All appeals set down on or before the day named shall, subject to any directions from the Committee of to any agreement between the parties to the contrary, be entered in such list of business and shall subject to any directions from the Committee to the contrary, be heard in the order in which the) are

sittings. set down

71 The Registrar of the Privy Conneil shall subject to the provisions of R 42, notify Notice to parties of day

the parties to each appeal by Summons at the earliest possible date, ot the day appointed by the Judicial Committee for the

fixed for hearing appeal Only two counsel heard

on a side in appeals

Nautical assessors

hearing of the appeal, and the parties shall be in readiness to be heard on the day so appointed 72 At the hearing of an appeal not more than two counsel

shall be admitted to be heard on a side

73 In Admiralty appeals the Judicial Committee may, if they think fit require the attendance of Nautical Assessors

JUDGMENT.

Notice to parties of day fixed for delivery of judg ment

74 Where the Judicial Committee, after hearing an appeal decide to reserve their judgment thereon, the Registrar of the Privy Council shall in due course notify the parties by Summons of the day appointed by the Committee for the delivery of the judgment

75 411 Bills of Costs under the orders of the Judge of Committee on appeals Petitions and other matters, shall be referred to the Recistrar of the Privy Taxation of costs Conneil or such other person as the Judicial Committee may appoint, for taxition, and all such taxation shall be regulated by the S. hedule of Fees set forth in Schedule C bereto

What co to taxed in England

76 The Taxation of costs in Lighted shall be limited to costs incurred in England

77 The Registrar Order to tax

of the Privy Council shall with all convenient speed after the Judicial Committee have given their decision as to the costs of an

appeal Petition or other matter assue to the party to whom costs have been awarded an order to tax and a notice specifying the day and hour appointed by him for taxation. The party receiving such order to tax and notice shall not less than 48 hours before the time appointed for trantion lodge his bill of costs (to, other with all necessary vouchers for disbursements) and serve the opposite party with a copy of his till of costs and of the order to tax and notice

78 The Taxing Officer may if he think fit disaflow to any party who fails to lodge his Powers of Taxing Officer where taxation delayed through the fault of the parts whose to to are to be tixed

bill of costs (together with all necessary vouchers for disburse ments) within the time prescribed by the last preceding Rule or who in any way delays or impedes a taxation the charges to which such party would other vise be entitled for drawing his bill of costs and attending the taxation 79 Any party aggrieved by a taxation may appeal from the decision of the Taxing Officer to the Judicial Committee The appeal shall be heard by way of

Appeal from decision of Taxing Officer

motion and the party appealing shall give three clear days notice of motion to the opposito party and shall also leave a copy of such notice in the Registry of the Privy Council 80 The amount allowed by the Taxing Officer on the taxation shall subject to

Majosty e Order Council

amount of taxed costs any appeal from his taxation to the Judicial Committee and to be inserted in His subject to any direction from the Committee to the contrary be in inserted in His Majesty's Order in Council determining the Appeal or Petition

81 Where the Judicial Committee directs costs to be taxed on the pauper scale the Taxing Officer shall not allow any fees of counsel and shall only Taxation on the pauper award to the agents out of pocket expenses and a reasonable allowance to cover office expenses such allowance to be taken at about three e ghths of the nanal professional charges in ordinary appeals. Such hauner scale shall apply to and include the application upon which leave to appeal in forma pauperis was

granted 82 Where the Appellant has lodged security for the Respondent's costs of an appeal Security to be dealt in the Begistry of the Privy Council the Registrar of the Privy with as His Majesty's Council shall deal with such security in accordance with the direct order in council deter tions contained in His Wajesty's order in council determining the mining appeal directs appeal

# MISCELLANEOUS

83 The Judicial Committee may for sufficient cause shown excuse the parties from compliance with any of the requirements of these Rules and may give such directions in matters of practice and procedure as they Power of Judicial Com muttee to excuse from shall consider just and expedient. Applications to be excused from compliance with rules compliance with the requirements of any of these Rules shall be addressed in the first instance to the Registrar of the Privy Council

who shall take the instructions of the Committee thereon and communicate the same to the parties. If in the opinion of the said Registrar it is desirable that the application should be dealt with by the Committee in open Court he may direct the party applying to lodge in the Registry of the Privy Council and to serve the opposite party with a police of motion return able before the Committee

84 Any document lodged in connection with an appeal pointion or other matter
tending before His Myesty in Council or the Judicial Com
ments and the many be unended by leave of the Registrar of the
Privy Council but if the said Registrar is of opinion that an
Application for leave to unend should be dealt with be the

Application for leave to used should be dealt with by the Committee in open Court he may direct the party applying to lodge in the Registry of the Prry Council and to serve the opposite party with a notice of motion returnable before the Committee

Affidavits may be 85 Mildavits relating to any Appeal Petition or other sworn before the Privy Council or the Jouleal tray of the Privy Council Committee may be sworn before the Registray of the Privy Council

sworn before the Regis matter lending before His Mijesty in Council or the Judicial trir of the Prix Council Committee may be sworn before the Registrar of the Prixy Council 86 Where a party to an Appeal Petition or other matter pending before His Maje tr in Council changes his keent such party or the new agent shall

Change of Agent forthwith gave the Registrar of the Privy Council and the outgoing Appear agent

87 Subject to the provisions of any Statute or of any statutory Rule or Order to the Scope of application of contraty these Rules shall apply to all matters falling within the rules

"unclust purishering of His Valesty in Connect

Mode of citation and dato of operation and Rules 1925 and they shall come into operation on the 1st day of January 1926

# SCHEDULE A

# Rules as to printing

I All Records and other proceedings in Appeals or other matters pending before His Majests in Council or the Judicial Committee which are required by the above Rules to be printed shall be printed in the form known as demy guarto.

II The size of the paper used shall be such that the sheet when folded and trimmed will be 11 inches in height and Si inches in width

III The type to be used in the text shall be Pica type but Long Primer shall be used in printing accounts tabular matter and notes. The number of liues in each pige of Pica type shall be 47 or thereabouts and overly tenth line shall be numbered in the margin

IV Records shall be arranged in two parts in the same volume where practicable

Part I The pleadings and proceedings the trunscript of the evidence of the witnesses the judgments decrees etc. of the Courts below down to the Order admitting the

Appeal

Part II The exhibits and documents

V The Index to Part I shall be in chronological order and shall be placed at the beginning of the volume

The Index to Pirt II shall follow the order of the exhibit mark and shall be placed immediately after the index to Part I

VI Part I shall be arranged strictly in chronological order 1 e in the same order 13

the Index

Part II shall be arranged in the most convenient way for the use of the Judical

Committee as the circumstances of the case require. The documents shall be printed as fit as suitable in chronological order mixing planning and defendant a document stoccitien when necessary bach document shall show its exhibit mark and whether it is a planning of defendant a document (unless this is clear from the exhibit mark) and in all cases documents relating to the same matter, such as

(a) a series of correspondence or

(b) proceedings in a sait other than the one under upped shall be kept together. The order in the record of the documents in Part II will probably be different from the order of the Index and the project pregnumber of each document shall be inserted in the printed index.

The parties will be re ponsible for arranging the Record in proper order for the Indicial Committee and in difficult on as Countel may be asked to settle it

VII The do uments in Part I shall be numbered consecutively

The documents in Part II shall not be numbered apart from the exhibit mark

VIII I seh document shall have a heading which shall consist of the number or exhit tr ark and the description of the document in the Index without the date

IN Fach document shall have a marginal note which shall be rejeated on each page ever which the document extends is -

#### PART I

(a) Where the ease has been before more than one Court the short name of the Court shall mr tagger Where the case has been before only one Court the name of the Court need not mear

(b) The marginal note of the document shall then all ear consisting of the number and see rittion of the document in the Index with the date except in the case of oral evidence

ici în the case of oral evidence plumt ff evidence or defendant s evidence shall arrear enerth the name of the Court and then the marginal note consisting of the number in the Index and the withe squame with examination cross examination or re examinatle crema le 21 11

#### 1 ART 11

The word Tx) by lall fr tappear

r. I to file exhibit shall then appear concesting of the exhibit mark and **t** % t the locument m the Index with the date

The parties shall agree to the own sion of formal and prelevant documents but the description of the document may appear (both in the index and in the record) if deered. with he words not printed against it

t long serie of documents such as accounts rent rolls inventories etc. chall not te printed in full unless Counsel eo advise but the parties shall agree to chort extracte being printel a enecimen-

Al In casce where maps sent from abroad are of an inconvenient size or unsuitable in thirroter the appellant shall in agreement with the respondent prepare in England from the miterials cent from abroad map drawn properly to scale and of reasonable size chowing sefar as po sible the claim of the re je tive parties a different colours

#### SCHEDULE B.

C u strict and places referred to an Rules 22 99 and 34

Ametral a 1 ritish Hondura British North Borneo Bruner (exlore) Chana Eastern Mr can Dejendencies Falkland Islands

Federated Walay States

Fm Houghoug India Mauritius New Zealand

Pore1a Sevebelles

Somaliland Protectorate Straits Settlements

## SCHLDULE C

# I

Lees allowed to agents conducting appeals or other matters before the Judicial Comm ttee of the Privy Council

(33 1/3 per cent 19 added to these fees )

| (33 1/3 per cent 19 added to these fces )                                                                 |             |
|-----------------------------------------------------------------------------------------------------------|-------------|
| Retainer fee                                                                                              | £si         |
| Drawing appearance or civeat                                                                              | 0 13<br>0 5 |
|                                                                                                           | 11          |
| Perusing printed record for every printed sheet of 8 pages<br>Perusing written record for every 20 folios | 0 6         |
|                                                                                                           |             |
| Drawing index per folio                                                                                   | 0 2         |
| Drawing marginal notes and headings per folio                                                             | 0 0         |
| Attending at the Registry in examine proof print of record with certified record per day                  | 3 3         |
| Attending at the Registry to examine proof print of record with certified record per hilf day             | 1 11 (      |
| Correcting revised print of record per sheet of 8 pages                                                   |             |
| Foreign or Indian cases                                                                                   | 1 1 (       |
| Other cases                                                                                               | 0 10        |
| Instruction for petition or motion or to oppose                                                           | 0 10        |
| Instructions for pelition or appeal                                                                       | 0 10 (      |
| Instructions for case                                                                                     | 100         |
| Drawing petition motion case or affiday t per folio                                                       | 0 3 0       |
| Copying petition motion case or affidavit per folio                                                       | 0 0         |
| Correcting proof of case per sheet of 8 pages Foreign or Indian cases                                     | 110         |
| Other cases                                                                                               | 0 10 6      |
| Drawing and fair copy case notice                                                                         | 0 10        |
| I crusing petition motion or affidavit per folio                                                          | 0 2         |
| Perusing petition of appeal                                                                               | 11          |
| Perusing case per printed sheet of 8 pages                                                                | 1 1 0       |
| Instructions for and preparing retainer to counsel                                                        | 0 10 0      |
| Instructions to counsel to argue an appeal                                                                | 100         |
| Instructions to counsel to argue a petition or motion                                                     | 0 10 0      |
| Instructions to printer                                                                                   | 0 10 0      |
| Attending consultation                                                                                    | 1 0 0       |
| Attending at the council chamber for the hearing of a petition or motion                                  | 1 0 S       |
| Attending at the council chamber all day on an appeal not called on                                       | 3 G B       |
| Attending the hearing of an appeal per day                                                                | 3 6 9       |
| Attending a judgment                                                                                      | 1 6 8       |
| Approving draft order                                                                                     | 0 10 0      |
| Attendances generally                                                                                     | 0 10 0      |
| Attendances on counsel where fee is 30 guineas or inver                                                   | 100         |
| Drawing bill of costs per folin                                                                           | 0 1 0       |
| Copying bill of costs per folin                                                                           | 0 0 6       |
| Attending taxation of costs of an appeal                                                                  | 1 1 0       |
| Attending taxation of costs of a peliting or motion                                                       | 1 1 0       |
| Sessions fee for each year or part of a year from the date of appearance (in                              | 3 3 0       |
| appeals only)                                                                                             | 1 1 0       |
| Letters etc. (in petitions)                                                                               | 2 2 0       |
| Letters etc (in appeals) for 1st year                                                                     | 1 1 0       |

For each following year

II Council Office fees

|                                                                                                                           | £ | ş. | d |  |  |
|---------------------------------------------------------------------------------------------------------------------------|---|----|---|--|--|
| F ntering at pearance                                                                                                     | 1 | 0  | £ |  |  |
| Amending appearance                                                                                                       | 0 | 10 | 0 |  |  |
| Examining proof priot of record with the certified record at the Registry (chargeable to appell tot only) per day         | 2 | n  | 0 |  |  |
| I xamining proof print of record with the certified record at the Registry<br>(chargeable to appellant only) per half day | 1 |    | 0 |  |  |
| Lodging retition of appeal                                                                                                |   |    |   |  |  |
| Lodging petition for special leave to appeal                                                                              |   |    |   |  |  |
| Lodging any other petition or motion                                                                                      |   |    |   |  |  |
| Lodging case or notice under R 60                                                                                         |   |    |   |  |  |
| Setting down appeal (chargeable to appellant only)                                                                        | 5 | _  | 0 |  |  |
| Setting down petition for special leave to appeal (chargeable to petitioner only)                                         | 2 | -  | 0 |  |  |
| Setting down any other petition (chargeable to petitioner only)                                                           | 1 |    | ŏ |  |  |
| Summons                                                                                                                   | î | ō  |   |  |  |
| Committee report on petition                                                                                              | 2 |    |   |  |  |
| Committee report in appeal                                                                                                |   |    |   |  |  |
| Original order of his Maje to in Council determining an appeal                                                            | 5 | 0  |   |  |  |
| Any ther regulal order of Ha Maje to in Connect                                                                           | 3 |    |   |  |  |
| 1) in opt of an order of His Majesty in Council                                                                           | 0 | 5  | o |  |  |
| Or ginal order of the Judicial Committee                                                                                  | 2 | 0  |   |  |  |
| Plain copy of Committee Order                                                                                             | 0 | 5  |   |  |  |
| Lodging affidavit                                                                                                         | ō | 10 |   |  |  |
| Certificate delivered to parties                                                                                          |   | 10 |   |  |  |
| Lodging Careit                                                                                                            | 1 |    | ň |  |  |

Subpoena to witne ses

7 0 10 0

Taxing fee Gd for each pound allowed or a fraction thereof up to £ 00 and one per cent berond that eum calculated at the rate olds for each £25 or a portion thereof

# APPENDIX V.

#### STATEMENT OF OBJECTS AND REASONS

The Bill is sufficiently explained in the Report of the Special Committee printed below.

H ERLE RICHARDS

Simla 3rd September, 1907

Peport of the Special Committee appointed to consider the amendment of

the Cuil Proced tre Code

We have the honour to present this report on the projects to amend the Codo of C P which have been submitted for our consideration by the Government of India and unced to it a drift Bill unseeded by us A detailed account of the alterations introduced in the Bill mill be found in the Notes on clauses which form the second part of this Report but we desire by wave of prefere to mike some observations of a general character on the defects in the studing law which appear to us to call for reform and on the more important of those alterinous

1 The Code of C P of 1862 has been in force for 25 years and the experience of these cars his shown that the general lines on which it proceeds are sound. The mitters in which it his proved defective are for the most part mitters of defail and they arise, as it seems to be the control of the mitter in amount from the first that it is impossible to frame a fixed and rigid Code in such a manuer as to sufficiently meet the varying needs of an are-so discribed as that to which the Code apple in our opinion it is essential that there should be some machinery to enable variations to be introduced in procedure to meet the different sequirements of different localities as well as the complete of the control of the code of the complete of the code of the complete of the code of the complete of the code of the complete of the code of the complete of the code of the complete of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of the code of th

venience must arise from this cause in the first instance but this is but a small disadvantage in we cannot think that are should stand in the wef

3 The adoption of this principle has necessarily involved a departure from the arrangement of the present Code but in other respects we have advectly adhered as closely as possible to the existing lunguage the merining of which is now well understood by Courts and by principlinesses freeling center.

where experie

for in any ch

the amendme

rather than to promound we recognize the second process of the court and it consequence, to encourage technicalities. For this reason we have made no ittempt to embod in the Code adject of the very numerous decisions on the earsting sections we have middle maneudments to meet case law only on joints on which there is no flict of authority. Make a maneudment of clubority propisions in regard to procedure than it the time when its own less justification for the enactment of clubority propisions in regard to procedure than it the time when the Code of 1852 was proced. Since then the standard of legal efficiency in the ordinal live level materially rived and the principles of procedure are now so well undesited that the Courts may be trusted to apply them intelligently in evers for which no provision may, be made in terms.

Fut although we have made the present Code the basis of our drift we have carefully stryin cit the III stiffet I blie Scheet Committee in 193 and we destuce to express our acking the properties of the Committee for the store of information it contains and for the many it is collected within Henry!

Apart from the te arrangement to which reference has been made we have not introduced many changes of a radical character in the Code

- 4. The general reduce of some of the amendments, we recommend may be conveniently all it is a large semination of the extent to which the various stages of a saw will be #fice ally them.
- 1. To legar with at whose of that the multiplicate of suits will be further curtailed by the zero proxisces we have inserted to remove limitations which we regard is needless on the comprehensive seta but and is the wider powers of amendment vested in the Courts worder die isl. An adaptive che is provided by the power of a Court to interfere where embarcase meets thele to be with.
- B. Increased fielding have been given for the critico of process to which further reform of a large modern Clause. It is haped that in the gradual autolization of sortice by a large k found a solution of one of the principal diffects in our legal system.
- C. In our opioion, it is not sees ears that highests in this contains should come to triple in the clearly defice. I and that each bould not be expanded or grounds, which destribes referring to the five first the turps of we think that the present system of pleadings in the many distribution of the whole is the many of the clearly stated and who has a work which the first wide of the first plantage with hint they divide all lead to sounder and favor whether the first wide is the first whole in the motive of the first way but to the first who may be a first the many the first whole to the first whole the first whole the first whole the first way is the first whole the first way in the motive of the first way is the first whole the first way in the motive of the first way is the first way in the first way.

be have not been able within the time at our dispo all to make these forms of the other form to the appendix to Schedule I complete. But this is a matter of detail which can be further oundered before the Bill by its colourless.

- Diffinot possible to seture expedition in the disposal of suits that is, the questions of fact on which there is a rill context no narrowed down is far vajo oble. As a step toward, this we have used posted in the roles an Orler in which provision is under for the dimession out only of documents but also of free. It must be let be little its only their daylines to make ade patte use of the Orler. In it is knoped that the Courts will encourage the new of its wave it corrows. Both and orlers to the work of the time of the value of the orlers will encourage the new of its wave it corrows.
- E We attack much importance to a proper in leave and elective courts in the worful of the procedure presented for the first herring. The code writefund makes provision for examination of prince by the Court and we have altered the larguage so is to compel the production of decrements at the first herring. In our opinion, this will act is a will taxticle their owther furneering of decrementary endomes.
- F. The groups of relating to the heiring of suits do not call for material alteration but we have thought it well to ground expired to the theiring and delivers of judgment. It would obviouble to wrong that such an accident should be around the terms and vehicle therefore with the disposal of the crist and vehicle therefore week degree and vehicle therefore week degree and vehicle therefore week degree and vehicle therefore week degree and vehicle therefore week degree and vehicle therefore week degree and vehicle therefore week degree and vehicle therefore week degree and vehicle therefore week degree and vehicle therefore week degree and vehicle therefore week degree and vehicle therefore week degree and vehicle therefore week degree and vehicle therefore week degree and vehicle therefore we have the vehicle therefore we will be a supported to the vehicle therefore we will be a supported to the vehicle therefore we will be a supported to the vehicle therefore we will be a supported to the vehicle that the vehicle therefore we will be a supported to the vehicle that the vehicle there is the vehicle that the vehicle there is the vehicle that the vehicle there is the vehicle that the vehicle there is the vehicle that the vehicle there is the vehicle that there is the vehicle that the vehicle there is the vehicle that the vehicle there is the vehicle that the vehicle that the vehicle the vehicle that the vehicle there is the vehicle that the vehicle that the vehicle that the vehicle that the vehicle that the vehicle that the vehicle that the vehicle that the vehicle that the vehicle that the vehicle that the vehicle that the vehicle that the vehicle that the vehicle that the vehicle that the vehicle that the vehicle that the vehicle that the vehicle that the vehicle that the vehicle that the vehicle that the vehicle that the vehicle that the vehicle that the vehicle that the vehicle that the vehicle that the vehicle that the vehicle that the vehicle that the vehicle that the vehicle that the vehicle that the vehi
- 6. Change of waperture has been made in regard to due eet. In the first lace we have needed an express proxision recognizing the distinction between the most performance and device. We hope to this way be afford fredittes for chicking, the letter that so it reads to the objectionable practice of leaving for determination in execut on questions which should be decided by the decree. The change should ensure the more expedit us dig to be casts which the process and the continuous casts which the process and the process are such when the process and the process are decreased invested of wapertured which we have introduced in in legar I to most kips and "These are very source to the theory of the process of the finite of source ordinate has been expedited by the consistence of the provision of the Thinter's cours conditions in the first source was a let the occasiones of the first source of the provision regulating this matter's —2 to doubt with in their entirely in the Code and we have threefore unreduced in the Code and we have threefore unreduced in the Code and we have threefore unreduced in the Code and we have threefore unreduced in the Code and we have threefore unreduced in the Code and we have threefore unreduced in the Code and we have threefore without of the Code and we have threefore without of the Code and we have threefore without of the Code and we have threefore without of the Code and we have threefore without of the Code and we have threefore without of the Code and we have threefore without of the Code and we have threefore without of the Code and we have threefore without of the Code and we have threefore without of the Code and we have threefore without of the Code and we have threefore without of the Code and we have threefore without of the Code and we have threefore without of the Code and we have threefore without of the Code and we have threefore without of the Code and we have threefore without of the Code and we have threefore without of the Code and we have threefore without of the

In our opinion, it is expedient to give greater assistance to the Courts in the framing of decrees. The importance of this branch of procedure cannot be over rated, it is surrounded by difficulties which are a fruitful source of error and consequently of litigation. We have amplified the provisions of the Code to meet this defect, and have miroduced some forms which can be adopted to meet the requirements of undividual cases. We think that further forms might be added with davantage teloue the Bill becomes law.

- H Amongst other matters, we have removed limitations which at present exist on the power of appointing Receivers, and have conferred a power to appoint Receivers on Subordinate Courts.
- Execution -The subject of execution is, perhaps one of the most difficult with which we have had to deal. The present system in the molustil at any rate, tends to exce use delay and affords facilities for defeating the claims of creditors. At the same time the creditor often has only himself to blame owing to his own luches in prosecuting his rights. In the Presidence Town the same objections cannot be fairly raised the system works well, whilst in the motussil the difficulties arise not so much from the machinery itself as from the defective manner in which it is worked. One of the most fruitful sources of hitgation is the setting a ide of execution sales on the ground of irregularity in the publication of the sale proclamation. It 14 notorious that in many of these cases the Court's officer either through negligence or dis honesty has not duly published the proclamation but it is impossible to deal with such cases by any provision in a Code After a most careful consideration of the subject, we have not seen our way to any very drastic changes in the present system. We have found ourselves unable to accept the some what far reaching proposal of the Committee of 1902 in relation to the execu tion of decrees by precept but we are so far in accord with the view expressed by that Com mittee as to have been able to meert in the Bill a clause which chables the Court which pased the decree to issue a precept to any other Court to attach property of the judgment deligi pending execution in the erdinary course. Boyond this we have felt we could not safely go

We anticipate that there will be a substantial saving of time and consequent expense from the provision requiring that messe profits shall be ascertained by the Court under the decree itself and not a now in execution proceedings.

clause 53 has been introduced to settle a long mooted goint upon which there is nich discript of judicial opinion as to whether or not questions as to the limibility of ancestral property in the hands of a som or other descendant to whom it has come otherwise than by descript the payment of the debt for which the decree was passed can be determined under 0.4 of the piezent Bull corresponding with 8 24 of the ensuing dood. We think they should be

Other amendments deserving notice relate to (1) the power to break open the outer door of

We regard the changes made in relation to execution as calculated to materially as we the judgment discipling in recovering the fruits of his judgment

subject (1) Should any of the sections of importance have arried in connection with 135 Code? (2) Should the right of ripeal as now existing be altered and it so in white direction, we are of opinion that the best course would indoubtedly be to eliminate from the Code illustrances are not ribitation, and insert them in a new and comprehensive Arbitrition Act and insert them in a new and comprehensive Arbitrition Act and the arrivation and the second of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the contract of the c

In regard to appeals, some change to othe Judenia Committee as expressed in favour of finality in cases of arbitration will take advantage of every such right in LLR 25 Cal 141 (which followed many other cases in the Calcutta High Count) we have inserted the words "or being otherwise invalid" in Sub-s (c) of S 221 of the present Code if their control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the contro

on a -pc 111 case under S 517 and to allow one appeal as from order under S. 521, 523 and 526. And I wang regard to the rather wale language of the Indicast Committee in Children series we have further thought it advisable to under the elevathat an order graining an application either under S 23 or S 525 is not to be decimed a decree within the meaning of the Code, otherwise there would be a under right of appeal from orders under these sections than from a decree under S 222. The other alterations deed with the text rather than with any question of

- policy of Trinciple 7. Suits relating to public matters —We have inserted a clause to enable actions for pullic matters to be brought with the consent of the advocate General priceporaries of special damage. It has been represented to us that such a power is needed and we concur in that time.
- Public Charites —The sugge ton his been mide on high authority that some on pre-reference should be made in the Code to the power of the Court to apply Cypics details in the calling of schemes. But this power would appear to exist already within its proper limits (Vance of I year on e LR 3 I A 32) and we do not think it necessary to make express reference to it.
- I have been epper ented to us to be more thru one goutlemm who e opinion is entitled to weight that the power to enquire into the affairs of public clarities should be made more extensive. The clause as it stands, gives sufficient powers to the Courts to disect accounts and to finme homes when once a suit has been instituted but it is and that members of the public interested in any public charts ought to have the means of calling for and inspecting accounts without undertaking the barden of a suit at least in the first instance. We are told that receivings districted from charitable trusts are in some crossery large in amount that in one eccunits of their paperal time are ordinarily rendered and that there is good ground for believing that a countie, the partner is required on understood operation.

The Hon ble Dr Rushhehary Ghose supports these views and has submitted a clause to give effect to them. It is in the following terms -

- 93 A (1) The Court may also upon an application by any two or more per one having the like interest and having obtained the like convent direct any trustee of such charity to crue to be prepared and filed in the Court within such time as may be specified in the order a detuiled account of the receipts and disbursements in connection with the trust property for a period not exceeding there were many the disbursements of the application.
  - (2) Such accounts when fied in Court shall be open to inspection by the public
  - (3) A trustee who fails to comply with any such direction shall be removed if a suit for that purpose be instituted unices he can show good cause for such fullule
- We have given to the subject our best consideration and desire to record our amplitum with the motives of the proposers. But we have not masted the clause in the Bull because we think that the question is one of policy on which the public opinion of the communities uniterest? I hould first be obtained. It inflects primarily as we understand the Hindlu and to a less scient the Muhammadan community. And we should not feel justified in recommending an amendment of the law on such a subject as this unless the leaders of those communities were to express their approximation by proposal in inequivocal terms. If it is returned the clause proposed by To flosso may be accepted
- 3 Suits by or against firms Attention is directed to the new provision in regard to suits by or against firms (O NN) which will we hope prove acceptable to the commercial community.
- 10 New procedure—We have given power to provide by Rules for Counter thing Third Party Pro edure Summar. Procedure in suits for debt or inpudated demands as for instance tent or un other default sum payable under a control and originating summons. We are of opinion that these forms of proceeding may neefally be adopted in some aires but that this is a matter which should be left for each High Court to decode
- Il Appeals—ha regards appeals from original decrees we have departed but slightly from the existing. Code. We have thoughtst admixable to give legislative sanction to the rew to no appeal shall he from a consent decree or as to costs except to leave of the Court but the original shall he from a consent decree or as to costs except to leave of the Court but the original shall he from a consent decree or as to costs except to leave of the Court but the

decree to appeal from that decree at ness on an appeal from the final decree tending to that which is so desirable,

V.

As regards appeals from appellate decrees the ouls substantial departure from the ex-Code is the insert on of Clause 103 Experience has shown the desirability of this clause the effect of which will be to avo d remands with their consequent delay and expense

which allow an appeal from any order made under Rules from which an appeal is expre if allowed by Rules We have gone carefully into the question of the cases in which an appeal

should be allowed from these orders and our conclusion is expressed in the Rules themselves 12 Rules -The distribution of the provisions of the Codo between the body of the Bil and the Rules is a matter on which opinions may well differ. The general principle on which we have proceeded has been to keep in the body of the Bill those provisions which appear to be to be fundamental and those provisions which confer powers operating outside the Province in which the Court is situated. In some cases we have adopted the plan of inserting leading provisions in the Bill stating in general terms the powers of the Court and of lea ing the details to Rules in matters of less importance the provisions have been relegated altogether to Rules The result of this re arrangement is to reduce the Act as distinct from Schedules to 155 clauses. The existing order of sequence has speaking generally been majutained but the reduced bulk of the Bill has rendered it no longer necessary to reproduce the division into chapters

It is proposed to vest the power of making Rules in High Courts subject to the control of Local Governments (or in the case of the Calcutty High Court of the Govern ment of India) but we think it most desirable that in exercising this power the Courts should have the advice of representatives of the various branches of the legal profession and we have accordingly provided that in the ease of Chartered High Courts and of Chief Courts Rules shall only be made after those Courts have taken the opinion of a Rais Committee on which there will be representatives of the Bar of Valuels or Pleaders and in Presidency towns of Attorneys In the case of other High Courts power has been given to establish such Rule Committees as the Governor General in Council may determine It's believed that Standing Committees of this kind will be of great value. We have thought it better to require the same sanction as is required by the Indian High Courts Act of 1861 14 order that the rule making power should correspond with the power conferred under that Act but we are of opiniou that in the interest of uniformity it is expedient that all amendments of Rules should be communicated to the Government of India and to other Righ Courts before sanction is given to them. This wo understand can be effected by executive order

If our proposal is adopted it will probably be useful to publish annually in every Pro since some manual corresponding to the English Annual Practice containing -

- (1) the Act.
- (2) all Rules of procedure made under it or under other acts in the Province,
- (3) notes of decisions on the Act and Rules
- 13 We are sensible that there may be defects and flaws in the Bill which we append to this Report The subject is complicated and technical and the time at our disposal has been limited. We do not doubt therefore that much improvement may be made in the Bill before it is finally presed into law But in our opinion, it is framed on the right lines. We hiere for the reasons we have stated that in any reform of Civil Procedure it is essential to introduce some elasticity, to give wider powers of control to the High Courts and to invest them with a larger discretion in regard to the conduct of eases which come before them. Mr Dil bi our deliberations and we take

m his experience of the working nowledgments of the services of

Mr Law of the Legislative Department who has attended to the clerical and Iress work to our entire satisfaction

| (Signed) |    |   | H ERLE RICHARDS  |
|----------|----|---|------------------|
| (        | ** | ) | FRANCIS MACLEAN  |
| (        |    | ) | LAWRENCE JENKINS |
| (        | ** | ) | S ISMAY          |
| - (      |    | ) | RASHBEHARY GHOSE |

#### NOTES ON CLAUSES

# A -CLAUSES OF BILL

#### Progra or BID

#### Prehminary

Can all the defentions have been rearranged in althabetical order

It is competitive of the definition of the word detree rests on the first that is referent to the right of type-1 is determined. The Committee have in the main althered to the existing definition, but the have modified it in two respects and this his movided a light receiving of the linguage. The junique modification aims at permitting an appeal from an adjudication which part outs to settle the rights of the juries, though it does not completely

In pose of the suit. Such an algorithment the Committee describe as a preliminary decree.

The explanation is noted before the make it elevit that a decree may be partly final and puttly preliminary. Thus, a decree for the recovery of possission of immoreable property and for me in explicit would be of this mixed chiracter.

The word within has been sub-tituted for mentioned or referred to in with a view to being within the definition of decree or lers against sureties (see Cl. 142) and orders as to Coart fees in payers runts (see O NVMIL R 13) and thus providing for appeals therefrom

The only other modification is for the purpose of excluding a right of appeal from an order of dismin all for default

It als first late —We have in crited a definition of legal representative —an extines in which has been amounts interpreted by the High Courts as would appear from the reported receive his are not easily reconcilable with one another. See S.C.W. N. 843 in which aims tail the carbier receive are reviewed.

The Committee trust that the definition which has been added by them will set at rest what owing to the absence of any such definition from the present Gode is a some what debat able point

Meme profits—The Committee have altered the definition of means profits as a six occlude from the calculation any increased rents and profits due to improvement; made by the person in wrongful possession for which he cannot at present claim compensation from the rightful owner either by way of mutigation of damages or otherwise.

Clause 4—The clause as drafied will it is believed effect till the sayings covered by S. 4.

of the Code. The concluding paragraph of that section is believed to be obsolete and has accordingly not been reproduced. On this point the opinions of Local Governments are invited

Clause 6 —In view of the extended scope of Cl 4 the reproduction of Ss 6 and 7 (except as to the final paragraph of S 6) does not appear to be necessary

The words or protedings in sixts. have been introduced in this clause to negative the account to which a decrees sent for execution has pursished to to execut the decree though the amount exceeds the limits of the pecuniary jurisdiction of the Court a point on which there is a conflict of opinion (ILL R IN VM 300 IL R IS Col. 465, 461)

Clause 7 —The provisions as to Provincial Small Cause Courts have been rearranged in a bat is hoped in a more convenient form

#### PART I -SHITS IN GENERAL

The provisions contained in S 10 of the Code were first circled by Act \I of 1836 and were reprodued in the Code of 1839 and in subsequent Code. In the opinion of the Committee their retention is no longer necessary and they have been omitted

Clause 11—Res paintals—It is not possible to make a compiler exposition of a subject so complex as that of res paintaind within the himst of a section of an Act and the Committee than it better to received 8 13 as it stands in the Gode with such modifications only as experience has shown to be nece sary

The Committee recognize that a proceeding does not come within the language of that section but they think it better not to deal with this point in express terms for the reason that the applicability of the doctrine of res judicate to certain proceedings is not open to doubt, and they forsee that any express reference to proceedings in a crystallised definition might only lead to difficulties (L. R. 11. 4.3 and L. R. 29.6.1.07).

The word another has been substituted for former as being more in conformity with Indian decisions

Explanation I is new and is intended to affirm the view that the competence of the jurisdiction of a Court does not depend on the right of appeal from his decision

Lxplanation VI —The inclusion of public rights is to give due effect to suits relating to public mustances (Cl. 91)

Clause 12 -This clause is new and is necessitated by the transfer of certain of the provisions of the existing Code to Rules

Clause 13 —The provisions as to foreign judginouts have been rearranged and as it is hoped stated more clearly

Section 14—The last paragraph has been omitted. It appears to the Committee that it not possible to maintain this distinction in the case of all Asiatic Courts. The Courts of Japan for instance are entitled to be treated on the same footing as European Courts. They know of no satisfactory distinction which could be drawn so as to give effect to the intention of the existing provisions and they recommend that the paragraph should be omitted and that Courts should rely on the powers given by Cl. 13

Place of sunny —The provisions under this heading have been collected and re arranged Clause 10 (a) —The insertion of the words with or without rent or profits is intended to remore any difficulty there may be where the defendant does not reside within the local limits of the Court within whose jurisdiction the property is situate

Clause 18 -The Committee have added words to this clause in order still further to restrict the taking of technical objections as to jurisdiction

Clause 20.—The Commuttee have ometted Explanation ILL of S 17 which has become unnecessary owing to the addition made to sub cl (c) of the words wholly or in part in reference to the sause of action

Clause 24.—The words at any stage have been added to remove the difficulty created by the view that a suit cannot be transferred after the hearing has once commenced as to which there is a conflict of decision

Clauses 26-35 -The provisions in Chapters III to WIII of the present Code have been in the main relegated to Rules but such general provisions as are believed to be essential have been preserved in Cl 20 to 3s

been preserved in Cl 26 to 3.

Clauss 32—The Committee have omsitted the last paragraph of S 136 of the Code so
they think nuncessary to impose penal consequences for a default of the class indicated

#### PART II -EXECUTION

Clauser 30—74.—The hull of the provisions us to execution will be found in the Role that the mun provisions as to the Courte by which decrees may be executed the questions to be determined by Courte executing decrees the limit of time for execution transferres and legit expresentistives procedure in execution arrest and attainment the religious to Collectors of power to execute certain decrees the distribution of assets and resistance to execution have been returned in the body of the Bill

Clause 46—Precept —Though a system of execution based on precepts is in the opin of the Committee open to grave objection they think the idea may but ultimed for the purpot of enabling a decree holder to obtain an interim attachment where there is ground to apprehend that he may otherwise be deprived of the first of his decree. They have for this purpose 11 troduced Cl 46 into the Bill They think it expedient to first time limit for the continuin of this interim attachment but it the same time they have empowered the Court to extend the period to meet the exigences of particular cues

After careful consideration ment under a precept re attachm sary Though at first sight it ma not be necessary when the issue o tion after careful consideration to a

re attachment, having regard to the agency hy which execution is carried into effect

Clause 47 —The Committee have omitted sub-cls (a) and (b) of S 244 of the existing Code because they are strongly of opinion that questions regarding the amount of any mesue

p ofits or interest should be defermined by the decree and not in execution. If this view is accepted it will be possible to exercit a an effective control over the action taken by Subordinate Courts in dealing with yould institled.

The Committee have re drafted and el (3) and middle computage on the Court to determine questions arring a to representative of parties. In the opposition at a many-placing that separate tauts should be methated for the decision of anch questions. The delix and expense unabled are effect a car great and result in the medities protraction of bitterino.

The explanation is intended to put an end to a conflict of judicial decision

Scenar 257 t - The Committee think, that S 257 d max be consided with ultimatage. It was first enacted by act VII of 1879 with a view to protect the interests of judgment debtors we by degree holders. The section has given rase to come by the third Courts in found in mactino to

16 of the Indian Contract Act is amended
where it is required

Clause 51.—This clause states generally the powers of the Court in regain to execution leaving the details to be determined by rule. If will be observed that the power to direct immediate execution 1 no longer restricted to one class of suits but that it is now general in term. In planitation that may be found necessary will be imposed by rules.

Clave 35—Ha been idded by the Committee in order to set at rest a question on which the High Courts are divided in opinion. It is from that where a son or grands on takes any ancestral projects by survivor thy be a bound to pay out of such property ill debts of his ancester not incurred for immorth or illegal purposes but whether the creditor can follow the property in the hand it has son or grands on nexecution is a debtained point under the Code. The question is merel one of procedure and the Committee have come to the conclusion that any controvers between the patter with regard to the lithight of this sou or grandson to pay the debts of his ancestor should be determined in execution it being open to them to raise any objection or defence in such proceedings which they might have raised in a separate such is stituted by the creditor the tituse in question not imposing upon them a greater highlity than that imposing by the filling when the proceedings of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processing of the processin

Clause 50 (1) seemed provise .—The object of this provise is to prevent vexitious forms of resistance to execution which constantly obstruct decree holders in the execution of their decrees

Clause 55 (2) — The sub clause is intended to cover the case of certain persons or classes of persons whose summary areal might as in the case of railway servants be attended with danger or inconvenience to the public

Clave 61—The Committee have reproduced his Clause from the times Bill (Cl. 202 B) in accordance with whit they undersland to be the values of the Government. But the centilions should in their opinion be so modified as to release the Courts from fixing the portion to be released from threshold.

To mip 0. this duty on the Courts would materially moreuse their work in a matter in regard to which they are not in a position to form the best opinion and would probably result in an undescribe lack of uniformity

an understatle lack of uniformitic

Clause 02 The committee have inverted a new provision to uniform the breaking open
of the outer door of a judgment debtor's house. They do not think that it would be safe to

extend the operation of the provision to the hops of a stranger Section SSS -This extent of the present Code first upwars in the Code of 1877. It was not suggested by any decuded over and the only explanation offered by the Soliest Committee, by whome trans stretched at a s. of these

whom it was introduced as as follows—

"We think that the pecchimation of execution sales should state the incumbrance, (if any)
to which the interest about to be sold as hable and we have provided that no Judgo etc. shall
do no necable for error in the proclamation, unless at this sheet committed (alphonestic.)

The Committee are of opinion that, having regard to the provisions of Act VIII of 1850, the section may safely be omitted

Clause 64 — in explanation has been added to make it clear that claims within the protection of this clause include claims for raterble destribution of assets.

The word another has been substituted for lormer as being more in conformity with Indian decisions

Indian decisions

Explanation I is new and is intended to affirm the view that the competence of the jurisdiction of a Court does not depend on the right of appeal from his decision

Explanation VI -The inclusion of public rights is to give due effect to suits relating to

public nuisances (Cl 91)

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provisions of the existing Code to Rules

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s Section 14—The list paragraph has been omitted. It appears to the Committee that it is not possible to munitain this distinction in the case of all Assatus Courts. The Courts of Japan for instince are entitled to be treated on the same footing as European Courts. The know of no satisfactory distinction which could be driven so as to give effect to the intention of the existing provisions and they recommend that the paragraph should be omitted and this Courts should rely on the powers given by Cl 13

Place of sung -The provisions under this heading have been collected and is arranged

Clause 10 (a) —The insertion of the words with or without rent or profits is intended to remove any difficulty there may be where the defendant does not reside within the loss limits of the Court within whose jurisdiction the property is situate

Clause 18 - The Committee have added words to this clause in order still further to restrict the taking of technical objections as to purisdiction

Classe 20—The Committee have omitted Explanation III of S 17 which has become unnecessary owing to the addition made to sub-of (c) of the words wholly or in part in relativence to the cause of action

Clause 24 —The words at any stage have been added to remove the difficulty crested by the view that a suit cannot be trusferred after the herring has once commenced as to what there is a conflict of decision

Clauses 28-35 -The provisions in Chapters III to NIII of the present Cole have been in the unum relegated to Rules but such general provisions as are believed to be essential have been preserved in Cl 26 to 35

Clause 32 -- The Committee have omitted the last paragraph of \$ 130 of the Code at they think unnecessary to impose penal consequences for a default of the class indicated

#### PART II - EXECUTION

Clauses 36-74 -The bulk of the provisions a

but the main provisions as to the Court; by which

3208

determined by Courts executing decrees the limit

representatives procedure in execution arrest and attachment the relegation to Collector of power to execute certain decrees the distribution of assets and resistance to execution have keen returned in the body of the Bill

Clause 46-Precept -Though a system of execution based on precepts 13 in the of p of of the Committee open to grave objection they think the idea may be ultilized for the purper of entilling.

The description of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of the purper of t

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of this interim attachment but at the same time they have empowered the Court to extend the period to meet the exigencies of particular cases

re attachment, having regard to the agency by which execution is carried into effect

Clause 47 —The Committee two omitted subcls (a) and (b) of S 241 of the exal as Code because they are strongly of opinion that questions regarding the amount of any ment

profits or interest should be determined by the decree and not in execution. If this view is accepted it will be rossible to exercise an effective control over the action taken by Subordinate Courts in dealing with such matters

The Committee have re drafted sub cl (3) and made at compulsory on the Court to deter mine questions arising as to repre entitives of pirties. In their opinion it is not pedient that sentrate suits should be in-tituted for the decision of such questions. The delix and expense involved are often very great and result in the needless protraction of litigation

The explanation is intended to put an end to a conflict of judicial decision

Section 257 4 -The Committee think that S 257 A may be omitted with advantage. It was first epacted by tet \II of 1579 with a view to protect the interests of judgment debtors scarnet the everylan of undue pressure by decree holders. The section has such rise to con-Courts as found in practice to idin Contract Act is amended

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Clause 51 -This clause states generally the powers leaving the details to be determined by rules. It will be immediate execution ; no longer re-tricted to one class of \_

any limitation that may be found necessary will be imposed by rules terms

Clause 53 - Ha been added by the Committee in order to set at rest a question on which the High Courts are divided in opinion It is true that where a son or grandson takes any ancestral troperty by survivor hip he is bound to pay out of such property all debts of his ancestor not incurred for immoral or illegal purposes but whether the creditor can follow the properts in the hand of the son or grand on in execution is a debatable point under the Code The question is merely one of mo educe and the Committee have come to the conclusion that any controver v between the parties with regard to the liability of the son or grandson to pay the debt, of his ancestor should be determined in execution it being open to them to raise any obje tion or defence in such proceedings which they might have raised in a separate suit in stituted by the creditor the clause in question not imposing upon them a greater liability than that imno cd by the Hindu law

Classe 55 (1) second prourse - The object of this proviso is to prevent vexations forms of resistance to execution which constantly obstruct decree holders in the execution of their decrees

Clause 55 (2) -The sub clause is intended to cover the case of certain persons or classes of persons who e summary areast might as in the case of ruleary servants be attended with danger or inconvenience to the put he

Clause 61 - The Committee have reproduced this Clause from the former Bill (Cl 269 B) in accordance with what they understand to be the wishes of the Government But the conditions should in their spinton le so modified as to relieve the Courts from fixing the portion to be released from attachment

To importh; duty in the Courts would materially merease their work in a matter in regard to which they are not in a position to form the best opinion and would probably result in an undesirable lack of uniformity

Clause 62 The committee have inserted a new provision to authorize the breaking open of the outer door of a judgment debtor s house. They do not think that it would be safe to

extend the operation of this provi ion to the house of a stranger Section 288 - This section of the present Gode first appears in the Code of 1877. It was

not suggested by any decided case and the only explanation offered by the School Committee his whom it was introduced in as follows --

We think that the proclamation of execution sales should state the incumbrances (if any) to which the interest about to be sold is liable and we have provided that no Judge etc shall be answerable for error in the proclamation unle sat has been committed dishonestly .

The Committee are of opinion that having regard to the provisions of Act AVIII of 18.0. the ection may safely be omitted

Clause 64 - in explanation has been added to make it clear that claims within the protection of this clause include claims for rateable distribution of assets,

Clause 69 --- The provisions as to Collectors have been placed in a separate schedule—They deal with a special matter and are not of general application

Clause 73 -The Committee have slightly aftered the wording of this Clause in order to bring it into line with the Transfer of Property Act, 1892, S 96

#### PART HI -- INCIDENTAL PROCEEDINGS

The general powers of Courts in regard to commissions have been summarised in Cl 75 and the detailed provision will be found in the First Schedule

#### PART IV -SUITS IN PARTICULAR CASES

The bulk of the corresponding part of the present Gode will be found in the Rules. The provisions as to suits by alene, etc, have been returned in the Bill and sine only of the provisions relating to suits by or against the Government. There is a general clause defining the nature of internededs suits.

Glauss 81—The Committee thank that the same measure of protection should be afforded to the defendant where Government underthies the defence as where the Government makes no application for the purpose, and it appears to the Committee that the proper protection should be that the defendant should be exempt from meane arrest and his property from means estate ment. They therefore propose to strike out the provise from Cl 259 and to alter sub Cl (a) of Cl 270 so at to give effect to this

Clause 80 (2)—The Committee have inserted words in this sub clause to make it clear that the decision of the Government is final and not open to question by the Court A doubt had been raised on the point

#### PART V -SPECIAL PROCEEDINGS

Arbitration and suits relating to public matters have been discussed in the former park of this report

Clauss 99 (Public Charties)—As a doubt has been expressed in at least one reported decision whether S 303 is or is not mandatory, the Committee have thought it desirable, in order to estite this question to introduce sub of (2)

#### PART VI -SUPPLEMENTAL PROCEEDINGS

Here again a leading provision has been retained in the Bill, and the datails of procedure have been relegated to Rules.

#### PART VII -APPEALS

Giauts 97 —The Committee have insorted an express provision to compel litigastic appeal from prelimitary decrees, and have estopped thom, on their taitive to do so, from resust objections to such decrees in appeals from fine leteros. On this point they accept the manimost opinion of the Calcutta High Court. They think it unreasonable that parties should sillor proceedings to be carried on to their final stage and large cost to be recurred if they intend to rely upon objections which could be taken at an earlier stage.

Glauss 99 —The Committee have extended this clause in order to give the Gourts a large function on dealing with irregularities in proceedings, and they have unserted approximate the point decided to I L R. 26 Bom 259 and I L R. 27 Mad 80 and 10 a recent decision of the Calcutti High Court.

Clause 100 -The Committee have struck out the word 'specified' in the expression 'specified law or usage," as being in their opinion redindant

Clause 105—Though the remarks of the Privy Council in Mohethur Singh v This Bengal Government (7 Moo IA 283) are wide enough to embrace an appeal term as order of remand the Committee think those orders were probably not in their Lordshijs contemplation when they condemned the new that a failure to appeal from an interlocutory order.

should deprive the person aggreeted of his right to object to such order when subsequently appealing from the decrea. And the Committee think there are good reasons on the score of delay and expense for treating an appeal from an older of remand as a spacial case and practiding an appellant from taking, on an appeal from decree any objection that might have been urged by way of appeal from an order of remand

The Committee have deleted the word such to remove a difficulty it creates (10 Moo LA 340, 413 12 Moc I \ 157)

# PART VIII - REFERENCE REVIEW AND REVISION

These provisions are not substantially altered. They are summarised in this Part and the details are in rules

PART 1X -CHARTERED HIGH COURTS

This is not materially altered

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PART \ -RULES.

bee of ereations in the former Part of this report

#### PART VI -MISCELLANEOUS

The Committee have emitted S 646 as they see no reason specially to differentiate the case of a Remotrar and it is believed that in practice no use is made of the section.

Clause 197 -The Committee have inserted the words 'or other person after the word "officer' in sub Cl (b) in order to give the High Court power to relieve the officers of the Courts of the work of administering affidavits in cases in which it may be necessary to do so. It has been represented to them by the Calcutta High Court that this relief is much required

Clause 140 -The terms of S 583 of the Code do not justify the practice founded on it, and the Committee have therefore re east the section so as to bring it into closer conformity with that practics

Clause, 145 and 148 to 150 are new. They are intended to enlarge the discretion of Courts

B-RULES

The Committee think that the division of the rules into orders will be found convenient for the porposes of citation and reference

Under Cl 35 the Court has full power to apportion costs The Committee understand that in practice the provision of \$ 25 is not operative in the mniassil and that part of the section which related to costs has not therefore been reproduced

- O I, R 3 (S 28) -The Committee realize that the words in respect of the same matter' in R. S. hate given rise to great difficulty, and they think it advisable to follow the wording of the English rule and to omit them
- O I. Br 5 and 7 -The Committee thought that it was desirable to add O AVI, Br 5 and 7, of the English rules
- O III, R 2 (S 37) -The provisions of existing Codes which are represented by this clause are in somewhat different terms and are himited to persons holding general powers of attorney within certain local limits. The Committee think it unnecessary to preserve these limitations and have made the sub clause general It follows that the present Cl 37 (b) becomes unneces sary It is included in sub Cl (a)

The last pragraph of S 37 has been omitte? us no longer necessary

O III, R 4 (S 33) -The Committee are uncertain whether it is necessary to make a reference to the Court of the Judicial Commissioner of Sindh The point is one for the Govern ment of Bombay

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Lute, 1), h procure in General the time when it was a circovery are haled on the Lute, 1), h procure in General the time when it was passed. Since them the Limb procudure has but namended and a now contained in O XXXI. This derivative of a second profile in the Bules regulating the growdure on the on-jund in ecf the High Courts of Calcut 1 and Lomina, and has it is all red been found to work sat if action in partice.

On the other hand in mufasul C u to lit be ... e has we here made of the manimetr's dry over and the Committee the drost thus the Bulle of the Calcutta and Lumbar H, h C crew on the ror, had a damay be so dy adopted without r k of di turking a p o.edu e w h which the mulas i Courts have be me familiars of

This will accure uniformity of practile and also the advantage of their immentary in the Rules prescribed by the English decripose.

O AIII -- Adminiors -- The Committee think the pract e of adminiors may with advantage to extended to facts is well as to documents

The procedure is not compulors but is a pion would realt in cheapen! and expediting ht artion and it is hep-lithat its use will be ex our aged by the Courts.

- O AI; R G (S 150) There does not seem to be any real conflict as to whether an argeal he though at mrst sight at might appear otherwise. It has therefore been considered more says to provide corn, also for an armonic start, but for an armonic start, but for an armonic start, but for an armonic start is a formal start and the start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start armonic start arm
- O A) R 11 (S 210)—The Commutee have added words to sub-rule (1) of this Rule in ode, "o occurred the ruling of the Bombon High Court in the case of Papin Gainul Pan augre v Dypha 1 (LL.R. 1 Bom. 90) as the printing medicated by that ruling seems to prevail only in the Presidence of Bombon and not in the rat of India.
- O \\ R 14 (S 214) -The camendment, are build on the rulings contained in the deci-
- Have geometric the companion expressed in L.L. R 21 Mad at page 463 we have blood but tight to mich at clear that tutle week, without a must extrement of transfer. To require a true for now might throw a cloud over numberle a titles which rest on the assumption suctioned by long reach or that no in trumper of that for was necessary.
- O Al R 18 (S 216) The Committee have introduced an amendment to give effect to the view that upwals from decrees relating to set off should he to the Courts to which appeals in its rect of the circumst clum would be
- O \AIR ?—The committee have omitted certain words from the last paragraph of \$2.56 of the Code is order to make it clear that the Court cannot recognize a py ment or adjust ment which has not been e itsel for any purpose whatesever. It follows that an uncertified parament or adjustment cannot operate to prolong the period of limitation for applying for execution under the Limitation of the conditions.
- O AAI R 8 —The Committee have nuested this rule to provide for cases which they are told are not uncommon of an extate being sutuated within the purisdiction of two or more Courts. There are do: 1000 on othis point but they are not harmonious and the Committee than at well to distribute the law definited.
- O AMI R 11 (S 2.6)—The Committee have omitted the limitation imposed under existing Code on oral applications for immediate execution. They cae no reason why this limitation should be preserved.
- O AM R 11 (e) The Committee have not given effect to the engagetion that this should be insured to payments and adjustments which the eveditor executing the decree is bound by law to recognize as this would remove a valuable incentive to state trul. That payment is have been made (see I.R. 20. Lam. 28e).
- O AAI R 20 -The Committee have ommatted the words or has or their represente tives. This will be covered by the general clau &
- O AM R 23(4) explanation and illustration [4] (S \*46)—This addendum has been introduced in accordance with the twees of the Calcutta and Allahashad high Courts as expressed in the eves of Hun J D \_40 (other One Doyal Gahe (I E R 9 Cal 479) and Ram Sukh Dass v I do Ram (I L R 13 All 237)
- O YVI R 20(8 248)—The Committee have emitted the reference to a decree passed on alpeal for thit ordinarily the decree to be executed [Livido Arabur Rey v Reph. Burrolla count Ro./[14 Mos. I \ 465) and Muharmad belanten Rem v Muhammad 2 on Lham (I.E. R. 11 W. 2071)
- O AM R 32(8 260)—The Commutte have omitted in this rule all reference to a decree for the recovery of a wise for there can be no such decree under the law as a wise can not be treated as a chattel to be delicated over to the hashand. Where any third person prevents the wife from returning to be rubashand taker may obtain an injunction against him which may be enforced in case of disolectionse either by the imprisonment of the defendant or by the statement of his property or by both
- O AM, R 34 Section 261 has been recast so as to bring it into conformity with the chronological order of events and a provision has been added to meet the requirements of the Indian Recipitation Act

Husain (L. L. R. 21 Cal. 66)?

- O AMI, Hr 44 and 45 These provisions were inserted in Lill No II with the approval of the Government of India, and the Committee have therefore reproduced them in the present edition of the Bill
- O XXI, R 56 -- The purpose of this Rule is to put an end to doubts which from time to time have arisen as to the continuance of an attachment by ressou of the practice of "stuling off proceedings" or "romoving proceedings from the file" for which there is no justification in the College.
- O XXI, R 57 (S 278)—Though the execution of mortgage decree is expressly incorporated in the Code, the Committee still think that claims and objections entaing out of the area tion of such decrees should not be the subject of summary procedure under this and the following Rules but should be determined in the ordinary course

This does not imply that the procedure under the latter Bules as to resistance to posses sion or dispossession does not apply

- OXXIR 76—In Rr 76 end 83 express reference has been made to a re sale so as to make it clear that the default mentioned in those rules will attract the consequence indicated in R. 70 In this connection reference may be made to I L R 7 Cal 337
- O XXI R 8. The Committee have attered this Rule in order to prevent its lead obligatory on the Court to forfire the deposit in every case. The Rule as it stends has caused hardship in certain circumstences, rule the case of Sambasia Aygar v 1 pdinade Sams (IL IR 25 Mad 385).
- O XXI, R 88 (S 310 A) Words have been added so to make it clear that a purchassf acquiring a title before the sale in execution can claim the benefit of the Rule. In other respects the Committee consider it advisable to adhere to the wording of the section.

The proposal that the sale should be set aside on payment of the purchase money instead of the amount specified in the proclamation is in their opinion, frought with dauger if would be obviously useless unless subsequent protection were given to the property and such protection might tend to collusion, which would be most projective, in the doctor holder.

O XXI R 89 -- The Committee have atruck out the provisions as to irregularity in attaching the property as such irregularity obviously cannot affect the price

They have introduced the words rateable distribution of assets ' to clear up a doubt which has been the subject of discussion in several cases,

They have altered the language of the provise in order to meet the doubts which have been raised as to the evidence upon which the Court can act [Tasadduk Raini hian v Ahamad]

- O XXI, R 91 The Committee think it proper to retain the provisions of the Code
- which make it necessary for the Court to confirm the sale lu each case

  O XXI, R 92 (S 315)—The Committee have added words at the commencement
- of the clause in substitution of the last paragraph of the section which thus becomes nanoccessary
- O XXI, R 95 [S 316] ~The Committee have preserved the limitation of three years from the date of the certificate as suggested by the Select Committee in Bill No II This clears up a doubt as to the time from which limitation begins to run which has been discussed on more than one occasion
- S. 361, and the Committee think the remaining filmstrations may also be deloted as they are too obvious to serve any usefull purpose.
- O XXI, R 3 —The Committee have introduced words in order to conform to the lan guage of the Indian Limitation Act, 1877, as amended
- O XXII, R 5 (S 306) -Thengh or la the word used in the Code of 1882 and the Code of 1877, in the Bill of 1877 the word and is used, and it appears to the Committee

clear that and is required by the context If and is not used then the contrast with the preceding section is lest.

v

The explanation can be omitted having regard to the definition of legal representative inserted by the Committee

- O XXIII R 3 -The Committee have considered it expedient to alter the language of S. 375 so as to recognize the power of a Court to enquire into and to record a disputed compromise
- O XXI R 1(3)(S 380)—The Committee have delated the lestwords of this sub rule because the nature of the aut excludes the possibility of the property in suit being immoreable
- O ANIX R 2—The Committee have enlarged the language of the Code so as to allow of service by post on corporations having a registered office and by these ments the rule is brought into line with the provisions of the Indian Companies Act Companies authorized to see and be sued in the name of an officer or of a treatee must be very few if indeed any exist and they do not enware to the Committee to call for see all twotiment.
- O NVV R 1 -The Committee have adopted with the necessary alterations the English procedure in relation to cuits against firms. This new procedure has been in force for some time in the Prosidency towns of Calculta and Bombay and has worked satisfactority.
- It is hoped that its general application will be found useful by the mercantile community, for the trales remove technical obstacles which under the present procedure may seniously impede this class of hits, two as where a partner has died
- O XXXII R 3(4) —This is based on S 443. The Committee think it necessary to ensure that notice should reach one paterested in the immore swelfare and this rule sime at securing this result. The form of application and of notice in conformity with this sub rule will be in setted in the schedule of forms
- O XXXII R 9 —The Committee think it expedient that where a guardian insists on his right to be appointed next friend in the place of snother there should be power to require him to become hable or give security for costs in the snit previously incurred
- O XXXII R 15 —The Committee have extended this rule so as to cover the case of a person incorporate deform protecting has unterests by reason of his mental weakness or of his being a deaf mute
- O XXXIII R 1(8 401)—The Committee have not preserved S 402 In the light of the case law it in misleading as of are at suggestathats a cutt will be for loss of cast or abuse lenguage and they can see no sufficient reason for withholding from a pauper a right to sue as such in respect of defamation or assault
- O XXXIV R 1 The provace to 8 85 of the Transfer of Property Act 1882 has given itse to certain doubts which the Committee have songhit to remove by substituting for it the words now added with a view to making it clear that a person not a party is not bound by a decree [Zen. Nath Rat v. Lachman Ram. [L. R. 2 I. A. 1935].
- The explanation has been inserted in order to remove doubts which have ar sen from the conflict of authorities on the point
- O XXXIV R 2 (b) —The Committee have inserted the words of necessary before retransfer as according to mufacul practices are transfer is not ordinarily required and they think this practice should not be altered
- O XXXIV R 3 -The Committee have omitted the provision as to the defendant paying money to the plaintiff They think it better that in every case he should pay it into Court
- O XXXIV, R 9—This rule is new. It is a recognition of existing practice and remedies an obvious omission in the Transfer of Property Act 1882

- O XXXIV, R 11—The Committee have inserted this ule in compliance with the sign gestion of the Pray Council in Gopt Narain Khanna v Bansidhar (L R 32 I A 123) This clause was in the Transfer of Property Bill, but was omitted by the Select Committee on that Bill on the ground that it ought, to find a place in the Crail Procedure Code
- O XXXV, R 3—The Committee think that the institution of the interpleader suit affords a sufficient reason for the stay of other higation in reference to the same subject matter and they have modified 8 476 so a to give effect to this rew
- O XXAVII, R 1—As Chapter AXXIX of the Code is transferred into rules, the Committee have not reproduced paragraph (e) of S. 583 as its appropriate place will be in rules under the Presidency Small Cause Courts Act, 1882
  - O XXXPII R 2 -- The explanation to S 532 was inserted to negative the effect of the meaning, as it stands, is obscure The Committee bare dded words in the body of the rule which will remove a nimel
- O XXXVIII, R 6 (S 483)—The Committee have omitted the words "property within the jurisdiction of the Court," as they have caused a conflict of decision and they think, as a mitter of policy there should not be the restriction these words suggest.
- O XXXVIII, R 13-This rule represents the views of the Government of India as expressed in the former Bill.
- pressed in theformer Bill.

  O XXAIX, R 6 -- Words have been added to section 408 so as to empower the Court to
  - O XL Having regard to their standard of efficiency, the Committee see no reason to withhold from Subordinate Judges the power to appoint Receivers They therefore propose that S 605 of the Code should no longer be relained, for its effect in practice is often to defeat the
    - O XLI -S 554 of the Code has been omitted as unnecessary.

purpose for which an application is made

order a sale of securities where that state of the market requires such a course

- O XLI, R 5 (\$ 546) The Committee have added words to S 545 in order to make it recution can be stayed by an Appellate Court, the more necessary to have an express power.
- [Balkishen Sahu v khugnu, (I L R 31 Cil-722]]. The Committee have introduced express words unthorizing an exparte stay, as the neal for such an order constantly arises in practice

tice have modified this rule in order to make it clear

property has previously been taken in execution [See

1 L R 33 Cal 927]]

- O XLI, R 7—The Committee have added this clause to meet particularly the case where the litigant does not quarrel with the decree but appeals from an order passed in oxecution of that decree (I. R. 28 Cal 734).
- O \(\lambda LI, R\) 23 After due consideration the Committee have thought it safer not to give legulative striction to the views enuncivited in \(Halab\) Balksh \(\circ\) Balkco \(Pravad\), (I \(\Lambda\) R\(\circ\) 33 lll 167). The power of reversal and remand is litble to be abused, while the procedure under S. 56 is free from this liability and at the same time furnishes a unifortial remedy.
- The words at the end of the rule have been added to clear up a doubt which is stated by the Select Committee to crist as to whether evidence recorded at the original trial can be used on the trial their remand.
- O XLI, R 34 —The Committee consider it most important that an Appellate Court should have the fullest power to do complete unsince between the parties
  - The Illustration indicates a type of ease for which provision as intended to be made

3917

O ALII R 1 (i)—The extension of time for the payment of mortgage money is obviously of much greater moment to the mortgages than to the mortgage. Therefore the Committee have rovaled for an agreat from an order returns but not from an order grant.

V.

ing an extension of time.

- O XLIII, R 1 (S 592) -- Words have been added to word the conclusion at which the Madras High Court has recently arrived (LL R 26 Mad 369)
- O \LI', R 1—The words or the construction of a document which construction may affect the ments' have been emitted as they appear to be sufficiently covered by the power to refer any question of the

# NOTES ON SCHEDULES

# SCHEDULE IV

The Committee have amended S 22 of the Limitation Act to supply an omission which has been noticed by the High Courts namely the absence of any provision with regard to a devolution of interest grade to the where it takes place otherwise than by reason of death. The section as amended will include not only cases in which a devolution of interest takes place pandante like want to death but also to other cases in which such devolution of courts.

The Code [S 312] contemplates the confirmation of a sale of immovable project immediately on the expiration of the thirty days allowed by Art 166 of the Limitation Schedule But the period allowed for an application to set asade a sale on the ground that the judgment debter has no subsole interest therein is sairy days flat 172]. The results that in some Previnces the confirmation of a sales adapted for sairy days whilst in other Provinces sales which have been already confirmed are lable to be set aside. The Committee think that in the matter of limitation an implication under S 311 and they therefore propose to repeal Article 172 and to smend tricle 166 so es to include applications under S 313.

## SPEECH

OF

## The Hon ble Mr ERLE RICHARDS

The Hon ble Mr ERLE RICHARDS — My Lord I have the honour to present the Report of the Salext Committee on the Bill to ensablate and amend the law, relating to the procedure of the Cente of Cavil Indicature and annexed to it a copy of the Bill in which the amendments suggested by the Committee are shown in tathemed type.

It will be seen from these papers that the Committee recommend no alcierations of a radical kind in the Bill as settled by the Committee which say it slimb during the past summer. There are a number of amendments of detail suggested which taken together effect a substantial improvement but the main lines of the Bill have been accepted.

The principal feature of movelty in the BMI as introduced as the re-arrangement of the clauses and the relegation of minor provisions to a schedulow which can be amended or added to by High Courts subject to the advise of Ende Committees. The proposal has met with general acceptance Local Governments and High Courts are at one in thinking that it will effect a valuable improvement in the machinery of our event procedure and the Committee agree will then

"Two amondments have been introduced in that part of the Bill which deals with the rule making power. The first is the in cition of a proviso that Rules before being made in x = x

published with the result that under S 23 of the General Clauses act there will be an opportunity for the public to criticise any proposals before they become law. This suggestion was pit forward by the British Indrin Association and the Committee think that it is one of value. The second change is in the composition of the Rule Committees. It has been pointed out this Rule Committees ought to have among their members some gentlemen in tonch with implicit practice. The Bill as introduced provided that one of the Judges on the Committee should have had mufassil experience but the Committee think that this in itself is hardly sufficient. They suggest therefore that there should be a Subordinate Judge on each Rule Committee and that there should be power also to appoint a Vakil or pleader practising in the mufassil. They suggest therefore that the Lull should not come into operation at once on passing but that there should be an interval sillowed in order that the public and profession may make them selves acquainted with the new arrangement.

The amendments of the other provisions of the Bill do not call for any special mention on the present occasion. Many of them are in the nature of corrections or improvements of drafting. Since the Bill was introduced in this Councillt has been once more examined and revise by some of our colleagues and the entiresms on it have been carefully considered and digested in the Legislative Department. In that way the work of the Committee has been much losseed. This is the fourth Committee which has now dealbrated ou cityl procedure and it is safe to say that there is no conceivable point which has not been fully discussed during those deliberations. I would point out my Lord that the present Committee like the Simla Committee are unanimous in their approval of this Bill.

# REPORT OF THE SELECT COMMITTEE

We, the understand Members of the Select Committee to which the Bill to consolidate to the select Committee to which the Bill to consolidate the select Committee to which the Bill to consolidate the select Committee to which the Bill to consolidate the select Committee to which the Bill to consolidate the select Committee to which the Bill to consolidate the select Committee to which the Bill to consolidate the select Committee to which the Bill to consolidate the select Committee to which the Bill to consolidate the select Committee to which the Bill to consolidate the select Committee to which the Bill to consolidate the select Committee to which the Bill to consolidate the select Committee to which the Bill to consolidate the select Committee to the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the select Committee the se

and of all the High Courts in Judia. In our opinion it will give a much needed clasticity to our pulsical procedure and will enable minor defects to be remoded as they arise without reserve to the Legislature, and we recommend it to the Council. We have introduced two changes into the Legislature, and we recommend it to the Council. We have introduced two changes into Park X of the Bill relating to the rain awhing powers. In the first place we have provided that Rules must be published before they are made, the result will be that S 23 of the General Rules must be published before they are made, the result will be that S 23 of the General have also made a change in that there will be an opportunity for the public to offer criticisms on any proposals for alterations of procedure before those proposals are finally passed into law. We have also made a change in the composition of this Rule Committee. It has been suggested by more than one authority that the interests of the mofussit were not sufficiently represented on those Committees as continued under the Bill. We recognise the force of this criticism and have accordingly provided that there shall be a Subordmata Judge on each Rule Committee and that the Table and the profession of the practicism in the mofusal will be eligible. We further recommend that the Dill hall not come into operation until the Lift Junary 1909 in order that the Public and the profession may have an opportunity of making themselves familiar with the

8. We have carefully considered the cutterium on the full as introduced and the changes which we recommend are summarised below. It will be observed that we do not advise any departures of importance from the conclusions of the Special Committee which not at Simila during the part summer. That Committee had before it a mass of opiniona from quitient and other authorities all over India dealing with every point of civil procedure, and they arrived at that conclusions only after a careful consideration of those opinions. We should not therefore its any case have discented from them without strong reason, but now pudgment those conclusions are right and we accept them. Since the full was introduced this been again examined and revised by some of our colleagues and the criticisms on it have been fugue against and revised by some of our colleagues and the criticisms on it have been fugue against the Legisla tive Department. By these means our deliberations have been much expedited.

#### CLAUSES.

Clause 2 (2) -The definition of "degree" has been generally accepted

Clause 11—We have restored the word 'former' and have inserted explanation I on the exgression of Sir Bhashyam Tyengar to remove a conflict of authority as to the meaning of the expression "former suit."

Explanation V has been omitted. We think it is liable to misconstruction and that the law is well established apart from the explanation

Clause 22 —We have emitted Cl 22 of the Bill as introduced, as in our opinion it is unnecessary. We think that sufficient provision is made for transfers under the succeeding Clause.

which compelled applications to the High Courts rict Court This in our opinion merely duplicates

Clause 25—C1 25 of the Bill as forceduced has been rendered unoccessary by the omission of Cl 22 We have accordingly taken it out and have put in its place a new clause taking Power for the Governor General in Council to transfer cases from one High Court to a rother

es ba noint 577

of the Code of Criminal Procedure 1898

Clause 34 —The words not being a decree for the enforcement of a mortgage or charge have been omitted in this clause and elso where in order to make it clear that a decree for the Payment of money does not include a decree for sale in enforcement of a mortgage or charge

o has obtained an interim attachment i the determination of the attachment we altered this clause accordingly. There

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Clause 51 -We have added a power to execute a decree by appointing a receiver on the eugestion of the Advocate General of Madras

Clause 54—We have restored S 265 of the crusting Code 16 has been pointed out this the provision in the Bull as introduced was opposed to the practice in some presumes under which all partitions of land paying revenue to Government are offseted by the resemble sufficient of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the provision of the

Glause 55 - Wo have carefully coosidered the provision as to breaking open dwelling houses and have come to the conclusion that it should be limited to dwelling houses in the occupancy of the judgment debtor

Clause 57 - Sub Cls (2) to (6) have been relegated to Bules (O XXI R 39)

Clause 59 —The remaining provisions as to the release of judgment debtors have keen brought up from the Rules and incorporated in this clause

Clause 60 (1) (g) — We have omitted the words military or civil because they appear to be of no value. The word pensioners of itself covers every class of pensioner

The exemption has been extended so as to cover pensions granted out of any service family pension fund notified in that behalf by the Governor General in Council

Clause 60 (1) (1) - This has been extended at the request of the Covernment of Burma

Clause 61—The words be exempted from hability to attachment or sale in execution of accree his eleca substituted for the words be released from introducing an all be free from hability to sale in execution of a decree in order to make it clear that the exempt in accreda to produce which has been hypotheested

Clause 62 -has been brought into line with Cl 55 as now amended

Clause 66 (1)—The wording has been ritered on the suggestion of the Hon tie Mr Justl  $\epsilon$  A Lunn so as to put the menning beyond doubt

Clause 79 (2) —This saving was accepted by the Select Committee of 1903 and we think it desirable to have it in the Bill in order to word possible doubt

Clau e 92 (1)—It has been suggested to us by several authorities that Local Governments should be emjowered to invest Courts subordinate to District Courts with power to try ca es under this clause of the which that this suggestion should be accepted

The necessary words have been added

۲.

Clause 96 (3) of the Bill as introduced has been emitted. The case law on the subject is sufficiently clear and considerable objection has been taken to the sub clause

Cause 95 -The wording of the provi o has been altered at now deals only with the declsion on the point of law referred

Cituse 104 - Sub (Cl ) (1) (t) has been added in order to give a right of appeal against the deed ion of the Court on a special case this is in accordance with the recommendation of the Spe ial Committee but appears to have been omitted from the Bill by mistake

Clause 107 -Sub CJ (1) is new We think it describe to have in the body of the Code a general provision about the powers of an appellate Court

C ause 134 is new It supplies an omission

Clauses 142 and 143 have been brought up from the Rules. We think they should be in the body of the Code

Cause 144 -Sub Ct (2) has been added on the suggestion of the Calcutty High Court We acree that re titution which may be obtained by application under this clause should not to made the subject of a ceparate suit

### SCHEDULE I

#### Order 1

Bules I and 3 - The words act or have been added before the word transaction

Rule 3 -Th: has been amplified so as to bring it into fine with R 1

Rule 5 -The words cause of action have been struct out

They have given rise to considerable difficulty in Eugland

Rule 8-We have on the suggestion of the Advocate General of Madras added the words for for the benefit of after the words on behalf of .

### Order III

Rule 4 (3) -We have adopted the elternative draft suggested by the Simila Committee in their report Order 11

Rule 19 -We have substituted the words he shall not be permitted to amend as the case may be for the words such order to amend become roid

# O.der I II

Rule 17 (1) -On the suggestion of the British Indian Association the word account. has been substituted for the word book

### Order IX

Rule 4 -We have struck out the provisions about limitation contained in this rule These provisions will be incorporated in the Bill to consolidate and amend the Limitation ict

Rule 13 -We think it necessary to provide specially for cases in which it may not be possible to set uside the decree as against the applicant only

## Order XX.

Rule 18 -This Rule has been altered so as to correspond with the amended Cl 54.

# Order XXI.

Rule I (2) -This sub rule has been inserted on the suggestion of the British India Asso. ation

Rule 7 -The words "or of the jurisdiction of the Court which passed it" have been omitted In our opinion a Court executing the decree of another Court ought not to go into any question as to the jurisdiction of the Court which passed it

Rule 20 -This Rule is new It is inserted in order to make it clear that the provisions as to cross decrees and cross claims apply to the case of mortgago decrees. The Rule also makes it clear that the expressions "decree for the payment of money" and other similar expressions in the Code do not include a decree for sale in enforcement of a mortgage or charge

Rule 45 -We have decided to recommend the omission of this Rule from the Bill It was taken from the Bill of 1303 but met with considerable criticism, and strong objection has been taken to it by the Madras Board of Revenue and the British India Association In our opinion the procedure presembed in this Rule is cumbrone and there would be little or no practl cal advantage from it

Rule 90 -The words 'or fraud ' have been added after the word 'irregularity" We think that the existing law as contained in S 311 of the present Code is defective, the omission in the section to refer to fraud as a ground for setting aside a sale having led some Courts to hold that an order on an application setting up fraud as a ground for relief is, unlike an order made on an application under S 311, a decree and open to second appeal This result, which often involves a considerable prolongation of these proceedings, is in our opinion undesirable. We think that applications for the setting aside of sales should, so far as the procedure applicable to them is concerned, stand on the same footing whether that are hazed on the ground of pregularity or on the ground of fraud

Rules 95 and 96 - We have struck out the provisions about limitations contained in these rules We agree with the Hon'ble Mr Justice Millor that it would be more appropriate to incorporate them in the Limitation Act, and we have suggested their incorporation in the Bill to amend and consolidate that let which is now before Council

#### Order 3311

Rules 3 and 4 -Rr 3 and 4 have been amended so as to provide that if no application for substitution is made within the time allowed by law the suit shall abate. We have struck out the provision that the Court may make an order declaring the abatement as in our opinion it is unnecessary and likely to give rise to difficulty

Rule 6 - The provision as to ante dating the judgment has been struck out and in its stead we suggest a provision to the effect that the judgment shall have the same force and effect as if it had been pronounced before the death took place. In our opinion this is all that is required

### Order XXXIV

### Some of the Rules in this Order have been re drafted

The Transfer of Property Act does not contain any provision for the passing of a final decree in cases where payment is mode in accordance with the terms of the preliminary decree This is in our opinion an omission and we have provided in Rr 3 (1), 5 (1) and 8 (1) for the passing of final decrees in such cases

We approve of the proposal to repeal the provisions of 8 90 of the Transfer of Property Act We think that these provisions have worked considerable hardship and are not really needed. The first part of the section enacts that a mortgages shall not bring the mortgaged property to sale otherwise than by in: precludes the mortgages from selling

with the mortgage debt at is in mortgages to purchase the equity "

quent to and distinct from the mortgage transaction, and we can see no reason why it should

not be equally compotent to him to have it sold in satisfaction of any claim which he may base against the mortgagor unconnected with the mortgago (Aktaratmal v Datm I L R 32 Cal 296 , Lisel v Peere, 1902 A C 461) In so far as it picludes the mortgagee from selling the property under a sudement for the mortgage debt at serves no neeful nurpose We understand that the provision was enacted to provont mortgagees from sung their mortgagors on the debt as such and in execution selling the mortgagor s interest in the property we however think that no such provision was needed seeing that under the law as it stood viter to the let the Court never allowed the sale of a bare equity of redemption under a judgment on the corenant [Sued I man v Rajcoomer 23 W R 187 Ahara Jan al v Daim L L R 32 Cal 2 tol

### Octor M.

hule 4 -We have redrafted this sule on the lines of S 18 (4) of the Provincial Insolvency to: 1907 We think that the sour to imprison receivers is too wide and should be omitted

# Order \LI

Ful. 24 We have struck out this rule as in our opinion it is unduly restrictive

#### Orler 71.111

Rick 1 We suggest that there should be appeals from orders pronouncing judgment against a party under Order VIII Rule 10 Order A Rule 4 and Order XVI Rule 20

The u orders are under the present law appealable as decrees but having regard to the den nition of a decree in the Code they would no longer be appealable in that way and we think it necessary to make them appeniable as orders. We have also given an appeal against an order made under Rule 21 of Order \[1]

Appendices - The forms have been amplified and where nece cary re-drafted. We think that as now cattled they are an improvement on the forms in the present Code

6 The publication ordered by the Council has been made as follows -

# In Luglish

| Gazette                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | Date                                                                                                                                                   |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------|
| Gazette of India Poit Saint George Gazotte Bombay Government Gazette Calcutts Gazette United Provinces of Agra and Oudh Government Gazette Government Gazette Government Gazette Lovernment Gazette Lovernm | Tth Soptember 1907<br>1st October 1907<br>1rd October 1907<br>18th Soptember 1907<br>27th September 1907<br>27th September 1907<br>18th September 1907 |
| Eastern Bengal and 15°am Greette<br>Central Provinces Gazette<br>Coorg District Oazette<br>Smd Official Gazette                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 26th September, 1907<br>26th September, 1907<br>21st September 1908<br>26th September 1907                                                             |

|          | in the Vernaculars             |                                                |    |
|----------|--------------------------------|------------------------------------------------|----|
| Province | Language                       | Date                                           |    |
| Madras   | Tamil<br>Telgn                 | . 28th January 1908<br>7thand 28th January 190 | )8 |
|          | Kanarese<br>Malayalam          | 7th January 1908                               |    |
| Bembay   | Marathi<br>Gujrata<br>Kaparese | } 29th Januar, 1908,                           |    |
|          |                                |                                                |    |

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|--------------------------------------------------|---------------------------|------------------------------------------------------------------|
| Province                                         | Language                  | Date                                                             |
| Bengal                                           | Bengalı<br>Hındı<br>Uraya | 21st January, 1908<br>17th December, 1907<br>27th December, 1907 |
| United Provinces Punjab Eastern Bengal and Assam | Urdu<br>Urdu<br>Bengali   | 18th January, 1908<br>17th January, 1908<br>8th February 1908    |
| Coorg                                            | Kanareso<br>Marathi       | st February, 1903                                                |

7 We think that the Bill has not been so altered as to require re publication and v recommend that it be pissed as now amended

# GENERAL INDEX

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Admission - Notice to admit - Notice to admit |

(111) Nou compliance with notice-Effect

| Content of Admissions by pleading O12R 11 Notices of Admissions by pleading O12R 11 Notices of Admissions after O10R Notices of Admissions after O10R Notices of Admissions after O10R Notices of Admissions of Property in the Content of the presence of Adverse Possession O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices of O10R Notices o   | (b) Implied admissions—Failure to deny plaint     | Sinction of, for suit under S. 92 of the Code-        |
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0 19 R 1 N 9

Affidavit -- Interrogatories, answer to-(Could )

(a) Secessity for athdayits in matter of record

- Oath of deponent who can administer oath S 139

(a) Difference between affidavit and solemn

(h) Whether evidence --- Matter of law

affirmation

(a) Athdayit on \_Matter of record

----Stamp of peressars

Avent-Principal, snit by-(Contd.)

behalf of Government

(c) Service of D occess on

--- Process service of

(b) Snit by pincipal against agent for accounts

- Whether agents claim of set off is
precluded by his not pleading it in his
written statement Ook 6 N 2

(a) Agent to accept service - appointment of

(b) Agent to receive process - Government

pleader-Power of-To receive process on

(i) Agent a right to refuse to accent service.

| -Nendemany be required 0 19 R 1 N 1  When may be required 0 19 R 1 N 1  (a) Power of Court to order 100 by affidant of document said upon 0 19 R 1 N 1  (b) Power to order my point to be proved by affidant of document said upon 0 19 R 1 N 1  Who can give affidant 0 19 R 1 N 1  Astent 0 19 R 1 N 1  Astent 0 19 R 2 N 1  (a) Acting and appearing is for party 0 3 R 2 N 2  (b) Appearance by Recognised agent 0 5 R 2 N 2  (c) Arbitration—Reference to 5 ch 2 P 1 N 10  (d) Defect to - Elected 1 (d) Arbitration - Reference to 5 ch 2 P 1 N 10  (d) Defect to - Elected 1 (d) Arbitration - Reference to 5 ch 2 P 1 N 10  (d) Defect to - Elected 1 (d) Arbitration - Reference to 5 ch 2 P 1 N 10  (d) Defect to - Elected 1 (d) Arbitration - Reference to 5 ch 2 P 1 N 10  (d) Offer to be bound by oath to opposite party - Dower of recognized agent to make such offer 0 3 R 2 N 2  (ii) To represent party 0 5 R 2 N 2  (iii) To represent party 0 5 R 2 N 2  (iv) Provisions as to 0 3 R 2 N 3  (iv) Provisions as to 0 3 R 3 N 1                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | -Stamp if necessary 0 19 K 1 N 2              | (1) Agent a right to refuse to accept service   |
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| (a) Power of Court to order 1 roof by affidant of document and upon 0 19 R 1 N 1                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                               | and appear in suit O3R3N1                       |
| (a) Power of Court to order 1 roof by affidant of document sued upon 0 19 R 1 N 1  (b) Power to order any point to be proved by affidant of document sued upon 0 19 R 1 N 1  Agent  —Authority of (a) Acting and appearing is for party (b) Appearance by —Recognised agent 2 of 2 P 18 E 1 1 (c) Artificial Defence to 2 P 18 E 1 1 (c) Artificial Defence to 2 P 18 E 1 1 (c) Artificial Defence as to 3 R 2 N 1 (c) Artificial Defence to 2 P 18 E 1 1 (c) Artificial Defence to 2 P 18 E 1 1 (c) Artificial Defence to 2 P 18 E 1 1 (c) Artificial Defence to 2 P 18 E 1 1 (c) Artificial Defence as to, when to be taken 0 3 R 2 N 2 (c) Defence as to, when to be taken 0 3 R 2 N 2 (d) Objection as to, when to be taken 0 3 R 2 N 2 (d) Objection as to, when to be taken 0 3 R 2 N 2 (d) Objection as to, when to be taken 0 3 R 2 N 2 (d) Objection as to, when to be taken 0 3 R 2 N 2 (d) Objection as to, when to be taken 0 3 R 2 N 2 (d) Objection as to, when to be taken 0 3 R 2 N 2 (d) Objection as to, when to be taken 0 3 R 2 N 2 (d) Objection as to, when to be taken 0 3 R 2 N 2 (d) Objection as to, when to be taken 0 3 R 2 N 2 (d) Objection as to, when to be taken 0 3 R 2 N 2 (d) Objection as to, when to be taken 0 3 R 2 N 2 (d) Objection as to, when to be taken 0 3 R 2 N 2 (d) Objection as to, when to be taken 0 3 R 2 N 2 (d) Objection as to, when to be taken 0 3 R 2 N 2 (d) Objection as to, when to be taken 0 3 R 2 N 2 (d) Objection as to, when to be taken 0 3 R 2 N 2 (d) Objection as to, when to be taken 0 3 R 2 N 2 (d) Objection as to, when to be taken 0 3 R 2 N 2 (d) Objection as to, when to be taken 0 3 R 2 N 2 (d) Objection as to, when the recognized agent and the top to the taken of the top to the taken of the top to the taken of the top to the taken of the top to the taken of the top top the taken of the top top the taken of the top top the taken of the top top the taken of the top top the taken of the top top the taken of the top top the taken of the top top the taken of the top top the taken of the top top the taken of the top t  |                                               |                                                 |
| (iv) Provisions as to 0.3 R.2 N.2 Agent — Authority of (a) Acting and appearing is for party (b) Acting and appearing is for party (b) Appearance by—Recognized agent qual 0.8 R.1 (c) Arbitration—Reference to beh 2.2 I.N.15 (d) Detection as to, when to be taken, and (iv) Person carrying on business as to 1.6 Main of the taken of the taken of the taken of the taken of the taken of the taken of the taken of the taken of the taken of the taken of the taken of the taken of the taken of the taken of the taken of the taken of the taken of the taken of the taken of the taken of the taken of the taken of the taken of the taken of the taken of the taken of the taken of the taken of the taken of the taken of the taken of the taken of the taken of the taken of the taken of the taken of the taken of the taken of the taken of taken of the taken of the taken of the taken of taken of the taken of taken of the taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken of taken  | (a) Power of Court to order proof by affidant | recognized agents whether valid                 |
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| Who can give afishant  Agent  Authority of  (a) Acting and appearing is for party  (b) Appearance by—Recognised agent O 3 R 2 N 2 1 (c) Arbitration—Reference to Sch 2 P I N 15 (d) Dietect in—Effect  (d) Dietect in—Effect  (e) Arbitration—Reference to Sch 2 P I N 15 (d) Dietect in—Effect  (f) Offer to be bound by cath of opposite party—One of the companied agent to make such offer  (g) Offer to be bound by cath of opposite party—One of the companied agent to make such offer  (ii) To represent party O 3 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepresent party—O 8 R 2 N 2 (iii) To sepre  |                                               | (iv) Provisions as to 0 3 R 3                   |
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| (g) Offer to be bound by oath of opposite party—Power of recognised agent to make such offer  (in) To represent party (in) To sepresent party (in) To   |                                               | (d) Lersons specially appointed to prosecute    |
| (g) Offer to be bound by oath of opposite party—Prover of recognised agent to make such offer  (g) Offer to be bound by oath of opposite party—Prover of recognised agent to make such offer  (g) Prover of recognised agent to make such offer of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the  |                                               |                                                 |
| (g) Offer to be bound by oath of opposite party—Tower of recognised agent to make such—Tower of recognised agent to make such offer  (n) To represent party (OSR2N2)  (ii) To represent party (OSR2N2)  (iii) To represent party (OSR2N2)  (iii) To spresent party (OSR2N2)  (iii) To spressed agent (Oserment (OSR2N2)  (iii) To spressed agent (Oserment (OSR2N2)  (iii) To spressed agent (Oserment (OSR2N2)  (iii) To spressed agent (Oserment (OSR2N2)  (iii) To spressed agent (Oserment (OSR2N2)  (iv) To spressed agent (Oserment (OSR2N2)  (iv) To spressed agent (Oserment (OSR2N2)  (iv) To spressed agent (Oserment (OSR2N2)  (iv) To spressed agent (Oserment (OSR2N2)  (iv) To spressed agent (Oserment (OSR2N2)  (iv) To spressed agent (Oserment (OSR2N2)  (iv) To spressed agent (Oserment (OSR2N2)  (iv) To spressed agent (Oserment (OSR2N2)  (iv) To spressed agent (Oserment (OSR2N2)  (iv) To sprese  | O3R2N4                                        |                                                 |
| Power of recognised agent to make such offer  O3 R 2 N 2 (1) To represent party O4 R 1 N 1 (2) (2) (2) (3) (2) (3) (3) (4) (4) (4) (4) (4) (4) (4) (4) (4) (4                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                                               | lector O 27 R 2 N 1                             |
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| Iron Court   S135                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | (iii) To sign memo of appeal O 41 R 1 N 1     | (a) Exemption of recognized agent—From arrest   |
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| (a) Recognize agent 1. Can invest and act in high court on behalf DF (call C110 N5 b) Bight of, to represent party—On the Orag national size of High Court S 119  Power of attorney  See Pour of Attorney  —Principal, rights and habilities in relations to (a) Accounts—Sut for—Between puricipal and agent—Form and contents of decrees (b) Agent featuring punicipal is money — Landbilty to part of the principal and principal and punicipal and principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H  | High Court                                    |                                                 |
| LP (All CLION 5  (b) Hight of, to represent party—On the Orag                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | (a) Recognised agent if can appear and act    |                                                 |
| (b) Bight of, to represent party—On the Original Bishe of High Court  —Section 80—Order of speciment under—Enforce ment of—Applicability of \$47  —Power of attorney  See Four of Attorney  —See Four of Attorney  —Agreement  See Contract  Agreement  See Contract  —Suit by or against—Procedure  O 20 R 16  (b) Agent retaining principal smoneys—Lash  Inty to pay interest  S 34 N 10  —Thermicial, suit by  (a) Decree in favour of agent for benefit of principal—H principal—H principal—H principal—Contract agent for benefit of principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H principal—H princip | in High Court on behalf of a party            | Froceedings under whether set on (21 be allowed |
| mal Side of High Court  Power of attorney  See Power of Attorney  Principal recognised agent of — Smit through recognised agent of — Smit through recognised agent of — Smit through recognised agent of — Smit through recognised agent of — Smit through recognised agent of — Smit through recognised agent of — Smit through recognised agent of — Smit through recognised agent of — Smit through recognised agent of — Smit through recognised agent of — Smit through Alem — Smit parent procedure — Code applicability of Preamble No 2 — Non resident foreigner carrying on business in principal—II principal can give agent for principal—II principal can give agent for principal—II principal can give agent for Parentipal—II principal can give agent for Parentipal can give agent for benefit of Parentipal—II principal can give agent for Parentipal can give agent for benefit of Parentipal can give agent for benefit of Parentipal can give agent for benefit of Parentipal can give agent for benefit of Parentipal can give agent for series agent for Parentipal can give agent for parentipal can give agent for Parentipal can give agent for Parentipal can give agent for Parentipal can give agent for Parentipal can give agent for Parentipal can give agent for Parentipal can give agent for Parentipal can give agent for Parentipal can give agent for Parentipal can give agent for Parentipal can give agent for Parentipal can give agent for Parentipal can give agent for Parentipal can give agent for Parentipal can give agent for Parentipal can give agent for Parentipal can give agent for Parentipal can give agent for Parentipal can give agent for parentipal can give agent for give agent for give agent for g  |                                               |                                                 |
| Power of attorney  See Power of Attorney  Principal, nights and inabilities in relation to (a) Accounts—Sut for—Between principal and agent—Form indicated the contents of decree (b) Agent retaining principal smores — Landing to the principal smores — Landing to the contents of decree (b) Agent retaining principal smores — Sak No—Code applicability of Presmible No 2—Non resident foreigner carrying on business in British India—Suit Jegants such person, whether maintainable — O 20 R10 % 2—Suit against.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | nal Side of High Court S 119                  | ment of - Applicability of S 47                 |
| See Four of Attorney  —Principal recognised agent of — Snit through recognised agent of — Snit through recognised agent of — Snit through recognised agent — OS R 2 N 7  —Principal, rights and inshibites in relation to (a) Accounts—Suit for—Between principal and agent—Porm ind contents of decroe — O 20 R 16  (b) Agent retaining principal somoney — Lash hity to pay interest — S 34 N 10 —Principal, suit by — Code applicability of — Prainble No 2 —Non resident foreigner carrying on business in British India—Suit systems turble person, whether maintainable — O 20 R 10 N 2                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                                               |                                                 |
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| (b) Costs not included in decree—Power of exe                                       |                                                                                                 |
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|                                                                                     | (a) P                                                                                           |
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|                                                                                     | (b) S ween parties Costs of the second of B5                                                    |
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| Costs—Contd)  —Interregationes, costs of S 35 N 2, O II R 3 N I c) Successful party—Order for costs of unit rogationes superportly withinted by fun glasses superportly withinted by fun (3) Successful party—Order for costs of unit rogations superportly withinted by fun (3) I and the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of the superport of                                                                                                    |                                                   |                                                |
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| (5) Appeal dismissed appellant to pay costs  S 39 N 39  When need not be inade S 39 N 5  Parties to bear thin own costs (a) When need not be inade S 39 N 5  Parties to bear thin own costs (a) When need not be inade S 39 N 5  Parties to bear thin own costs (a) When need not be inade S 39 N 5  Parties to bear thin own costs (a) When need not be inade S 39 N 5  Parties to bear thin own costs (a) When need not be inade S 39 N 5  Parties to bear thin own costs (a) When need not be inade S 39 N 5  Parties to bear thin own costs (b) When need not be inade S 39 N 5  Parties to bear thin own costs (a) When need not be inade S 39 N 5  Parties to bear thin own costs (a) When need not be inade S 39 N 5  Parties to bear thin own costs (a) When need not be inade S 39 N 5  Parties to bear thin own costs (a) When need not be inade S 39 N 5  Parties to bear thin own costs (a) When need not be inade S 39 N 5  Parties to bear thin own costs (a) When need not be inade S 39 N 5  Parties to bear thin own costs (a) When need not be inade S 39 N 5  Parties to bear thin own costs (a) When need not be inade S 39 N 5  Parties to bear thin own costs (a) When need not be inade S 39 N 5  Parties to bear thin own costs (a) When need not be inade S 39 N 5  Parties to bear thin own costs (a) When need not be inade S 39 N 5  Parties to bear thin own costs (a) When need not be inade S 39 N 5  Parties to bear thin own costs (a) When need not be in all of so, when comment in the own coalling the parties of some content to some claimed to bear thin own costs (a) When need not be in all of some costs (a) When need not be in all of some costs (a) When need not be in all of some costs (a) When need not be in all of some costs (a) When need not be in all of some costs (a) When need not be in all of some content to some claimed to bear thin own costs (a) When need not be in all of some content to some claimed to bear thin own costs (b) Parties to some ach parties to some content to some claimed to bear thin own costs (a) When need not be in this own cou                                                                                                    | Meaning of expressions                            |                                                |
| S 39 N 9  - When need not be inade  - Parties to bear chuit on so to to to bear  (a) When each party may be referred to bear  (b) Costs to alide result  (c) Costs to be costs in the cruis  (d) Costs to be costs in the cruis  (e) Costs to be costs in the cruis  (f) Costs to be costs in the cruis  (g) Costs to colline order  (g) Costs to colline order  (g) Costs to colline order  (g) Costs to colline order  (g) Costs to colline order  (g) Costs to colline order  (g) Costs to colline order  (g) Adjournment in pauper suit  (g) Adjournment in pauper suit  (g) Adjournment in pauper suit  (g) Adjournment in pauper suit  (g) Adjournment in pauper suit  (g) Adjournment in pauper suit  (g) Costs - Partie of the to see as a pauper  (g) Adjournment of court of sum claimed by plain  (g) Costs - Partie on account of sum claimed by plain  (g) Costs - Partie on account of sum claimed by plain  (g) Costs - Partie on account of sum claimed by plain  (g) Costs - Partie on account of sum claimed by plain  (g) Costs - Partie on account of sum claimed by plain  (g) Costs - Partie on account of sum claimed by plain  (g) Costs - Partie on account of sum claimed by plain  (g) Costs - Partie on account of sum claimed by plain  (g) Costs - Partie on account of sum claimed by plain  (g) Costs - Partie on account of sum claimed by plain  (g) Costs - Partie on account of sum claimed by plain  (g) Costs - Partie on account of sum claimed by plain  (g) Costs - Partie on account of sum claimed by plain  (g) Costs - Partie on account of sum claimed by plain  (g) Costs - Partie on account of sum claimed by plain  (g) Costs - Partie on account of sum claimed by plain  (g) Costs - Partie on account on account of sum claimed by plain  (g) Costs - Partie on account on account of sum claimed by plain  (g) Costs - Partie on account on account on account on account on account on account on account on account on account on account on account on account on account on account on account on account on account on account on account on account on account on                                                                                                     |                                                   |                                                |
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| 10   10   10   10   10   10   10   10                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                   |                                                |
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| (d) Costs to follow the erent: \$3.55 % 4 (d) Usual costs and interest \$3.50 N 3  — Vinor libility of minor plaintiil who on the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of th                                                                                                  | (1) Costs to be costs in the cruso S 35 N 4       |                                                |
| (ii) Usual costs and interest S 35 N 39                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | (i) Costs to follow event 8 35 N 7                | (a) Adjournment in nation suit O 33 R 16 N 1   |
| Thior Intellity of mmor plaintiff who on the first of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the control of the cont                                                                                                        |                                                   |                                                |
| (a) Costs—Livislity of minor plaintiff who on is to to the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of the cost of                                                                                                    |                                                   | O 33 R 15 N 5, O 33 R 16                       |
| TR 12<br>> N 19   ——Priment into Court of sum claimed by plain<br>the ther may be ordered to be paid ont of (3) Co-15 ——Where sum claimed is deposited in                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | (a) Costs-Liability of mmor plaintiff who on      | (c) Costs - Pauper suit                        |
| Nig                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                   |                                                |
| ther may be ordered to be paid out of (2) Costs—Where sum claimed is deposited in                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                   |                                                |
| ther may be ordered to be paid out of (a) Coats-Where sum claimed is deposited in                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                   | tıff                                           |
| estate of minor S 35 N 16 Court S 35 N                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | ther may be ordered to be paid out of             | (a) Costs-Where sum claimed is deposited in    |
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| Costs-(Contd )                                                                                                                                            | Coats-Security for-(Con-                     |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------|
| Pecuniary jurisdiction of Court power to award costs in excess of S 35 A                                                                                  | (v) Security for appeal                      |
| -Privy Council Appeal 0 45 R 15 N 14                                                                                                                      | Sie Prit                                     |
| (a) Costs-Assessment of - In Privy Council                                                                                                                | (b) Pauper proceeding (i) Costs—Some         |
| appeul O 45 R 15 N 14                                                                                                                                     | to continu                                   |
| (b) Consolidation—Costs in case of O 45 R 4N 4                                                                                                            | before secu                                  |
| (c) Costs-Principles and practicas to S112N 8                                                                                                             | 110.10                                       |
| —Probate cases S 35 N 23                                                                                                                                  | (11) Costs—Sect<br>ordered age               |
| (a) Costs—High Court pawer of — To order<br>costs in lower Court—Probate case<br>S 35 N 23                                                                | (c) (Miscellancous) (i) By neceiver          |
| (b) Order for payment of costs out of the<br>estate—Order how to be enforced S35 N 37                                                                     | becoming i                                   |
| -Proof of documents costs of S 35 N 2 O 13 R 2                                                                                                            | rule                                         |
|                                                                                                                                                           | (111) Security fo<br>payment of              |
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| (b) Claims and objections—Removal<br>of attachment en claim being                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | (vi) Wrong person's property attached—<br>Such person paying money to avoid                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| allowed—Lifect O 21 R 60 N 5<br>(c) Whether attachment ceases after                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | attachment-Whether he can recover<br>the money in execution S 47 N 13                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| sale and before confirmation of<br>sale 0 21 R 53 N 5                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | N 16                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| (212) Territorial jurisdiction                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | other                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| (1) Attachment — Debt — Jurisdiction of                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | xecu                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| executing Court—Where garnishes<br>resides outside jurisdiction                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | Par to S 30 N 2                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| 0 21 R 46 X 9                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | (a) Agreement superseding decree - Whether                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| (11) Attachment of money erother preperty                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | decree can be executed S 38 N 5                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| in custody of Court - Veney in custody<br>of Court in another District - Transfer                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | (b) Agreement to give time-Executing Court,                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| or R 52 X 1                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | power of to recognise agreement S 47 N 41                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| of to                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | (c) applicability of, S 10 to execution pro                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| , due to                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | ccedings S 10 N 7                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| bursing                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | (d) Decree not drawn up-Execution, whether permissible S 23 N 5                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| resident                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | (e) Discharge of debt prior to decree-Whether                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | can be pleaded in bar of execution S 47 N 31                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| 0 21 R 43 5 1                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | -Coffector execution by                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| (11) Immoveable property situated in more                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | See Collector                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| than one jurisdiction - Pewer to<br>attach O 21 R 3                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | Compromise decree O 23 R 3 N 27                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| (41°) \ 411dity                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | Comprems of execution proceedings                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| (1) Attachment under a wrong section—                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | 021 R2 N6 028 R4 N2                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| Pfleet 0 21 R 46 N 4                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | See alse Comprovisse                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| (ii) Attachment under decree which have                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | (a) Compremise on behalf of minor—Leave of<br>Court necessity for O 32 R 6                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| been et aside—Void S 38 N 5                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | (b) Provisions applicable 0 23 R 4                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| (111) Illegal attachment-Inherent power of                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| Court to remove attachment<br>O 21 R 60 N 1                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | - Different Courts-Concurrent execution of same decree in different Courts how far permissible                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
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| (214) Value of property attached to be                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | - 8 38 N 10                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
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| (i) Value of property to be attached to be<br>specified in any location for attached<br>O 21 R 17 N 9                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| (i) Value of property to the attached to be<br>specified in application for attachment<br>O 21 R 17 N 9<br>(ii) Value of property to be attached to                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| (i) Value of property to be attached to be<br>specified in application for attrefument<br>O 21 R 17 N 9<br>(ii) Value of property to be attached to<br>correspond with amount due under                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| (i) value of property to be attached to be<br>specified in application for attrahument<br>O 21 R 17 N 7<br>(ii) value of property to be attached to<br>correspond with amount due under<br>decree O 21 R 17 N 3                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | (b) Right of judgment debter to oppose seem                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| (1) Value of property to be attached to be specified in api heating for attrahment O 21 R 17 N ?  (11) Value of property to be attached to correspond with unboat due under decree O 21 R 17 N .)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | (b) Right of judgment debtor to oppo a execution application an around that condition                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| (i) Value of property to be attached to be specified in application forestrockment O 21 R 17 N ?  (ii) Value of property to be attached to correspond with immonst due under decree O 21 R 17 N .)  (iii) Warrant of O 22 R 27 N .)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | (b) Right of judgment debtor to oppose execu-<br>tion applications on ground that condition<br>imposed upon him by conditional decree by                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
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S 37 N 3

ree 537 N 3. O 45 R 5 N 5, 6, O 45 R 15

, Execution-Cross decrees-(Contd )

(b) Decree to be executed

(a) Claim of Government for court fee in pauper suit O 33 18 10 % 3

(c) Set off of - Applicability of provisions to decroes for sale on mortgage or charge

O 21 R 18 N 9

Execution—Court which can execute—Decree passed in appeal—(Contd)

(b) Privy Council decree

(ii) Decree passed in second appeal

| O 45 R 5 N 5, 6, O 45 R 15                      | decroes for sale on mortgage or charge                              |
|-------------------------------------------------|---------------------------------------------------------------------|
| (c) Revision, order passed in S 141 N 2         | O 21 R 20                                                           |
| (d) Successor of Judge passing decree           |                                                                     |
|                                                 | (d) Set off of-Conditions necessary                                 |
| (1) Change of nfficer in the Court hy           | O 21 R 18 N 2 to 11                                                 |
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| (11) Successor of Judge who passed decree, if   | attaching one of the decrees O 21 R IS N 10                         |
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|                                                 | - Declaratory decree 0 21 R 17 N 6                                  |
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| (1) Courts by which decree can be executed      | (a) Declaratory decree, il expediante                               |
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| (11) Court executing decree - Meaning of        | (h) Enforcement of right declared whether in                        |
|                                                 | execution 5 47 N 71 4                                               |
| S 47 N 74                                       | (e) Insertion of clause that decree may be                          |
| (iii) Court not coming within Ss 37 and 38      | fel tasethou of charse than acces may an                            |
| whether can execute S 150 N I                   | executed-Whether makes it executable                                |
| (iv) Court of first instruce-Meaning of         | S 38 N a                                                            |
|                                                 | (d) Partition if can be ordered where decree                        |
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| (v) Court passing decree ceasing to exist-      |                                                                     |
| Lffect-Which Court to execute                   | (e) Suit for working out rights declared -                          |
| S 37                                            | Majutainability S 11 N 115                                          |
|                                                 | -Decree for execution of document or endorsement                    |
| (vi) Court passing decree, 'ceasing to have     | Decree for execution of document or endorsem-                       |
| jurisdiction Court which can exo                | on negotiable instrument                                            |
| cute 5 37 N 5                                   | (a) Decree for execution of document by delen                       |
| (vii) Court passing decree, designation of,     | dant-Mode of execution                                              |
| lang shound subsamently b first                 | O 21 R 34 N 2 to 7                                                  |
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S 9 N 17

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Government-Suit by or against--(Cont ! ) (g) Suit against Covernment
(i) Jurisdiction

(a) Questions of title between Gorera

of civil Courts (b) Residence' of -- Whether Govern

where (c) Territorial jurisdiction

ment and subjects-Jurisd ction

ment can le said to reside any

S 20 N 10 11 S 79 \ 7 (d) Territorial jurisdiction - Govern

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Government

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Secretary f State

(a) Covernment how fir bound by Agent sact

(b) Servants of Government - Vegligence or

tortious acts- overnment if can be sucd

---- Applicability of \$ 47

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| S 79 N 3                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |                                                                                  |
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| ippeal by or against-In whose name to be in                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                  |
| stituted S 79 N 2                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                                                                                  |
| - Decree against                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | 1                                                                                |
| (a) 1 xecution of—When to issue S 82                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | 1                                                                                |
| (b) I ower to require security as condition for                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 513\0                                                                            |
| stay of execution or for restitution where                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | (f) Suit against Government - In                                                 |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | what Court suit is to be institu                                                 |
| execution is allowed pending apport O41 R 7                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | ted S16 \3                                                                       |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | (11) Notice                                                                      |
| I ocal ( overnment                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | (11) Tantica                                                                     |
| (a) Meaning of S 2 (1) and Notes                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                                                  |
| (i) Power of to make rules exempting certain                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                                                                                  |
| persons from personal appearance in Court                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | 1                                                                                |
| S 133                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | of notice 5 80 N 13                                                              |
| ——l arty                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | of notice SON 15                                                                 |
| (a) When should be joined as party to suit                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | (c) Suit on contract notice under 5 80                                           |
| O 1 R 10 N 25                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | whather necessary S 50                                                           |
| (b) In what cases necessary parties 573 N 6                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | (d) Planut to state that notics wis duly given S 80 and Notes                    |
| Powers of                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | duly given 8 80 and votes                                                        |
| (a) Matters within the power of covernment-                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | (e) Procedure-Notice of suit<br>S 80 and Notes                                   |
| Civil Courts jurisdiction S9 N 56                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                                                                                  |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | (f) Statutory notice                                                             |
| (1) Power to establish eattle pounds — Civil<br>Court power of to interfere S 9 N 56                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | (1) Fact of notice having been                                                   |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | given to be mentioned if                                                         |
| Right of                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |                                                                                  |
| (a) and the decirine of rateable distribution in                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                                                  |
| ovecntion P.13                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | amendment of plaint S 30 1 10                                                    |
| (b) To appeal against decree in pauper suit not                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 5 50 ( 10                                                                        |
| providing for payment of court fee to it                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | (111) Suit originally filed sgainst                                              |
| S 115 N 26                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | other defendants-Therrin                                                         |
| Suit by or against                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | terest subsequently devolve                                                      |
| (a) Appearance                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                                  |
| (1) I ixing of day for appearance on behalf                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | whether necessary                                                                |
| of Government - Reasonable time to                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | the to at a state                                                                |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | (11) Prior to suit—Mode of deli                                                  |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | very                                                                             |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | (c) Prior to suit—Objection as to                                                |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | who can take now to                                                              |
| (b) Costs                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | (1) Waiver of (1) Suit for injunction against—Tra                                |
| (i) Liability for costs \$35 \ 15 26                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | months notice whether neces                                                      |
| (c) Order for discovery                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | months notice with Sell vil                                                      |
| (1) Of documents whether can be passed                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                                                                  |
| O 11 Rr 12 and 13 N 17                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | (in) When lies                                                                   |
| (n) Whether can be required to file affidavit                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | 4                                                                                |
| of document   O 11 Rr 12 and 19 N 17                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | t .                                                                              |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | - Court mast                                                                     |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | (b) Surt on dismissal of Covert man                                              |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | acreantmeni                                                                      |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | (c) For defamation in tover ment                                                 |
| f 3                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | order                                                                            |
| fendint-Mode of description                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                  |
| 0.07 13 2                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | (7) Whether hes for wrot gran                                                    |
| O 27 R 3                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | (1) Whether hes for wrot gful dimension of R1                                    |
| (ii) Signiture and verification of pleadings                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | missal of servans                                                                |
| O 27 R 3  (iv) Signature and verification of Headings by whom to be made O 27 R 1                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | (e) Instances                                                                    |
| (iv) Signature and verification of Headings<br>by whom to be made O 27 R 1                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | (e) Instances 59 3 51                                                            |
| OTR3  (1) Signature and verification of Headings by whom to be made OTR1  (1) Over of Court to order attendance (1) Of person tale to answer meetions relations.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | (e) Instances Government Officer Sas Public Officer                              |
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| Interest-Right to-(Miscellaneous)-(Contd )                                                | Interlocutory orders-Questioning of, in appeal from                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
|-------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| (iii) Whether claimable on mesne profits                                                  | decree—(Contd)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| O 20 R 12 N 6<br>(1v) Of principal against agent retaining                                | (e) Order restoring suit dismissed for default<br>whether can be questioned in appeal from                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| his moneys S 34 N 10                                                                      | final decree O9R9N12                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| (v) Of surety paying on behalf of princi-<br>pal debtor S 34 N 10                         | (f) Order returning plaint for presentation to<br>proper Court O 7 R 10 N 11                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| (vi) On arrears of rent S 24 N 14                                                         | (g) Right to challenge order rejecting docu-                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| (vii) On dower debt S 34 N 10<br>(viii) On unascertrined sums whether claim-              | ments as madmissible or irrelevant O 13 R 3 N 3                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| ablo S34 N 9                                                                              | (h) Right to question S 105                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| (x) On unpaid legacies S 34 N 9 (x) On unpaid purchase money S 34 N 10                    | (i) Right to question order as to adjournment<br>O 17 R 1 N 8                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| (xi) On profits of trade—Whether claim-                                                   | (1) When can be questioned S 105 N 5 to 7                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| able S34 N9<br>(xii) On provisional payments due by one                                   | (k) When can be raised S 99 N 2                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| party to another - Whether claim-                                                         | Interfocutory Proceedings —Meaning of S 115 N 5                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| able on such payments S34 N 9 (xiii) On sums payable under contingent                     | Interlocutory Relief                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| contracts S 34 N 9                                                                        | See also Suit—Subject matter of suit—Pouer of<br>Court in regard to pending suit.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| (xiv) Upon amount of policy of insurance<br>S 34 N 10                                     | Arrest before judgment                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| Suit for                                                                                  | See also . Arrest-Judgment, arrest before                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| (a) Separate suit—When barred S 34 (b) Whether suit for principal barred on ground        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| ol res judicata S 11 N 7                                                                  | Inherent nower-To grant interlocutory relief                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| Tender of debt (a) Cossation of interest O 24 R 3 N 2                                     | International Law                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| (b) Tender of debt—Effect of—Principles                                                   | Foreign judgment, effect of S 13, 14 N 2                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| (c) Interest after tender of debt S 34 N 12                                               | Interplander OSS                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| (d) Plea of tender—Before action—Essentials                                               | Procedure whether applicable to suits and other proceedings under Agra Tenancy Act and Madres                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| Trnstee, liability of                                                                     | Estates Lands Act                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| (a) Liability for-Of person admitting that he                                             | Interpleader Suit —Costs and charges of plaintiff                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| holds subject-matter of property as trustes<br>of another party but failing to pay to him | See also Costs-Interpleader suit                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| or into Court as directed 0 39 R 10 N 1                                                   | (b) The right to charge on the subject matter                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| (a) Interest on arrears of rent-Waiver what                                               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| amounts to S 31 N 14 Interlocutory applications                                           | (c) To deduct the costs when paying the thing into Court 0 35 R 1 N 2                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| Affidavit-In support of-Contents of                                                       | (d) Right of plaintiff SS3 NG<br>(e) Separate proceeding in respect of, when                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| O 19 R 3 N 1                                                                              | necessary S S3 N 6                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| Costs of S 35 N 4 Interlocutory judgment                                                  | (a) Adjudication at, of the title to the thing                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| See Judgment.                                                                             | claimed 0.25 R4                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Interlocutory orders  See also Order.                                                     | T to the destroy and newton                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
|                                                                                           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| (a) Dismissal of-Whether order can be ques-                                               | (b) Plaintiff in—Transposition of one of the claimants as                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| tioned in appeal from decree O1 R 10 N 3  —Effect as res judicata S11 N 3, 22             | (e) Power of Court to make one of the defendants plaintiff in the snit 0 35 R 4 N 2                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| Sce also · Res judicata.                                                                  | -Payment into Court                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| ——Power of Court (a) To order sale O 39 B 6                                               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| (b) To pass interlocutory orders S 94                                                     | (a) Of thing claimed 0.5 L2, 0.6 Court  (a) Payment to wrong person by the Court  Effect—Lability of plaintiff 0.34 R 2 N 1  Photon of the court of the court of the court  Photon of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the court of the c |
| decree                                                                                    | -Piantin, discharge et, frem sait                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| al against decree—<br>rlocutory orders in                                                 | (s) at first hearing O.35 B                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| O 41 R 22 N 3                                                                             | Cal Trial of Mode of                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| Right to question order in appeal from                                                    | (d) On non-appearance of claimants O S5 R 4 N 2                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| final decision S 105 N 2<br>(c) Right to attack such orders in appeal from                | - Stay of suit by defendant against plaintiff                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
|                                                                                           | (a) Plaintill in-Sule against the time                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
|                                                                                           | defendants — Pendency of as the Procedure institution of Interpleader sult Procedure O 35 It 3                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
|                                                                                           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |

0 11 B 8, 9

OHRHNI

011 BoN1

0 11 R 11 N 2

011 R 11 N 4

O 21 R 22

O 35 R 3

S 88 Y 2

S 89 N 9

Interpleader Suit-Stay of suit by defendant against

(b) Stay of suit previ to it instituted by defen

(a) I laintid requiring defendants to mierplead

(a) Defendants clums to le b na file and ad

dant a sin t the plaintel in the interpleider

with reference to one relief-Suit whether

plaintiff-(C nt1)

-Test of

suit-Losta

interpleider

teres to on another

-When may be instituted

Interrogatories - inswer to - (Cont ! )

(I) Sufficiency of

(m) Use of- it trial-Mode of

(n) I ma toce examination

(b) Further answer-tpplication for

(i) Order to answer or answer further O 11 R 11

(h) Extent to which officer of corporation in suit

(1) Order to answer-Non compliance-Lifect

by or against is bound to answer

|   | (b) In what cases interpleader suit may be in                                          | (n) I sta toca examination O II R II N 1                                  |
|---|----------------------------------------------------------------------------------------|---------------------------------------------------------------------------|
|   |                                                                                        | (o) Whether evidence O 11 R 22 N 1                                        |
|   | tal the there can be filed with reference to mit                                       | (p) Whether party bound to answer<br>O 11 R 2 N 1, 12                     |
|   |                                                                                        |                                                                           |
|   | Highester damages of cases S 60 V 4                                                    | Costs of O 11 R 3 N 1 See also Costs-Interrogatories                      |
|   | Il bo mar institute                                                                    | -Delivery of                                                              |
| • | (a) Agent—Probatition of from sumg principal                                           | (a) Against Whom can be delivered                                         |
|   | to as to compel him to interplead with any                                             | 0 11 R 1 N 11                                                             |
|   | (u) igent or tenant-When such suit may be                                              | (b) Against whom may be allowed Oll BIN10                                 |
|   |                                                                                        | (c) Discovery by O 11 R 1                                                 |
|   | (a) The he of acenis and tenants to and principals                                     | (d) Leave of Court for delivery                                           |
|   |                                                                                        | O 11 R 1 N 12 O 11 R 2                                                    |
|   |                                                                                        | (e) Pouer of Court to regulate O 11 R 2 N 1                               |
|   | whom goods are consigned whether agent of O 35 h 5 N 2                                 | (f) Procedure 011 R 1 to 11                                               |
|   |                                                                                        | (g) Right to deliver O11 E 1 (h) Service on opposite party—Mode of        |
|   | (e) Suit by Railway Company — Against con O & R 5 N 2                                  | O11 B 2 N 1                                                               |
|   | (10elleneaut)                                                                          | (i) Sust by or against corporation O11 R 5                                |
|   | (a) Constructive was sudicate - Application of                                         | (i) Time for delivery 012 R 1 N 9                                         |
|   |                                                                                        | (t) When can be allowed O11 R1 N2                                         |
|   | the Towner on alarm whather ret sudscald bet 1                                         | -Form of 0 11 R 4                                                         |
|   |                                                                                        | -Meaning of 011 R 1 N 1, 3                                                |
|   | (c) Equitable claims whother can be given effect                                       | (a) Interrogatories and pleadings - Difference                            |
|   |                                                                                        | between the two O11 R 1 N 3                                               |
|   | (d) Plaint in-Contents of O 35 k1<br>(a) Plaintiff not to have any interest in subject | —N ' - '                                                                  |
|   | matter of east Says and Say No.                                                        |                                                                           |
|   | (s) Tere of plaintiff a distuterestedness                                              |                                                                           |
|   |                                                                                        | - 011R1N4                                                                 |
|   | (g) Whether subject matter can be banded over                                          | (c) Scandalous irrelevent, ato Oll R6N 2 to 9                             |
|   | to one of the rival claimants on his giving                                            | —Object of Oli Bi N2                                                      |
|   | Recutivy                                                                               | Objections to                                                             |
|   | Interpretation of Statutes                                                             | (a) Grounds of O 11 R 6 N 2 to 9, O 11 R 7 N 1                            |
|   |                                                                                        | (b) Interrogatories by answer O II E G                                    |
|   |                                                                                        | (c) Remedy of party on whom interrogatories                               |
|   | of statutory provisions - Instinction perween                                          | are delivered O11 R6 N1                                                   |
|   |                                                                                        | (d) Right to taise objection in affidavit to answer                       |
|   | Retrospective effect Preamble N 3                                                      | Oli B6                                                                    |
|   | (a) Ot S 66                                                                            | (c) Setting aside of objectionable interrogatories<br>O 11 R 7            |
|   | (b) When to be given (c) Whether vested rights are affected by later S 154 N 1         | (Miscellaneous)                                                           |
|   | enactment S 154 N 1                                                                    | (a) Applicability of provisions to minors                                 |
| , | Rules se to Preamble N 7 14                                                            | O 11 R 23                                                                 |
|   | Interrogatories                                                                        | (b) As to contents of document-Necessity of                               |
| , |                                                                                        | 011 R 2 N 1                                                               |
| ′ | (a) Affidaget of -Objections to-No exception to                                        | (c) Examination of person on commission on-                               |
|   | be taken but insufficiency may be objected                                             | When may be ordered O 26 E 1  (d) Examination on commission of witness on |
|   | 10 011 15 10                                                                           | (a) transmission on commission of attacks on                              |
| ŧ | (h) Affidavit of-Right to raise objections to                                          |                                                                           |
|   | (c) Claim of privilege by person interrogated                                          | interrogatories 0 26 R 1 N 5                                              |
| 1 | (c) Claim of privilege by person interrogated                                          | (e) Matters in respect of which they can be                               |
| ı | (A) From in Amendment of S 153 N 5                                                     | allowed Oll MIN 2 to 8                                                    |
| , | (a) Extent to which party interrogated is bonnd                                        | (i) Matters to which they may relate O 11 R 1                             |
|   | to answer O II to 8 M I                                                                | (6) Turning interrogation, 10 to Sapanited to                             |
|   | (f) Failure to give—Effect O 11 R 11 N 1                                               |                                                                           |
|   |                                                                                        |                                                                           |
|   |                                                                                        |                                                                           |
|   |                                                                                        |                                                                           |

| I-4                                                                                    |                                                            |
|----------------------------------------------------------------------------------------|------------------------------------------------------------|
| Interrogatories - (Miscellaneous) - (Contd)                                            | Issues-Findings on-(Contd)                                 |
| (h) Power of Court to pass appropriate orders in                                       | (c) Duty of Court to give decision on all points           |
| regard to delivery and answering of interro                                            | O 15 R 3 N 1                                               |
| gatories 8 30 (1) Setting aside or writing out of 0 11 R 7                             | (d) Duty of Court to try and dispose of all                |
| (1) Suit on promissory note—Defendent plead-                                           | 135 ues 0 14 R 2 N 2                                       |
| ing want of consideration—Interrogatories                                              | (e) Whether may be added after pronouncing                 |
| by 0 11 R 1 N 3                                                                        | Indement 0 20 R 3 N 3                                      |
| Intervenor                                                                             | -Framing of O14 R1                                         |
| See Parties                                                                            | (a) Date fixed for                                         |
| Issues                                                                                 | (1) Is date of first hearing of snit                       |
| Abandonment of                                                                         | OSRIAS                                                     |
| (a) Power of legal practitioner O3R4N4                                                 | (ii) Whether date fixed for hearing of suit                |
| (b) What amounts to 014 R 1 N 7                                                        | O 9 R 8 N 3                                                |
| (c) Whether amounts to compromise                                                      | (b) Duty of Judge to frame                                 |
| O 23 R 3 N 7                                                                           | (i) To ascertain real points in lasue though               |
| Additional issues                                                                      | not raised clearly in pleadings                            |
| (a) Framing of O 14 R 5                                                                | O 14 R 3 N 3                                               |
| (b) When discretionary 014 R 5 N 4                                                     | (11) To frame issues suo molu _O 14 R1 N7                  |
| (c) New issues—Framing of—When obligatory                                              |                                                            |
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(v) Order refusing to frame issues - Whe

ivi) Power of Court to compel attendance

(xiii Refusing t frame or wrongly framing

(vm) When vitercemit be produced at

ther the tion can be re opened at trial

of per on or production of documents

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first ! tiring though the issues may not have been from d

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0 20 R 1 N 6

| - meethi auer sui-                                                      | tel armente contraction basebone still of some                  |
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(a) Certified copies -- Application for -- Nature of
O 20 H, 20 N1

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| successor 020 R 8                              | 0 20 K 20 X t                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
|------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| (11) To proceed on basis of evidence taken     | (b) Certified copies—Right to—Principles                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| before predecessor 018 R 15                    | O 20 R 20 VI                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
|                                                | (c) Filing of - Along with memo of appeal                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| (111) To strike off party added by predecessor | O 41 R 1 X 4                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| O1 R 10 N 33                                   | (d) Right to copy of judgment in appeal                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| (17) When may deal with evidence taken by      | O 41 R 30                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| predecessor 0 20 R 1 N 3                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| (e) Pronouncement of judgment by               | ——Date of 0 20 R 3                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| 0 18 R 15 N 2, O 20 R 1 N 3                    | (a) Dating and signing at time of pronounce                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| (1) Notice of date of judgment                 | ment 020 E3                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| O 20 R 1 N 9                                   | (b) Failure to date—Effect 020 R 3 N 5                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
|                                                | (e) Notice of date to parties 0 20 E 1 V9                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| (11) Principles O 20 R 2 N 2 3                 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| 0 20 R 3 N 2                                   | -Death of parties before                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| (f) Review by O 47 R 2 N 2                     | (a) Death of party before judgment but after                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| (a) High Court Judge Successor of              | hearing-Effect-Judgment binding                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Powers of Power to review                      | Q 22 R 6                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| O 47 R 2 N 2                                   | Deeree, to follow                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| (g) Setting aside of ex parte decree by        | (a) Decree must be passed when indement his                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| 0 47 R 2 N 2                                   | (a) Decree inter to lassed when [nonmon S3]                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| Suit against                                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| (a) For acts done m course of dattes-Maintain  | (b) Variance between judgment and desired—<br>Which to prevail S 11 N 120                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| shifty SON 58                                  | Which to prevail                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
|                                                | -Expunging of matter from O6 R 15 N 6                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| Transfer of                                    | (a) In represent of chiestichaile Bittler, or                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| See also Court—Change of presiding officer     | Order of Fligh Court 5 440 m +                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| (a) Power of successor to proceed on basis of  | (b) Inhereot power To expunge unnecessary or                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| evidence taken before previous Judge           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| O 18 R 15                                      | Power of High Court 8 151 No                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| (b) Pronouncement of judgment written by him   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| -Principles O 20 R 2 N 3 3, O 20 R 3 N 2       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
|                                                | (d) Scandalous remarks                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| Judgment                                       | -Foreign judgment-Meaning of S 13 14 \3                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| Admission, judgment on                         | -Form and contents of Oco R4 N                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| See also Admissions                            | A A A S A A A A A A A A A A A A A A A A                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| (a) Right to apply for judgment on admissions  | (a) applicability of provisions as to 1.00 (9 B 3                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| 0 12 R 6                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
|                                                | The state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the s |
| (a) Mistake-Inclusion of property not belong   | (c) Court to state its decision on each teste O .OR5                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| ing to judgment debtor-Rectification-In        | Tomal Tomal                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| herent power S 151 N G                         | (d) Fyndence-Pailure to consider-Legality                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
|                                                |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| - Appeal judgment in O 41 R 30                 | (e) Failure to set out points for determination                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| 0 11 11 30                                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
|                                                | (i) Judgment against party failing to salm                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| R4N4.5.6                                       | written statement called for by Court                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| ties alone to                                  | Requirites of such judgments 0 8 R 10 1                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| be basis S3JN3                                 | (g) Judgment in appeal                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| (b) Whether judgment can be based on local     | (h) Jud ment in appeal — Failure to con-il                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| inspection by Judge O 18 R 18 N 1              | grounds of appeal -I egality-Revi 100                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| (c) Importation of Judge's personal knowledge  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
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|                                                | (i) Judgment of High Court 0 41 K 31                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| Cancellation of                                |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| (a) Judgment whether can be caseelled for      | sity for giving L. P (Cal) C1 12                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| failure to produce succession certificate      | sity for giving 1, P (Can Case)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| required O 20 R 3 N 3                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Conditional judgment                           | •                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| (a) Duty of Court to pass decree on pronounce- |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| ing judgment-Judgment making proluc ,          | •                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| tion of succession certificate condition       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
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ion on Judge a own know

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(b) By whom to be pronounced O 20 R 1 N 3 4

another Judgo-Effect

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| ment written by one J                                     | ndge by his     |
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(a) I me e sart in lings

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-High Court judgment of

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(a) C ntents of D 1011 leige of fits of a s

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judgment

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          without separate suit in execution
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(e) borm of-Provision for appointment of re

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-Breach of promise of-Suit for damages for-Whe ther of small cause nature

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-Injunction restraining-Mirriage taking place in -pr'e of injunction-1 sability for punishment 03)R2N6

--- Temporary injunction-Restraining O 37 R 2 N 3 -Injunction restrining whether will be granted

03) R 1 N 19 -Of female party - Pending case-1 flect - Whe O 22 R 7 and Notes ther case abates

-Of party - Pending case - I fleet - Whether case abates O 22 R 7 N 1 -Validity of-Suit for declaration in regard to-

Maintinability of I P (Ca) C1 35 V 4 - Validity of - Suit for declaration of involvints of marriage-Necessary parties O 1 R 10 N 13

Master and Servant

-Private service-l'av of servants-When Secomes O 21 R 16 N 3 Salary of servant-When falls due O 21 R 48 N 1"

Material objects See I milence-Unternal of perts

### Maxima

-Actin personalis moretur cum persona (A personal right of action dies with the person)

O 22 R 1 N 4 to 16 - 4ctor st juitur forum ter (1 plaintiff follows the Court of the defendant) S 14 N 9

- Actus curioe newinem grittabit (in act of the 0 21 R 11 N 6. Court shall prejudice no man) S 151 N 6 - Indi alteram partem (No one abould be con-

demned anheard) S 151 N 6 O 5 R 1 N 1 -Cersante ratione legit cernat et ijsa lez (Tho reason of the law ceasing tho law itself ceases) 5 144 N 13

-lauity acts in personum

own realm may be safely disobeyed beyond its S 14 N 9, S 20 N 32 jurisdiction)

5 16 N 11

-Interest reignblicae ut sit finis litium (It con cerns the state that there bo an end to law smits) S 11 N 2, Ss 100, 101 N 2, S 112 N 9, S 152 N 18 -Lex non court ad impossibilia (The law does not compel a man to do that which he cannot possi-

bly perform) O 21 R 1 N 4

-Mobilia sequentur personum (Moveables follow the person) 5 16 N 10

-Nemo debet bis vexars pro una et eadem causa (No person should be vexed twice over for the same cau<e) 511 N 2 -Nemo debet esse judex in fropisa cau a (No ono S9N3 can be a judge in his own cause)

Omma praesumantur contra spoliatorem (All things are presumed against a wrong doer)

O 6 B 13 N 1 - Omma praesumentur rite esse acta (All things aro presumed to have been rightly and daty performed)

#### Maxims-(Contd )

-Resenter alios acta alteri nocere non delet (Things done between strangers ought not to injure a

property so as not to mmro rights of others)

S 9 N 42 -Lbs jus the remedium (Where there is a right, there is always a remedy) 89N2

### Medical Certificate

By unregistered medical practitioner-Court, whether bound to accept such certains ite S 115 N 12 Mesne Profits

### - Ascertannment of

(1) application for or as to (i) Whether one in execution or in suit

S 47 N 38 (ii) Dismissal for default - Whether bars O 20 R 12 N 4 fresh application (in) Under preliminary decree-Default in

prosecuting application-Whether suit can be dismissed for such default O 20 R 12 N 4

(14) Whather may be returned for presentation to proper Court O 7 R 10 N 6
(r) Withdrawal of -Without leave of Court

-W hether frosh application barred O 20 R 12 N 4 (b) Commission for local investigation

0 26 R 3 (c) Decree for possession and meane profits-Enquity as to mesne profits under decree-

ing to one in execution O 20 R 12 N 4 (d) application for assessment of - Rejection of-Whether frosh application barred

### (e) Assessment of-Principles as to

O 20 R 12 N 5 (f) Decree for-Whether attachment can be ordered pending ascertainment of mesne profits O 21 B 42

(g) Decree for - Enquiry as to mesne profits whether proceeding in execution S 17 N 39

(b) Euquiry as to under preliminary decreefruipris to sholf O 20 B 12 N 4 (1) Suit for-Ascertainment of profits-Notice

-Failure to give-Effect S 115 N 12 (j) Preliminary decree directing enquiry as to

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(L) Proceedings for-Compromise of 0 23 R 4 N 2 -Decree for

See alsa Decree-Preliminary and final-Mesne profils decree for

(s) Form and contents of O 20 R 12 N 2 (b) Form and contents where decree is for jossession and meane profits 0 20 1 12 (c) Tours of decree in cases of deductions made

for costs or expenses of cultivation O 20 R 19 N 1 (d) Jurisdiction - Power to pass decree for

amount exceeding pecuniary jurisdiction of

(e) Final decree for-Proceedings for-Whether proceedings in execution 09 R 13 N 2 Mesne profits-Decree for-(Contd )

immoveable property

.... - -- -

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S 16 N 4

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Mesne profits-Restitution, by way of-Right to-

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| (k) Whether can be set-off against decree against                                       | (ix) On reversal of decree under which                                                 |
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| (m) Whether decree for payment of money                                                 | under lower Court a decree liable to                                                   |
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| Decree not granting, effect (a) Executing Court if can grant S 38 N 8                   | -Right to                                                                              |
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| the litigation 5 147 N 2                                                                    | O 32 R 12                                                                                  |
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            (1) Setting aside of
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           is member of
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| ogainst them without unendment  O IR IN 1  (d) Meaning of  (e) Meaning of  (e) Meaning of—I sison added as defendant to suit on bond—On ground that he had no title to amount due under bond  (f) Provided the sison added as defendant to suit on bond—On ground that he had no title to amount due under bond  (f) Provided the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as the sison as | (v) Scope of O 1. R 8 O 1. R 8 N 14.  (v) Scope of O 1. R 8 O 1. R 8 N  (vi) Suit on behalf of numerous persons  When can be brought O 1. R 8 N  (vi) Hinstrative Cases  (vi) Illustrative Cases  (vi) In respect of injury suffered by a par  cular community with reference it  public right  (vi) On behalf of clubs and of 1. R 8 N  (vi) On behalf of public—Maintanability  (vi) Suit for resovery of trust property  Who can sue  (vi) Suit by resuber of casts in respect  infungement of rights of casts, 8 N  (vi) Suit by results of casts, 8 N  (vi) Suit by a reguest trusted execution  and administrators—Meconstry parts  metades  (vii) Suit by no seguest trusted execution  and administrators—Meconstry parts  metades  (vii) Suit by on behalf of followers of 1. R N  (viii) Suit on behalf of followers of 1. R N  (viii) Suit on behalf of followers of 1. R N  (viii) Suit on behalf of followers of 1. R N  (viii) Suit on behalf of followers of 1. R N  (viii) Suit on behalf of followers of 1. R N  (viii) Suit on behalf of followers of 1. R N  (viii) Suit on behalf of followers of 1. R N  (viii) Suit on behalf of followers of 1. R N  (viii) Suit on behalf of followers of 1. R N  (viii) Suit on behalf of followers of 1. R N  (viii) Suit on behalf of followers of 1. R N  (viii) Suit on behalf of followers of 1. R N  (viii) Suit on behalf of followers of 1. R N  (viii) Suit on behalf of followers of 1. R N  (viii) Suit on behalf of followers of 1. R N  (viii) Suit on behalf of followers of 1. R N  (viii) Suit on behalf of followers of 1. R N  (viii) Suit on behalf of followers of 1. R N  (viii) Suit on behalf of followers of 1. R N  (viii) Suit on behalf of followers of 1. R N  (viii) Suit on behalf of followers of 1. R N  (viii) Suit on behalf of followers of 1. R N  (viii) Suit on behalf of followers of 1. R N  (viii) Suit on behalf of followers of 1. R N  (viii) Suit on behalf of followers of 1. R N  (viii) Suit on behalf of followers of 1. R N  (viiii) Suit on behalf of followers of 1. R N  (viiii) Suit on behalf of followers of  |
| (i) Right to apply or take proceedings in place of original party — Whother representative must have been brought on record  (a) Right to claim restriction S 146 N 9  (b) Right to claim restriction of stated by the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of the state of th | (vii) Suit ou behalf of follower of R & N eular religion of Hundu community (x) Suit on behalf of inhubu community (x) Suit on behalf of inhubutant of town or village (xi) Suit on behalf of members of sack caste or class (xi) Suit on behalf of Muhammain com munity (xii) Suit on behalf of Muhammain com munity (xii) Suit on behalf of Muhammain com munity (xii) Suit on behalf of Old R & N (xii) Suit on behalf of Old R & N (xii) Suit on behalf of Old R & N (xiii) Suit on behalf of Old R & N (xiii) Suit on behalf of Old R & N (xiii) Suit on behalf of Old R & N (xiii) Suit on behalf of Old R & N (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf of Indian community (xiii) Suit on behalf |

01R8N18.01R10N27 (1) Person on whose behalf suit is metituted

O1R8N20, O1R10N32

(111) Persons represented, whether can be

(1) Whether such a suit can be brought on

behalf of a body against some of its

brought on record after decree

(b) Against whom representative suit can he

own members

O 1 R 10 N 27

01R8N8

Representative suit

brought

See also Representative suit (a) Addition of parties

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Law
        Numerous persons having same interest
         in one suit-Right of one or more of
         such persons to sue or defend on be
                                01R8N14, ~
        Scope of O 1, R 8
                                   01R8N
        Suit on behalf of numerous persons
          When can be brought
        trative Cases
        In respect of injury suffered by a par-
         cular community with reference to
         public right
        On behalf of clubs and other associ
         tions
        On behalf of public-Maintainability
        Suit for recovery of trust property.
Who can sue O1 R 8 N
        Suit by member of caste in respect
         infringement of rights of casts
                                   OIRSN
        Suit by or against trustees, executor
         and administrators-Necessary partie
         -Beneficiaries, whether must be in
         pleaded
        Suit on behalf of fluctuating body
O 1 R 8 N
        Suit ou behalf of followers of a parti
                                   OIRSN
         cular religion
        Suit on behalf of Hindu community
                                   01R8N
        Suit on behalf of inhabitants of town
                                   OIRBN
         or village
        Suit on behalf of members of sect 0
                                   OIRBNI
         caste or class
        Suit on behalf of Muhammadan com
                                   01E8N
         munity
   (xiii) Suit to establish or negative public
                                   OIRSNI
        right
   r- m's at to cet aside alienation of property
 , .....
                          O 1 R 8 N 2 10 to "
(a) Notice
     (1) Of institution of suit to persons inte
         rested in suit
(b) On whose behalf representative suit can be
    brong
     (a) (
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OIRSNS

01 R 8 N 16

(11) Difference of opinion among persons

whose behalf representative suit is brough t-Effect

Parties-Striking off of-(Cont !)

tel (Mucellan, out)

Parties-Representative suit-On whose behalf re

presentative suit can be brought-(Contd )

strike out parties

(vi) When proper

O 35 R 4

(c) Interpleader suit-Transposition of one of

the claimants as plaintiff

| pre-entative suit can be brought-(Confd)                                        | (c) (Viscellanious)                                                                    |
|---------------------------------------------------------------------------------|----------------------------------------------------------------------------------------|
| (iii) Numeious persons whother should be                                        | (a) Court by which parties can be struck                                               |
| capable of ascertainment O1 R 8 N 3                                             | off 01R10N33                                                                           |
| (iv) Not having proprietory interest in suh                                     | (n) Defeudant-Piaintiff giving up a de                                                 |
| pect matter of suit 01R8N3                                                      | fendant-But his name not formally                                                      |
| (v) Persons on whose behalf such suit can-                                      | struck out—Effect O1R10N33                                                             |
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| (vi) When can be brought—Whether meet                                           | O1R10N83                                                                               |
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| sary O1R8N3                                                                     | atrike out his name-By whom can                                                        |
| (i) Parties to suit" who are S 47 N 7                                           | he made 01 R 10 N 12                                                                   |
| (i) Person represented, whether party to                                        | (v) Plaintiff, addition as-Effect-Motion                                               |
| • suit 01 R 8 N 1, 18                                                           | to stuke out his name by whom can                                                      |
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| (n) Who can bring reprosontative suit                                           | (v) Suit by unauthorised person-When                                                   |
| OIRSNS                                                                          | substitution of plaintiff may be made                                                  |
| (o) (Viscellaneous)                                                             | 01 R 10 N 2 to 8                                                                       |
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| vidual right into a popresentative ac                                           | tiff-Substitution of right plaintiff                                                   |
| tion 01R8N6                                                                     | 01 R 10 N 2 to 8                                                                       |
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| -Rights and liabilities of                                                      | (f) When may be made—Application for bring<br>ing on record legal representatives—Whe- |
| (a) Exemption of-From arrest while going to,                                    | ther substitution may be made                                                          |
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| -Striking off of O1 R 10 N 33                                                   | 01 R JD N 37                                                                           |
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| (ii) Person whose name is struck off from                                       | -Whether plaintiff can proceed against                                                 |
| the record—Position of S 47 N 8                                                 | the other or others for the balance                                                    |
| (b) When can be struck off                                                      | OIRTNI                                                                                 |
| (i) Defendant-Notice, impossibility of<br>serving-Whether his name can be       | - Suit relating to public religious or charitable                                      |
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| purties O1 R 10 N 37                                                            | as party to suit under S 92-Power of                                                   |
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| as to-Rulo that objection should be                                             | (h) Defendant as plaintin-Power of Court to                                            |
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| strike out narius O 1 R 12 N 1                                                  | le) Interpleader smt—Transposition of one of                                           |

O 1 R 10 N 33

Partition-(Contd ) -Revenue paying estate

(a) Cenrt by which partition can be made

| 3480 GENER                                                                                                                                                                   | U |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|
| Parties~Transposition of-(Contd)                                                                                                                                             | ſ |
| (d) Limitation 0 1 R 10 N 41<br>(e) Power of Court 0 1 R 10 N 34<br>(f) Plaintiff as defendant when to be made<br>0 1 R 10 N 36                                              |   |
| (g) Power of Court to transpess defendent as<br>plaintiff and proceed with ant where plain<br>tiff desires to withdraw suit 0 23 R 1 N 10                                    |   |
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| (Mitcellaneous) (a) Decree-Creation, devolution or assignment                                                                                                                | l |
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| (d) Suit by or against clubs and other esseciations 01 RS N 4                                                                                                                | ļ |
| Partition See also Hindu Joint Tamily                                                                                                                                        |   |
| Commission to make     (a) For immoveable property     (b) Order oppointing or refusing to appoint commissioner for effecting partition—Order                                |   |
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| (c) Suit for preliminary decree—Commissioner<br>for making partition 0 26 R 13<br>(d) Whether may be appointed in respect of<br>revenue paying estate 0 26 R 14 N 3          | l |
| (a) Defendant—Whether can apply for execu                                                                                                                                    |   |
| (b) Enforcement of decree where decree does<br>not actually allot shares S 47 N 33                                                                                           |   |
| (c) Limitation—Applicability of 12 years' rule  8 48 N 2  (d) Partition if can be ordered in execution                                                                       |   |
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| -Mode of                                                                                                                                                                     |   |
| (b) Joint family dwelling house—Mode of parti-<br>tion O 26 B 14 N 4<br>(c) Working out rights of parties O 20 B 18 N 7                                                      |   |
| Procedure ofter preluminary decree                                                                                                                                           |   |
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| (b) Plaintiff desiring absolute separation of his share 0 20 R 18 N 5                                                                                                        |   |
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(b) Decree for partition-Mode of execution !
    (c) Partition by Collector when to be orde
-Right to enforce-Nature of right-Continu
  right
-Smt for
   (a) Births and deaths in the family, pend:
         (1) Birth of another coparcener pendi
              suit - Non-joinder - Objection as
              when may be taken
                                         0 1 R 13 2
         (11) Death of plaintiff-Bringing on reco
              legal representatives-Procedure
                                        O 22 R 3 N
        (111) One of the parties dying pending st
              -Decree for increased abare to t
              other claimante-Power to pass
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              sharere dying after preliminary dect
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        See also Decree-Preliminary and final-
                     Partition, decres in, sut for
         (i) For ejectment if can be passed in such
                                         OTRINI
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              (a) Application for-Who can make
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                  should be drawn up as decrees
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     (viii) Reversal or setting aside of
             (a) Reversal-Defendant's right to be
                  restored to joint possession
                                     S 144 N 19, 20
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S 35 N 4

S 35 N 3

O 20 R 14 N S

07R H V 5

stamp duty-

Partition-Suit for-Decreo-(Cont 1)

(a) Eugrossment on stamp paper O 26 R 14 N 10

Whether plaint can be rejected

(b) Final decree stamp for

(c) Fulure to pay

(1x) Stamp for

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(f) Determination of share
                                      O 20 R 18 N 5
         (i) In exe ution
   (c) Frame of
                                                                    medy for dissolution
          (1) Rule against -SI litting of claims
                                  02R2N3 10 17
   (L) Fresh sust
         (1) Dismis al for default of - Whether
              fre h suit for partition is barred
                                         09R9Na
        (u) Preliminary decree-Whether suit for
              partition lies there ifter
                                      O 20 R 18 > 5
        (111) Omission to divide portion of property
              -Subsequent suit for pirtition there
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    of—If hes

         (1v) Suit for partition of properties joinly
              held by plaintiff a family whether bars suit for partition held by such
              family jointly with strangers
                                        02 R 2 N 21
          (v) Whether bire enbaquent suit for
              mesno profits
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     (i) Suit for-Joinder of canses of retion
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     (h) Parties - Transposition of
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     (1) Receiver appoinment of
                                                                    Power of Small Canso Court
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           (1) Party if may be appointed receiver
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           (1) Numerous defendants - Whether one
               or more can defend sust un bebalf of
                                          OIRSNS
                                                              -Receiver of partnership assets
          (11) Of moreable property-Points for de
                                        O 20 R 18 N 3
                termination
          (m) Partition of Hindu joint family pro
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                perty
          (iv) Power of Court to require party in
               sole occupation to give security for shares of income of the others
                                                                     perty in receiver a hands
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           (v) Questions involved in suits-Venning
of O 1 R 10 N 30
                                                              -Suit by or against
           (vi) Whether tomporary injunction can be
                granted in such suit
                                         O 33 R 1 V 5
                                                                     defondant
Parinership
              First
     See also
                                                                     Who can continue suit

    Accounts of

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plaintiff s share in one stom of partnership

assets-Whether decree for general taking

of accounts can be passed

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Sch 2 P 1 N 19\*

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| (b) Date on which partnership to stand dis                                      | (m) (Misscillaneous)                                                                     |
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| stances from which such mental state can  O GR 4  (w) Of inserpresentation relied on—To be green O GR 4 N.3 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R 5 N.1 R  | (t) Value fraudulent intention knowledge or other mental stage - Whether circum | of yaka<br>3 B 1± N 1                                               |
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| (w) Of misrepresentation relied on—To be green  O G R 4 N N  R 4 N 12  to be set out  O G R 4 N N  R 4 N 12  to be set out  O G R 4 N N  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 1  G S R 5 N 2  G S R 5 N 2  G S R 5 N 2  G S R 5 N 3  G S R 5 N 3  G S R 5 N 3  G S R 5 N 3  G S R 5 N 3  G S R 5 N 3  G S R 5 N 3  G S R 5 N 3  G S R 5 N 3  G S R 5 N 3  G S R 5 N 3  G S R 5 N 3  G S R 5 N 3  G S R 5 N 3  G S R 5 N 3  G S R 5 N 3  G S R 5 N 3  G S R 5 N 3  G S R 5 N 3  G S R 5 N 3  G S R 5 N 3  G S R 5 N 3  G S R 5 N 3  G S R 5 N 3  G S R 5 N 3  G S R 5 N 3  G S R 5 N 3  G S R 5 N 3  G S R 5 N 4  Point not raised in senecessary  G S R 6 N 3  G S R 6 N 3  G S R 6 N 3  G S R 6 N 3  G S R 6 N 3  G S R 6 N 3  G S R 6 N 3  G S R 6 N 3  G S R 6 N 3  G S R 6 N 3  G S R 6 N 3  G S R 6 N 3  G S R 6 N 3  G S R 6 N 3  G S R 6 N 3  G S R 6 N 3  G S R 7 N 3  G S R 6 N 3  G S R 7 N 4  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S R 7 N 5  G S  |                                                                                 |                                                                     |
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| R 4 N 12  R 4 N 12  R 4 N 12  (22) Fower to order—Power to suppose terms as a constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the constant of the  | (w) Of misrepresentation relied on—To be given<br>O 6 R 4 N 3                   |                                                                     |
| termin to be set out  (2) Fower to order—Power to impose terms as to coats  (2) Fower to order—Power to impose terms as to coats  (3) Fower to order further and better parties  (4) Right of way—Sunt for—Principle of R & N. 15  (5) Right to apply for further and better parties  (6) R & N. 15  (7)  (8) Right to apply for further and better parties  (8) Right to apply for further and better parties  (8) R & N. 15  (9) R & N. 15  (1) Who can sign Of R 1 N. 15  (1) Who can sign Of R 1 N. 15  (2) Sunt on installment how of R & N. 15  (2) Sunt on installment how of R & N. 15  (2) Sunt to astallhub private right of A. 77  Termin to be set out Of R & N. 15  (2) Sunt to astallhub private right of the A. 15  (2) Sunt to astallhub private right of the A. 15  (3) Fowers of Court to the survey  Of R & N. 5  (4) Fower of Court to the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old power of the old powe | R 4 N 1                                                                         | (a) Suit by several plaintiffs—Who should sign                      |
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| (a) Right to apply for further and fetter particulars  OGR5N1  (b) CR5N1  (c) CR5N1  (d) Farticulars—Better and further principlars order for—Non compliance with—Whether pleadings need be struct out on ground of the principlar of the present of the principlar of the present of the principlar of the present of the principlar of the present of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the principlar of the princi | (24) Right of way-Suit for-Plaintiff to state                                   | (a) For containing inconsistent silegations                         |
| culars  OGR5NI  (a)  mind is inferred should be specified  mind is inferred should be specified  OGR10 Vi  (iii) Suit on instalment hond OGR4N7 (iii) Suit on instalment hond OGR4N7 Termini to be set out OGR4N7 (iiii) Suit on systallish private right of way- Termini to be set out OGR4N5 (iiii) To be given when necessary OGR4N5 (iiii) To be given when necessary OGR4N6 (iv) Sundalons matters OGR10 Vi  (iv) Sundalons matters (iv) Power of—To travel outside pleadings (iv) Fower of—To travel outside pleadings—Fower of speal late Court to dispose of appeals—On ground and travel in memo of appeals  (iv) Whether covers cause title (iv) Whether covers cause title                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | 06R4N1o                                                                         | ther                                                                |
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| mind is inferred should be specified.  mind is inferred should be specified.  (a1) Suit on installment bond O6 R 4 N 7 (21) Suit to installment bond O6 R 4 N 7 (22) Suit to isstallment brites differ to way.  Termin to be set out O6 R 4 N 5 (23) Undown influence and occretion to be given of R 4 N 5 (24) To be given when necessary O6 R 4 N 5 (24) To be given when necessary O6 R 4 N 5 (24) To be given when necessary O6 R 4 N 5 (24) To be given when necessary O6 R 1 S (3) Undown for the set of the specified of the set of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specified of the specif |                                                                                 | 06 R 15 Y 4                                                         |
| mind is inferred should be specified  (a1) Suit on installment bond  (b) GR 10 N;  (c1) Suit to installment bond  (c) GR 10 N;  (c1) Suit to installment bond  (c) GR 10 N;  (c1) Suit to installment bond  (c) GR 10 N;  (c1) Termin to be set out  (c1) Under influence and coercons to be given  (c1) Tower of Court in the set out  (c2) Under influence and coercons to be given  (c2) Tower of Court for traited outside pleadings  (c) Fower of Court for traited outside pleadings  (d) Effect—Pleadings not the only material from which issues can be framed in the only material late Court to dispose of case or points not raised in pleadings—Fower of specifies and the Court to dispose of appeals—On ground and traited in memo of appeal  (d) Fiftee of Court forest course of appeals —On ground and traited in memo of appeal                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | ( i iii                                                                         | order for-Non compliance with-Whether                               |
| (211) Butt on installment hond O GR 1 NO (212) Suit to statchish private right of way 7. Termina to be set out O GR 4 NY 7. Termina to be set out O GR 4 NY 1. (213) Undue influence and correction to be 6 R 4 NS (214) To be given when necessary O GR 1 NS (214) To be given when necessary O GR 1 NS (214) To be given when necessary O GR 1 NS (315) NS (4) Effect Pleadings not the only material from which issues can be framed (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (21 NR 1 NS (2 | \                                                                               | such non compliance O 6 R 16 N 4                                    |
| (212) Sunt to establish private right of way— Termina to be set out 0 6 R 4 N 15 (213) Undue influence and coercion to be given  (214) To be given when necessary 0 6 R 4 See also Practice—New point () Flower of—To travel outside pleadings (b) Effect (c) Lifect—Pleadings not the only material from which issues can be framed (a) Power of Court to dispose of case on points (a) Power of Court to dispose of appeals—On ground not raised in flower of appeals  (a) Power of Court to dispose of appeals—On ground and travel in memo of appeals  (b) More of Court to dispose of appeals—On ground and travel in memo of appeals  (c) Effect of (b) Scandalons matters (c) Scandalons matters (c) Scandalons matters (c) Scandalons matters (d) Effect—Seat out product to strike out such matter of Court to strike out such matters (c) Unnecessary or scandalous matter—Power of Court to strike out such matters (d) Effect—Seat on pronote—Discrepary between pleading and proof (a) Effect—Seat on pronote—Discrepary between pleading and proof (b) Whether covers cause title  (c) Effect of (b) Whether covers cause title (b) Power of Court—Object of such power (c) Scandalons matters (d) Effect—Seat on pronote—Discrepary between pleading and proof (c) Effect—Seat on pronote—Discrepary between pleading and proof (c) Effect—Seat on pronote—Discrepary between pleading and proof (d) Whether covers cause title (d) Power of Court—Object of such power (e) Scandalons matters (d) Effect—Seat out pro- notes (d) Effect—Seat out promotes (e) Effect—Seat on pronote—Discrepary (e) Effect—Seat on pronote—Discrepary (e) Effect—Seat on pronote—Discrepary (e) Effect—Seat on pronote—Discrepary (e) Effect—Seat on pronote—Discrepary (e) Effect—Seat on pronote—Discrepary (e) Effect—Seat on pronote—Discrepary (e) Effect—Seat on pronote—Discrepary (e) Effect—Seat on pronote—Discrepary (e) Effect—Seat on pronote—Discrepary (e) Effect—Seat on pronote—Discrepary (e) Effect—Seat on pronote—Discrepary (e) Effect—Seat on pronote—Discrepary (e) Effect—Seat on pronote—Discrepary  | 0 6 R 10                                                                        | (a) Powers of Court to strike off-Matters which                     |
| (213) Undue influence and coercount to be given  (214) To be given when necessary  OGR 4 N 5  (214) To be given when necessary  OGR 4 N 5  See also Practice—New point  () Power of—To travel outside pleadings  (E) Liflect—Pleadings not the colymanicant  from which issues can be framed  101 R 3 N 2  (2) Power of Court to dispose of case on points  not raised in pleadings—Power of appeal  Late Court to dispose of appeals—On  ground and travel in memo of appeals  (a) Whether covers cause title  (b) Scandalons matters  (c) GR 16 N 1  (d) Stage at which it may be struck out  (d) Unnecessary or scandalous matters—Power  of Court to strike out such matters  OGR 16 N 3  (d) Stage at which it may be struck out  (e) Unnecessary or scandalous matters  OGR 16 N 3  (d) Batege at which it may be struck out  (e) Unnecessary or scandalous matters  OGR 16 N 3  (d) Batege at which it may be struck out  (e) Unnecessary or scandalous matters  OGR 16 N 3  (d) Batege at which it may be struck out  (e) Unnecessary or scandalous matters  OGR 16 N 3  (d) Batege at which it may be struck out  (e) Unnecessary or scandalous matters  OGR 16 N 3  (d) Batege at which it may be struck out  (e) Unnecessary or scandalous matters  OGR 16 N 3  (e) Unnecessary or scandalous matters  OGR 16 N 3  (e) Batege at which it may be struck out  (e) Unnecessary or scandalous matters  OGR 16 N 3  (e) Unnecessary or scandalous matters  OGR 16 N 3  (e) Excellent it may be struck out  (e) Unnecessary or scandalous matters  OGR 16 N 3  (e) Excellent it may be struck out  (e) Unnecessary or scandalous matters  OGR 16 N 3  (e) Unnecessary or scandalous matters  (e) Excellent it may be struck out  (e) Unnecessary or scandalous matters  (f) Fower of Court to strike out such matters  OGR 16 N 3  (e) Unnecessary or scandalous matters  (e) Excellent it may be struck out  (e) Unnecessary or scandalous matters  (e) Excellent it may be struck out  (e) Unnecessary or scandalous matters  (e) Excellent it may be struck out  (e) Excellent it may be struck out  (e) Excellent it | (212) Suit to establish private right of way -                                  | trial OGR16N4 OGR2N5                                                |
| (4) To be given when necessary  GR 4  See also Practice—New point () Fower of Cort ravel outside pleadings (5) Lifect—Pleadings not the only material from which issues can be framily from which issues can be framily and the court of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of the cort of t | (z13) Undue influence and operator to be given                                  | 06R16N1                                                             |
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| b) Effect (c) Liflect—Pleadings not the only material from which issues can be framed in the only material from which issues can be framed in 18 3 N 2 (d) Power of Court to dispose of case on points not raised in pleadings—Power of typed late Court to dispose of appeals—On ground anot raised in memo of appeal (d) (e) (e) (e) (f) (v) whether covers cause title (e) (f) (f) (e) (f) (f) (f) (f) (f) (f) (f) (f) (f) (f                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | See also Practice—New point                                                     | (e) Unnecessary or scandalous matter-Power                          |
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|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 041 ~ 2 ]                                                                       | 0 7 B 1 N 4                                                         |

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      (g) Whather can be raised in issues
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(1) Whether judgment can be based on

--- Presentation-Stage at which to be presented

Pleading-Verification

Pleading-\erification-Effect of-(Contd )

m pleadings

(c) Object of

(11) Whether is evidence of facts contained

(1) Signature by third person whether to

be made in the presence of Court

(11) Verification not stating source of in

formation-Verification, whether faul

(111) Palse or defective verification-Lifect

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(a) Decree for-Euforcement-Mode of-Whe

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  - (a) Order of remand by appellate Court in mat ter over which it has no inrisdiction— Lifect O 41 Il 23 N 28
- --- Issnes remand of
  (a) Findings return of by lower Conrt-Objections to findings -- Timo for --- Extension of S148 N 5
  (b) For trial-- Power of appellate Court to re
  - mit issues 8 107
    (c) Power of appellate Cours to frame issues and
  - remand case for re trial on them
    Old R1 N 4 5
  - (d) Res idicates—Remand of issues by appellate Court—Hearing of appeal after remand— Whether appellats Court can reconsider iesues decided before remand O 41 R 20 N 4 (e) When dismissing appeal summarily—Lega-
  - hty O 41 R 11 N 4

    -New point after remand
    (a) New points if can be raised when case comes
  - (a) Now points if can be raised when case comes back on remand —Objection as to puris

    distingtificant be raised S 21 N 3
  - diction, if can be raised S 21 N 3

    Order of, when can be questioned in appeal from decision after remand S 11 N 22, S 105 N 8
  - decision after remand 8 11 N 22, S 105 N 8 8 151 N 4, O 41 R 26 N 4
  - ---Parties-Addition of -- Whether parties can be added by the Court OIR 10 N 11, 32
  - ---- Power of appellate Conrt
    - (a) Court not compotent to ontertain appeal re manding issues—Effect O 41 R 25 N 7 (b) Order to be passed by lower Court not to be
    - indicated O 1 R 10 N 11
      (c) To remand case S 107
    - (d) To remand directing lower Court to amend plaint and proceed with trial on amended plaint OGR 17 N 13
    - Prelimicary point—Disposal on Sec Issue,
  - Preliminary point

    Privy Council—Remand by
    See Privy Council Appeal
- S 141 N 2

- Remand-(Contd)
  - Second appeal, remand in (a) For determination of questions of fact
  - (b) Power of second appellate Court S 103 N 2

    Transfer of case remanded
  - (a) Jurisdiction S 24 N 6

    Trial of remended case
  - (a) Cont by which remanded case to be tried— Effect of case being tried by some other
    - Court than that to which it is remanded
      S 99 N 5
      (b) Notice of date of hearing 0 41 R 17 N 10
    - -What amounts to

      (a) Whether order in appeal reversing order

      returning plaint for presentation to process
    - returning plaint for presentation to proper Court can be treated as order of remand O 7 R 10 N 11
  - —When may be ordered
    (a) Correct issue not raised by lower Court—
    - Whon remand will not be ordered
      Old R5N7
      (b) Whether appellate Court can remand case
- where lower Court has ordered plaint to be returned for presentation to enother Court O 7 R 10 N 11

## See also Relief

- -Civil and criminal-Both remedies open-Mein temability of euit when criminal prosecution hes been resorted to S.9 N.20
- Bes been resorted to

  Gongurent remedies—Provision of two remedies—
  Whether remedies exclude each other
- S 95 N 13, O 47 R 1 N 2

  —Concurrent remedies—Two remedies open—Whe
  ther one operates in derogation of other
- -- Concurrent romedy S 9 N 62, 63, 64
- See Practice—Concurrent remedies
  ——Special remedy—Provision for—Suit, if maintain-
- able S9 N61
  —Splitting of —Bar of subsequent suit on same causa of action O2 R2 N2
  - -Splitting of Suit for mortgage money personally from mortgager whether bars suit for sale of
  - mortgaged property O 2 R 2 N 1

    —Summary and concurrent Provision for—Soit
    not barred S 9 N 50 63, O 21 E 58 N 1
- Rent
  Decision es to rent for ona year, how far evidence
  - of rent for inture years S 11 N 15

    —Decree for arrears—Whether decree for money
- O 21 B 53 N 3
- Decree for possession and rent-form and contents of decree 0 20 R 12
  - - -Snit for
      (a) Dismissal of soit for enhancement of rent,
      whether bars suit for rent O 2 R 2 N 23
    - whether hars suit for cent O 2 R 2 N 23 (b) Necessary and proper parties O 1 R 10 N 20 (c) Rule egainst splitting of claims—Effect
    - (d) Valuation—Mode of S 15 N 22 (e) Whether of Small Cause nature S 102 N 13

L P (Cal) Cl 12 N 3

S 96 N 22

Representative suit-(Contd )

-Extent of representation

-Execution of decree against community

(a) Decree against certain members of a sent-Whether can be executed against others

S 50 N 14

S 47 N 7

Rent Acts

Rent-Suit for-(Contd )

----Appeal under--Procedure

(f) Whether one for land or immoveable pro

| Rent Controller                                     | Extent of representation S 47 N 7                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
|-----------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                                                     | Instauces of S 11 N 59 , O 7 R 4 N 2                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| Whether subject to superintendence of High          | (a) Cases in which such suit can be brought                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| Court Govt of Ind Act S 107 N 5                     | O 1 R 9 N 21                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| Representative                                      |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
|                                                     | (h) Suit to word transfer made with intent to                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| Plaintiff filing suit for partition and pending the | defeat or delay creditors of transferor                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| suit mortgaging his share-Death of plaintiff        | brought by attaching decree holder -                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| pending suit—Mortgagee, whether representative      | Nature of 0 21 R 63 N 8                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| of plaintiff S 146 N d                              | -Meaning of S 11 N 59 , O 1 R 8 N 21                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| Decree against one of several representatives-      |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Whether binds others S 50 N 14                      | Parties                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
|                                                     | See Parties                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
|                                                     | Permission to sue                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| Of decree holder or judgment debtor-W ho is         | (1) Absence of-Effect S 115 N 12,14                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| S 47 N 17                                           | (b) Conrt's permission under O 1, R 8 not                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| Right of-To proceed or apply in place of original   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| party-Instances of applications which can be        | obtained—Effect                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| made by representative S 146 N 5                    | Persons on whose behalf suit can be brought                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
|                                                     | 01R8N8                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| Right of, to continue proceedings-As person         | (a) Fluctuating body-Maintainability                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| claiming under another—Which he cannot him          | OIRSNS                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| self institute S 146 N 3                            | (b) On behalf of Hindu community - Main                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| Representative suit                                 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| See also Community.                                 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Public                                              | (c) On behalf of public — Maintainability                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
|                                                     | 01 R 8 N 3 S                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| Abatement                                           | (d) Persons " having same interest in sult".                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| See Abatement                                       | meaning of 01R8N8                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| Competency                                          | -Plaint in, contents of O 1 R 8 N 17 , O 7 R 4                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| (a) Alleged common right found not to exist-        | (a) Concise statement substituted for copies of                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Effect O1R8N21                                      | (a) Concise statement substituted for copies                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| (b) In respect of public nuisance S 91 N 9          | plaint to show in what espacity suit is<br>brought or defendant is sued 0 7 H 9                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| (e) Whether can be brought only under O 1           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
|                                                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| R 8 S 11 N 59, O 1 R 8 N 21                         | Res judicata S 11 Expl 6.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| Compromise                                          | S 11 N 59 to 07                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| (a) Whether can be compromised O1R8N23              | (a) Decree when operatos as res judicata                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| Coets of S 95 N 24, O 1 R 8 N 23                    | Olksum                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| See also Costs-Representative suit                  | (b) Non compliance with O 1 R 8 - Effect-                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| - Death of party                                    | Whether decision operates as 123 judicata                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| Dette of party                                      | S II N 591                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| (a) Death of one of the plaintiffs-Continuance      |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| of suit by the other O 22 R 2 N 2                   | Suit against whom can he brought                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| (b) Effect of O 22 R 1 N 12                         | (a) Defendant, whether may be sued in repre                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| (c) Whether abates on death of plaintiff            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| 0 1 R 8 N 24                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Decree in                                           | (1) title-there were on hebrif of a hody can be                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| - Effect, whether ses judicata                      |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
|                                                     | OIRBNS                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| See also Res sudicata                               | -Snit on behalf of company 0 29 R 1 N 3                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| (a) Essential condition for binding person other    | 2 7 7 7 7                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| than parties O1 R 9 N 10                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| (b) Extent to which it binds persons repre-         | (a) Right of suit in community essential                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| sented who are not actually on record               | 1. brought                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| O1R8N21                                             | (h) Suit for damages, whether can be brought                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| (c) Persons bound by decree O1 R 8 N 21             | under O 1, R 8                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| (d) Power of Court to pass decree in favour of      | Who can represent                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| persons forming a smaller number out of a           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
|                                                     | class of persons—Number of persons that                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| larger class O1R8N21                                | class of persons—Number of persons Ot R 8 N 11                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| (e) Whether binds persons whom plaintiff ex         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| pressly refuses to recognise as membera of          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| class he professes to represent O1 R 8 N 21         | others whether must sue on behalf of all                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| (f) Whether Court can declare rights of indivi-     | others whather must sue on benation 5 91 N                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
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| som trains are and the other                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | 521 X 1 2 2 2 2 2 2 2 2 2 2 2 2 2 2 2 2 2                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| 2 27 27 27                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | - Set off two of all terms in the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the set of the |
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1 suit

. to fix further

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17 -Executor-Property in possession of-Whether roceiver can be appointed in respect of such pro (g) Whether necessary fornducting case perty O 40 R 1 N 16 after remand O 41 R 23 N 32 Probate proceedings-Compromise of (h) Whether necessary for deation for rea Preamble N 2 toring suit dismissed for alt 09R9N1 -What property can be devised by will-Property (1) Whether necessary for allegation to set under attachment, whether can be devised aside ex parte decree 0 9 R 13 X 14 --- Illiterate party valuat by ---- Whon probate necessary in the case of wills by (a) Explanation of contents him-Rule re Hindus 07R4N5 quiring such explanatieWhother infra Withdrawal 03R4N2 - apport, withdrawal of -Serurate valalats (a) Several appeals filed agaysamo judgment 22 N 17 -Necessity for separate alats 31 N 3 O 41 R 1 N 15 super -Signature by party S 152 N 9 seded (a) Absence of-Effect-Presation of appeal (1v) Whether party withdrawing can subse br takil-lalidite 041 R 1 N 1 3 quently continue proceeding in his 03R2N2 (b) After limitation-Lfcct capacity as person claiming under e) Manner of signing 03114 48 N 3 (d) Who to sign-Personal astant, whether N 111 can sign valuat purpert to be executed 19N4 by Collector O 27 R 2 N 1 -Two persons takilat in favou.
(a) Execution of vakalat slavour of two (o) Stago at which it can be withdrawn-Notice to respondent 041R9N4 persons-teceptance best one-Present (f) Whother lower Court's decree is merged in ation of appeal by where to made appellate decree S 148 N 9 041 R 1 N 3 (g) Whether lower Court's decree superseded -When may be dispensed with 03 K4 N 14 S 33 N 5 Vakil -Costs on withdrawal of suit or appoal ٠, See Costs-Hithdraual of suit, costs on, 240 5 60 N 6 Sale of immoveable projects Tador a charge for unpaid purchase money - am of 0 34 B 15 N 4 Vested remainder -Whether can be attached it sold or only attached in execution S CO N 6, 21 Village Court -Applicability of Civil P C williago Minnessi's Seb 2 P 1 N 15 Court l'reamble N 2 -Whether rule against spi\_af of claims and 0 23 R 1 Sust, withdrawal of relicis applies O 2 R 2 N 36 (a) Appellato Court, power of, to allow Village headman 0 23 R 1 N 11 Whether public officer \$ 2 (17) Notes (1) When plaintiff respondent may be Village Munt 16 allowed to withdraw snit S 15 N 4 O 23 R 1 N 13 S 15 X 4 (b) Application for snits cogniz (i) Whether can itself be withdrawn acie by Villags Munsiff & Court S 15 N 4 O 23 R 1 N 16 Vrstts (c) Bur to fresh suit - Suit relating to-Maintain july of (i) In what cases applies S 11 N 128 S 9 N 25 Walver (11) Scope and extent of bar Of benefit of probibition want alienation of O 23 R 1 N 32, 33, 34 attached property S 64 N 16 (11) Under O 2, R 2, whether applies Of plea 02R2N10 811 N 6 -Of privilege by Prince or Chief in suit against him (1) a . SEGNT -Proof of S 64 N 16 Wali See also Executor .

S 35 N 18

B 52 N 7

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Withdrawal—Sult, withdrawal of — In cases where | Withdrawal - Sult, withdrawal of — With liberty to there are several parties—(Conid) | Withdrawal of — With liberty to eue again—(Sult)
                                                                        (vii) (lucellaneous)
                                                                              (s) Form of permission
                                                                                                      O 23 R 1 N 28
                                                                               (b) Limitation applicable to new suit
                                                                                                       O 23 R 2 N 1
            (1) + 0 10x 0x 200= F =
                                                                               (c) Notice to other side before grant
                 suit
                                             03B4NB
                                                                                   ing permission
                                                                                                       O 23 R 1 N 27
           (11) Withdrawal of suit by valil
                                                                              (d) Reversal of order granting per-
                                          O 23 R 1 N 20
                                                                                   mission-Effect
                                                                                                       O 23 R 1 N 37
                                          0 23 R 1 N 17
      (g) Minor, suit on behalf of
                                                                               (e) Whether permission can be im
            (1) Leave of Court necessity for $147 N 4
                                                                                   plied
                                                                                                      O 28 R 1 N 28
      (h) Part of claim
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            (1) Suit concerning properties situated in
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                                                                    (r) (Mascallaneous)
      (i) Partition suit
                                                                         (1) Applicability of provisions as to
            (1) Consent of other parties, necessity for
                                                                                                  O 23 R 1 N 2 to 9
                                         O 23 B 1 N 10"
                                                                         (ii) Application for withdrawal of snit
       (1) Pauper, suit by
                                          0 23 R 1 N 18
                                                                             imade - When does suit cease to exist
      (h) Permission for, effect of
                                                                                                       O 23 B 1 N 2
                                                                             in eve of the law
            (1) On prace order against plansiel for Inc-
                                                                        (iii) Form of-Implied withdrawal
                nishing security for costs
                                              O 25 R 2
                                                                                                      O 23 R 1 N 10
      (1) Res judicata
           (1) Withdrawal of suit without permis
                sion to bring fresh suit - Whether
                operates as res judicata
                                                                                                     Sch 2 P 17 N d
                                        S 11 N 123, 128
                                                                         f ir and and chiect of rale O 23 R 1 N 2
           (11) Withdrawal, whether operates as res
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    (m) Revision
                                                                -Smt.
           (1) Liberty to bring fresh suit - Grant
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                                                                   See Legal Practitioner-Authority of
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                                                            Witness
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                                                                 decline to be examined at any place other than
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                                                                 that of her own choice
                                                                                              S 56 N 1 ; S 132 N 2
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                                         O 23 R 1 N 12
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Exemption of From personal appearance in Court
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                                                                                                     arried woman
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                                                                 with restraint on elienation - transferability
                 (a) Condition as to payment of costs
                                                                                                          S 60 N 5
                     within certain time - Whether
                                                                 of such property
                                                                                                     O 25 R 1 N 9
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(a) Effect O 23 R 1 N 36
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the exercise of prisdiction S 115 N 12
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                     Permission to withdraw suit.
                                                                                                    O 20 K 13 N 2
                                                               Actionable wrong
                     whether can be granted
                                                                                                        S 105 N 6
                                                               - Administration
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0 23 R 1 N 2

O 23 R 1 N 26

(vi) Permission, whether can be questioned

by Court trying subsequent suit

Affecting the decision of the case

Agriculturists-Meaning of

-Affidavit ,

-Alien enemy

S 139 N 2

S 60 N 10

S 83

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| Document -Signing meaning of \$2 (20) and Notes                                   | -Room Sc2 N 2 - Rules S 2 (18) S 117 N 2                                                                                                                                                                                        |
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| 5 54 N 3                                                                          | -Sies ne more ate                                                                                                                                                                                                               |
| Elecution S 36 N 3                                                                | -Stamp-Venning of S 2 (10) 51/.0)                                                                                                                                                                                               |
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| Allegality                                                                        |                                                                                                                                                                                                                                 |
| - Immoveable property                                                             | Successful party in suit etc Suit 7                                                                                                                                                                                             |
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| Interlocutory proceedings S115 N 5                                                | ت د ه                                                                                                                                                                                                                           |
| — Jalkar                                                                          |                                                                                                                                                                                                                                 |
| -Judge who passed down                                                            | Suit for money Sit \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \                                                                                                                                                                        |
|                                                                                   | -Suit for money -Suit for money -Suit for money -Suit for money -Suit for money -Suit for money -Suit for money -Suit for money -Suit for money -Suit for money -Suit for money -Suit for money -Suit for money -Suit for money |
| - Judgment in tent . G 11 N cg                                                    | 3                                                                                                                                                                                                                               |
| - Jurisdiction 5 115 N 9 et seq                                                   | 3,                                                                                                                                                                                                                              |
| Jus tertu S 11 N 43   S 12 N 43   S 10 N 20                                       | 171                                                                                                                                                                                                                             |
|                                                                                   |                                                                                                                                                                                                                                 |
| - Lawful meaning of Ogg Pa No                                                     |                                                                                                                                                                                                                                 |
|                                                                                   |                                                                                                                                                                                                                                 |
| Legal practitioner O3R4N3                                                         |                                                                                                                                                                                                                                 |
| Malice S 95 N 13                                                                  | E 10                                                                                                                                                                                                                            |
| — Mark S 2 (20)                                                                   | or country orders not over a set a 1                                                                                                                                                                                            |
| Malice S 95 N 13                                                                  | or country ought not one of a steady in public  Wrong person meaning of                                                                                                                                                         |

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| 15001 FOLG                                                                                | TAPEZ [c]                                                         |
|-------------------------------------------------------------------------------------------|-------------------------------------------------------------------|
| Worship                                                                                   | Written Statement-Failure to file-(Conid)                         |
| Right of-Interference with, injunction restrain-                                          | (d) Fadur to file-Effect-Whether Court can                        |
| 0 10 Tt 2 N 4                                                                             | strike of defence OSR 10 N 1                                      |
| . 3 N 22                                                                                  | (e) No write statement filed-Whether issue                        |
| rform                                                                                     | necess r O 14 R 1 N 2                                             |
| ' S 9 N 43                                                                                | (f) Order to le-Farlure to comply with order                      |
| Writ                                                                                      | -Wholer defence can be struck out<br>O 11 R 21 N 1                |
| -Of fiers facias O 21 R 64 N 6°                                                           |                                                                   |
| Written Statement                                                                         | (g) Whether court can proceed ex parte merely                     |
| Additional written statement                                                              | •                                                                 |
| (a) Filing of-After period fixed-Effect                                                   |                                                                   |
| (b) Not to set up new or inconsistent case                                                | •                                                                 |
| OSB9N1                                                                                    | i i                                                               |
| (c) Power of Court to require written statement                                           |                                                                   |
| or additional written statement from parties                                              |                                                                   |
| and fix time for presenting the same O 8 R 9                                              | u in resistion - Judgment against de                              |
| Construction of                                                                           | failtin farty-Order pronouncing of re                             |
| (a) Denial of knowledge of fact whether amounts<br>to denial of fact O8B5N2               | 8 R 10 N 2                                                        |
| (b) In written statement that particular allega                                           | to file                                                           |
| tion in plaint is not admitted is denial                                                  | 8 R 10 N 1                                                        |
| 08 R 2 N 2                                                                                | -Filing of OSR1                                                   |
| Contents of 0 8 R 2                                                                       | (a) Court wich can call for writtsu statement                     |
| (a) Denial of plaint allegations - Fullure to                                             | -Wheter appellate Court can call for it                           |
| deny-Effect 08R5N2                                                                        | to the same of the                                                |
| (b) Denial of plaint allegations-Mode of<br>OSB3N1 OSR5N1, 2                              | (b) Effect - Whether ex parts decree can be passed 1 09 R 13 N 7  |
| (c) Denial of plaint allegations - Not to be                                              | (c) Turne flat for-Extension of time S 143 N 5                    |
| evasive 08R4                                                                              | (4) Type for Right of defendant to be siven                       |
| (d) Denial specifically or by necessary implies                                           | firm United                                                       |
| tions, absence of-Effect 08R5                                                             | (e) Whither aspection of plaintiff a document                     |
| (e) Distinct grounds of defence of set off to be<br>separately and distinctly stated 08R7 | may be claimed before filing of written<br>statemed 0 11 R 15 N 2 |
| (f) Duty of defendants to particularise all points                                        | (1) Whether leadings can be sphmitted subse                       |
| 08R2N1                                                                                    | OSRO                                                              |
| (g) Particulars of set off claimed by defendant                                           | ,                                                                 |
| 08R6                                                                                      |                                                                   |
| (h) Specification of reliefs claimed by defendant<br>O 7 R 7                              | •                                                                 |
| (1) Whether defendant can plead ground of                                                 | •                                                                 |
| defence which has arisen after institution                                                | 08 141                                                            |
| of suit OSRS                                                                              | to he tieth)                                                      |
| Court fee                                                                                 | -If can be required to be filed in appeal                         |
| (a) Claim of set off O 8 R 6 N 14                                                         | See Appeal Vritten statement in OSRIN1                            |
| (b) Whether hable to OSBIN4                                                               | Heaning of                                                        |

-Set off claim of written statement in answer to OSBG -Asserted by defendants -Signature and vinfication of

(a) By whom to be made-In suit by or against O 29 R 1 corporation

(b) By whom to be made in suit against Gov O 27 R 1 26 N 3 whether

OSRON1, OSR10N1

(b) Effect-Whether Court absolved from en S 115 N 12 tering into merits of case (c) Effect - Whether judgment can be pro

(b) Need not be specific as to claim for damages

(a) Damages - Claim for - Denial

statement- \lode of

(a) Effect-Procedure

Denial in

-bailure to file

nounced against party failing O 8 R 10 N i

in written 08B3N2

08R3N2

09B6N1